THE DORMANT COMMERCE CLAUSE AND A PUBLIC ECONOMY: LESSONS FOR PUERTO RICO

ARTICLE

*Jorge M. Farinacci Fernós**

I. Introduction 595
II. The Exception That Makes the Rule: The Death of the Dormant Commerce Clause as an Obstacle to a public Approach to the Economy.. 605
III. Some Final Thoughts About Doctrine 649
IV. The Puerto Rican Context 650

I. Introduction

In 2012, the Supreme Court of Puerto Rico held that the dormant Commerce Clause was applicable to the Commonwealth. Simple and fair enough. But that is only part of the puzzle. The bigger question is, what does this mean for the economic development of the island? In order to answer that question, we have to take a step

* J.D. University of Puerto Rico School of Law (2010); LL.M. Harvard Law School (2013). This Article, particularly Parts I and II, is based on my LL.M. Long-Paper "Another Pin Falls: The End of the dormant Commerce Clause as a Substantive Obstacle to a Public Economy as part of the U.S. Supreme Court's continued path of taking the courts and the Constitution out of the economic policy business" (March 2013; Prof. Mark Tushnet, Advisor). For the purposes of this Article, Parts I and II are an exact reproduction of that Paper, which has not been published, but is registered at the Harvard Law School Library. I have modified those Parts by editing out several segments for reasons of space. In other words, nothing has been added from the original Paper; some parts have been edited out so as to shorten the Article. Part I of that original Paper has been deleted for concerns of space. Some of its components have been placed in other parts of this Article, so as to maintain its internal coherence. Part III was written exclusively for this Article. As to the Introduction, it has been modified to add remarks concerning the particular object of this Article. I would like to thank Prof. David Helfeld (University of Puerto Rico School of Law), as this Article is the result of a challenge he posed to my Constitutional Law class back in 2007. I would also like to thanks Prof. Mark Tushnet (Harvad Law School) for his indispensable help in producing this text.

back: what is the current state of dormant Commerce Clause doctrine as a matter of federal constitutional law, and how does it impact policy-making in Puerto Rico in order to decide between a private or public approach to economic development? The Court's description of that doctrine has been superficial, in particular with regards to the private-public distinction. That omission must be clarified.

In 2007, a seemingly run-of-the-mill case was decided by the Supreme Court of the United States. It was just another controversy in a long series of dormant Commerce Clause cases about the limits of state power to regulate economic activity that impacts interstate commerce. If that weren't ordinary enough, the facts of the case generated even less enthusiasm: two counties in New York had approved a flow ordinance requiring that all garbage collected in the area be processed in a publicly owned facility.[1] But there was more than meets the eye. This case wasn't really about garbage disposal, just like *Lochner v. New York* was not just about bakers' hours.[2] While some scholars have mainly focused on its significance in terms of pure dormant Commerce Clause doctrine, others do see it as just a case about garbage. I believe it is part of a broader development in U.S. Constitutional Law: the *deconstitutionalization* of the U.S. economic system.[3]

In 1982, Edward S. Greenberg said that "the United States is not capitalist because of the Constitution; the Constitution is capitalist because the United States is capitalist".[4] Such reasoning is evidently valid, for most countries' economic systems and models are not the product of, but are, instead, the basis for, their constitutional structure. For example, in countries with socialist economies, the constitutional text rarely *establishes* that model. Instead, the Constitution attempts to give stability and endurance to a *previously realized or at least initialized* process: a socialist country will have a socialist Constitution. Therefore, the argument goes, a capitalist country will have a capitalist Constitution. But that causal relation is not as simple as it seems. Both silent Constitutions –like the United States'– and programmatic ones –like the ones of Portugal, the People's Republic of China and Chile– have, through different paths, arrived at the same place: flexibility in the development of economic policy to a point where more than one system is deemed

---

[1] *United Haulers Association, Inc. v. Oneida-Herkiner Solid Waste Authority*, 550 U.S. 330 (2007). This case must be seen in conjunction with *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008).

[2] 198 U.S. 45 (1905).

[3] *Deconstitutionalization* may not be the most appropriate term when discussing the relationship between constitutional law and economic organization in the United States. Although there is some of that going on in the US case for, as we will see shortly, there are some programmatic elements in the federal Constitution which are *deconstitutionalized* –that is, deprived of its substantive nature-, what has really happened in the United States is a process of *dejudicialization* –that is, taking the courts out of the substantive economic policy business-.

[4] Edward S. Greenberg, *How Capitalistic is the Constitution*?, 29 (Robert A. Goldwin & William A. Schambra, editors, American Enterprise Institute for Public Policy Research, Washington & London 1982).

to be constitutional. More to the point, that social consensus is the only thing that can really entrench a constitutional norm, particularly in the economic arena.

This proposition is *not* in opposition to the existence of positive, constitutional socio-economic individual and collective rights. Actually, they reinforce each other, because the existence of those rights should be seen as part of the constitutional minimums than have to exist *regardless* of the economic system that is eventually adopted. After all, a constitutional right to collective bargain, to an education, to healthcare and the like are applicable to most, if not all, economic models. Although it is certainly true that these rights tend to be constitutionalized with a particular, even constitutionally preferred, economic model in mind, that does not mean that such model, therefore, must be the only one adopted, or that it is incompatible with the notion of a *deconstitutionalized* or *dejudicialized* economic system. On the contrary, it is perfectly reasonable, even logical, that a constitutional regime leaves the systematic economic questions to the political process and, more importantly, to social culture, while enshrining particular positive socio-economic rights to protect certain sectors and values which must be observed *independent of the particular economic model adopted*. In that sense, those rights serve as minimums, so there could be such thing as particular constitutional socialist or capitalist models while other forms of socialism, capitalism or any other *ism* would not be constitutional if they don't observe these minimums. As to the subject of this Paper, in the U.S. case, these minimums don't take the shape of positive socio-economic rights, but of negative limitations on arbitrary government.[5]

In that sense, the question still remains: How capitalistic *is* the Constitution of the United States? Maybe our focus should be on broader questions: Is there a constitutionally mandated economic model in the United States? If not, are there constitutional alternative models? Does the Constitution place limits on these models but not on the existence of the models themselves? Granted, these are very general, broad and complex questions that cannot be answered in a single proposal. It would be very presumptuous to do so. Still, I dare to propose the following thesis, which I hope to fully develop in the coming pages: Although the United States does have a market-driven, private-property based capitalist economic model, very little of it is provided for in the constitutional text, especially in relation with state power. For this particular Paper, I will focus less on the market aspect and more on the private property angle of current constitutional law, and its interaction with the modern dormant Commerce Clause doctrine.[6]

---

[5] My main thesis in this regard is that the few substantive provisions of the U.S. Constitution that deal with economic policy and private property protection, such as the Contracts Clause, the Due Process Clause and, in this case, the dormant Commerce Clause, are left with only the same basic operative value: protection against evidently arbitrary government action.

[6] As we will see, even though conventional dormant Commerce Clause doctrine focused on market protection, the latest development of it has, *in order to prevent Lochner type results that force the adoption of an exclusive constitutional economic system*, shifted its attention from the protection

The reasons for the current state of a *dejudicialized* economic system are varied: (1) Contrary to Greensberg's apparent formulation, when the United States adopted its Constitution in 1787, *it wasn't yet a capitalist country*, as such, there was no capitalism to enshrine or entrench in the constitutional text;[7] (2) the yet-nascent capitalist class decided to protect its economic predilections and interests through *structural* instead of *substantive* devices; (3) because of its historical context, the U.S. Constitution is not –and could not be– a 'programmatic' constitution that commanded the adoption of a particular economic system; and most importantly (4) as with *all* constitutions –*even those of a programmatic nature*-, it is near impossible to wholly entrench an economic system in a constitution unless there is a strong social consensus behind it, as such, economic policy decisions will mostly be left up to the political process. Constitutions may, as some do, express their *preferred* economic model –and even lay down rules applicable to that particular system-. But they also have enough flexibility to allow for alternative paths for which the Constitution actually says very little. Through a deliberate process of interpretation, the United States Supreme Court has facilitated that multi-possibility Constitution. The economically silent nature of the U.S. Constitution has facilitated the process of *dejudicialization* of economic policy. Other countries have had it a little harder, although many have arrived at the same result.

This is not to say that the U.S. Constitution is wholly deprived of economic policy commands. But even those tend to give way to the last proposal I mentioned: in the real world –maybe unlike controversies about individual rights of a political, civil or even social nature-, when there is a clash between an economic constitutional provision and a strong political countercurrent going the other way, courts have generally permitted the democratic political decision to defeat the constitutional command. As a result, the economic model, and other general economic policy decisions are effectively *deconstitutionalized* or *dejudicialized*. And with respect to that process, the United States Supreme Court has not been the exception. For its part, the Court has been embarking on a 70 year old course to eliminate all constitutional obstructions to systematic economic decision-making by the democratic process. Contrary to popular opinion, that process did not end in 1937 when *West Coast Hotel* ended the *Lochner* Era.[8] Actually, 1937 was a mere starting point in a longer

---

of free markets to an analysis of ownership of the economic actor. In order to carve out the public exception, the Supreme Court has had to focus on property issues over market concerns. That fits in perfectly with my general approach to the general proposition of economic *dejudicialization* by emphasizing property over market analysis.

[7] Edward S. Greenberg, s*upra* n. 4 at 50. In that sense, the actual text, if not the *meaning* of the Constitution, was adopted *before* the United States embarked on a purely capitalistic road: "[T]he Constitution established a 'commercial' not a capitalistic regime." *Id*.

[8] To say that the Constitution doesn't require a *laissez-faire* economic policy does not settle the question entirely. After all, *laissez-faire* economics is but an extreme view of what a private property, free enterprise capitalist system consists of. As the current state of the U.S. economic system demonstrates, capitalism can have many manifestations: *laissez-faire*, the regulatory interventionist

process: shedding off constitutional objections to transformative economic change and development. In this Paper, we focus on the current battleground of that process: the dormant Commerce Clause and the power of states and local governments to embark on new economic experiments, particularly experiments centered on public and social property as engines of economic activity.[9]

The result of that process has created a seemingly incoherent state of things; incoherent in appearance only. As we will see when analyzing the main objective of this Paper, the U.S. Supreme Court's decisions in *United Haulers* and *Davis*[10] have come to a compromise solution with regards to constitutional provisions that affect economic policy: since the Constitution had only one type of economic system *in mind* –that is, one based on private property and a national free market-, its provisions will be applied full force only in situations *in which the underlying facts spring from that starting point*. If, however, there is a different economic model in place, those constitutional provisions shall be inapplicable, at least as commonly used. In our particular case study, the Supreme Court's development of a long line of so-called "exceptions" to the dormant Commerce Clause has a clear common thread: government ownership of productive entities and public participation in the economic sphere. What could be called an incoherent, sloppy, seemingly shaky rationale for creating those exceptions can be easily explained: *the Court had no choice*. In other words, if a controversy arises between private parties in an economic dispute, the Court will gladly apply the formulaic command of the dormant Commerce Clause doctrine. The same will happen with respect to other substantive constitutional provisions. When the controversy involves public economic actors, the doctrine must be inapplicable, or else risk *Lochner* type results.

We must not forget that the dormant Commerce Clause doctrine is based on the notion of *private* economic activity. That doctrine was *designed* to establish

---

welfare state, neoliberalism, amongst others; but all are examples of the same basic model. Therefore, our task is to look beyond the *laissez-faire* question and tackle a broader issue: if, unlike *laissez-faire* economics, generic capitalism *is* constitutionally required. I believe it is not. But in order to back up that claim, it is not enough to say *Lochner* is dead.

[9] The *Lochner* references in this Paper are not purely comparative. On the contrary, they are sequential. Since the beginning of state intervention in the economy, from regulation to participation, constitutional objections have been raised. The most notorious is, of course, economic substantive Due Process of *Lochner* itself. But the list is longer. The latest one to fall was, I propose, the dormant Commerce Clause. *See* Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 Va. L. Rev. 1091, 1099 (2008) "The constitutional-level rules that govern these [local and state] laws are derived primarily from the Commerce Clause, but also from the Privileges and Immunities Clause, sometimes the Equal Protection and Duce Process Clauses, and indirectly through takings and antitrust doctrine".

As discussed in the previous footnote, the death of *laissez-faire* constitutionalism doesn't settle the question. In the *Lochner* Era, substantive due process was used to prevent the *regulatory* state from placing limits on private economic actors. The question now is whether the dormant Commerce Clause prevents the *interventionist* state from displacing private forces all together in some, most, or all areas of economic activity.

rules for a private-enterprise based development of a national economy. As such, the alternative to creating these exceptions would have been to basically make it impossible for state and local governments to depart from the free enterprise model. Such *Lochner*-esque scenarios have proven, time and time again, too much for the Court. These bumpy exceptions are the only way to keep the decisions on economic policy strictly in the democratic arena. However, the Court has signaled that there are constitutional limitations to *any* and *all* economic experiments: they cannot be arbitrary or unjustifiably discriminatory. Of course, that judicial policy is not circumscribed to economic issues: it is the default rule for all public action.

What started with the necessary but apparently out-of-thin air "market-participant" exception in the 1970's has resulted in a series of conscientious decisions by the Supreme Court to eliminate constitutional obstacles to new economic models that are not inherently irrational. The latest one is the object of this Paper: the public monopoly or "self-regulation" exception laid out in *United Haulers* and explained in *Davis*. Using these cases as a starting point, and contrary to many scholars who wish to narrow those holdings, I intend to push the limits of those decisions to point out new possibilities in the realm of non-capitalist economic development for states and localities, based on public and social property models. In other words, to test whether the United States Supreme Court will continue its policy of effectively *dejudicializing* capitalism and leave the rest for the democratic political process.

That would, of course, entail the creation of new "exceptions" to previous doctrines. In particular, exceptions related to the last bastion of constitutional capitalism when it comes to private property: the Takings Clause.[11] Since the early twentieth century, the Court has interpreted the *few* constitutional provisions related to economic policy in such a manner as to basically wipe them out as plausible limits on radical economic transformation.[12] Will the Takings Clause stand in the way of the further *politization* and *dejudicialization* of American capitalism?

In the following Paper I wish to analyze the preceding proposals in the following order:; Part I focuses on recent case law regarding the development of dormant Commerce Clause doctrine as it applies to public entities and direct government involvement in economic activity, and attempts to set out future challenges and opportunities related to these recent decisions. In particular, I will discuss the

---

[10] *See* note 1.

[11] As we will see in greater detail, the scholarship critical of the creation of constitutional exceptions in situations where government has decided to embark on public-centered approaches to economic organization and development has deployed a defensive strategy based on a clause by clause objection. It seems as if some legal scholars in the United States wish to have all these seemingly isolated constitutional provisions create a sort of 'penumbra of capitalism'. But one by one, those penumbra generating provisions have given way, and rightly so.

[12] In particular, I refer to the Contracts Clause, the Due Process Clause and, most recently, the dormant Commerce Clause.

interaction of *other* forms of non-capitalist property and approaches with public economic development models, on the one hand, and the current tension between these decisions and Takings Clause law. Part II offers a brief reflection on Part I. Part III addresses how this current state of dormant Commerce Clause doctrine, and its particular application in the Puerto Rican context by the Commonwealth Supreme Court, requires a new approach in terms of policy in order to jump-start the weakened Puerto Rican economy; an approach that leaves the public road as the most feasible option. As we will see, the mistake made by the Supreme Court of Puerto Rico when it construed dormant Commerce Clause doctrine so strictly and protective of free market principles, could have the curious effect of forcing policy-makers to change course and experiment public models of economic organization. This Paper advocates for a public approach to economic development as a matter of policy and argues it is completely constitutional. Even more, the barriers represented by the dormant Commerce Clause according to those who still cling to its strict application –as a current majority in the P.R. Supreme Court appears to do– may actually force us to conclude that a public economy is the *most* constitutional way of organizing our economy.

For the purposes of this Paper, I adopt Professor Jorge Miranda's model on the different types of Constitutions.[13] Professor Miranda distinguishes between statutory or organic constitutions, and programmatic or doctrinaire constitutions.[14] While suggesting caution when making these distinctions,[15] Miranda proposes that statutory or organic constitutions "deal with the government, its organs and the political participations of citizens; those which concentrate the *form* and system of government without (*at least apparently*) dealing with the economic and social system."[16] On the other hand, programmatic or doctrinaire constitutions "lay down, in addition to political organi[z]ation, state programs, directives and objectives in the economic, social and cultural fields."[17] Miranda alerts us that this distinction is different from the dichotomy of social versus political constitutions, for both

---

[13] Jorge Miranda, *The Constitutional Basis of the Economic Order,* in Transition To A New Model Of Economy And Its Constitutional Reflections, Moscow, European Commission for Democracy Through Law, (Council of Europe 1993).

[14] *Id.* at 12. Also relevant here is Prof. Miranda's assertion that "[a]ccording to the doctrinarians and politicians of liberal constitutionalism, the state is only a constitutional state, a state rationally constitutional, if individuals have freedom, security and the right to *property*." (Emphasis added) *Id.*, At., 9. This reference to property is important for two reasons: (1) it adequately characterizes the main, and almost only, economic feature of the U.S. Constitution, that is, the protection of property; (2) it correctly describes how *some* classic liberal jurists see constitutionalism. I reject the assertion that the right to property, particularly as to private ownership over the means of production, is inherent to constitutionalism. This will permeate the entire Paper.

[15] *Id*.

[16] *Id*. (Emphasis added)

[17] *Id*.

organic and programmatic constitutions have "ideological factors," although it is more present in the latter.[18]

Miranda also proposes that some constitutional provisions are not always applicable, as they are conditioned on the existence of certain circumstances and premises. As we will see, this is crucial when analyzing dormant Commerce Clause doctrine, for most of it is based on the premise of the existence of a private economy: "A structural analysis of constitutional rules looks at the question differently. It distinguishes between basic rules and *rules which it **may** or may not be inherently possible to apply*."[19]

The main object of study in this Paper is a late nineteenth century document adopted by a newly created national entity in a period where capitalism was still an infant. As such, the U.S. Constitution may be characterized as a classic statutory or organic constitution made for a nascent liberal state.[20] For persuasive effect, I will employ the concept of the 'silent' or 'neutral' Constitution. I propose that *both* silent and programmatic Constitutions are subject to the same general rule which, in turn, has created a more specific one: (1) in general, systems which have both types of constitutions have, nonetheless, effectively *deconstitutionalized* or *dejudicialized* their economic systems, and rely mostly on the social force and consensus built behind a particular model, and (2) modern constitutional systems have, through a combination of judicial creativity, and other legal and political vehicles, followed a road of policy flexibility that allows the political process to ultimately decide the particular economic model that will be adopted.

Yet, even the concept of 'programmatic' constitutions (which I will use during the entire Paper) has to be further explained for, "[i]n the economic field, every

---

[18] *Id.* at 13. "In fact, every constitution contains both organic and programmatic elements." Miranda proposes, for example, that liberal constitutions tend to be more of the statutory or organic mold, while so-called Marxist-Leninist (I prefer Marxist or Socialist) systems ordinarily have programmatic documents. As to social democracies, Miranda suggests they resemble a systematic balance. *Id*. However, he does not discuss how to characterize *laissez-faire* programmatic constitutions, like the Chilean.

[19] *Id*. While this statement may be directed at socio-economic rights that are not directly enforceable, I believe it also applies to programmatic elements that may become inapplicable because of changing structural, material and ideological circumstances. (Emphasis added and emphasis in original)

[20] Miranda's suggestion that "[b]efore constitutionalism, the economic constitution of the state contained elements concerning corporate economic organization and state intervention in industry and foreign trade," is perfectly applicable to the Commerce Clause and the silent rise of the regulatory state that acquired full force during the 1930's. The question here is how to use that approach when analyzing the participatory state, in particular, the socializing state. *Id.*at 14. When he states that "[t] he liberal revolutions called this economic set-up into question, with the result that this type of state intervention was not provided for in the formal constitution" is perfectly applicable to the American economic constitutional experience. *Id*. As most relevant here, I propose to analyze the U.S. Supreme Court's answer to the following problem: "[T]he question of the economic constitution…arises only when there is a radical change of attitude and the people begin to declare that the state not only *can* but *must* intervene actively in the economy in order to transform it and remodel it." (Emphasis in original) *Id.*

state, before or after constitutionalism, has had an economic constitution in the form of basic principles governing the relationship between political authorities and the economy."[21] As Miranda further explains, "[i]t was only more recently though that the theory of the *economic constitution* was developed."[22] For simplification purposes, I will use the concept of the programmatic constitution. Finally, Miranda also tackles the problem of constitutional development as to economic issues –for example, through judicial interpretation– in the context of political and social forces and change: "The constitution can also change direction as a result of the political interplay resulting from its implementation or taking place parallel to it."[23] Social consensus is always key. In that sense, the U.S. Constitution can be easily characterized as a statutory or organic constitution –with some, few programmatic elements-, while the Constitution of Puerto Rico belongs to the programmatic category.

Finally, as previewed, my main focus in the *dejudicialization* process is the issue of public property as a possible motor for a new economic model for states and local governments. And as we will see in greater detail when discussing the new public entity self-regulation exception to the dormant Commerce Clause, 'what' is the social definition and role of property is crucial to understanding the different regimes available when embarking on a non-capitalist road of economic organization. Although later on I discuss particular options like cooperatives, non-profit organizations, worker collectives and other possible models in the context of the dormant Commerce Clause, it is worth making an introductory conceptual framework.[24]

Simon begins his treatment of social property introducing the concept of "economic democracy," which he describes as "the idea that the norms of equality and participation that classical liberalism confers a narrowly defined sphere of government should apply to the sphere of economic life."[25] As to alternative economic models of property, Simon identifies state property –connected to what he

---

[21] *Id.* at 14.

[22] (Emphasis added) *Id*. (Emphasis added)

[23] *Id*. at 17.

[24] For this part, I rely on William H. Simon, *Social-Republican Property*, 38 UCLA Law. Rev. 1335,1337 (1991). "This Essay's political purpose is to contribute to contemporary debates about radical economic reform, in particular to debates about the possibility of a 'third way' between capitalism (both its classical liberal and social democratic versions) and socialism." While I don't adhere to the 'third way', I use it precisely because, since it is a middle-of-the-road approach to economic organization, its interaction with the new public entity exception to the dormant Commerce Clause is very relevant as to the future development of the doctrine. Simon states that "any program for a particular economy would have to be an amalgam of a diverse variety of forms of property."

I agree, at least with respect to the policy choices that should be available to state and local governments when it comes to the new self-regulation exception carved out in *United Haulers*. The constitutionality of favorable regulation for public non-state property is one of the biggest questions posed by that case.

[25] *Id*. This is a challenge to the classical liberal notion of property.

calls "classical socialism"– social democracy and welfare-regulatory liberalism.[26] But, he also identifies an alternative model that is different from state property but also rejects "unrestricted accumulation and exercise of private property rights."[27] He calls it social-republican property, which is held by private individuals, but conditioned by the "potential active participation in a group or community constituted by the people," which limits inequality among members of a group or community.[28] According to Simon, this type of property is more common than believed.[29] Through this form of property, "productive resources [are] controlled by workers in a participatory workplace *but subject to important obligations to the larger society*."[30] In that sense, it is different from the "notion of capital ownership."[31] The important question is: is it *public*? More importantly, if this type of property has been statutorily distinguished by Congress so as to be treated differently from classic private ownership models, should it also have constitutional significance?[32] I propose that 'public' is not just government-owned.

---

[26] *Id.* Simon describes state property as "controlled by the officials of a democratic constitutional state." As to the other two, he states that they retain "the classic liberal notion of property rights, but it both qualifies them by regulatory restraints . . . like] welfare rights to minimal subsistence funded and administered through a tax-transfer system." In that sense, Simon criticizes social democracy because "[i]n contrast to social-republicans, social democrats tend to focus their attention and democratic concerns on regulatory and tax-transfers rather than on the structure of the primary process of production and exchange." *Id*. at 1349. As relevant to this Paper, I take this criticism to mean that social democracy doesn't tackle the issue of ownership of the means of production.

[27] *Id*. at 1336.

[28] *Id*. As examples, he mentions producer cooperatives and limited equity housing cooperatives. Aside from direct real property, he also suggests that some regulatory-welfare policies, such as tax relief and rent control measures, "create interests that resemble social-republican property." *Id*.

He identifies this form of property as a mixture of republican and socialist values. "Both republicanism and market socialism express or imply critiques of classical liberalism and corporate capitalism. They both suggest that the idea of democracy implicit in classical liberal social arrangements is implausible because it tolerates too high a degree of material inequality and too circumscribed a scope of participation in decisions of collective significance." *Id*. at 1338.

[29] *Id*. at 1337.

[30] *Id*. at 1340. (Emphasis added)

[31] *Id*. Among these differences is the restricted ability of the owner/citizen to fully monetize their interests. This creates a long-term relationship between them and the property.

[32] *Id.* at 1369. In general, Simon discusses (a) how American legal culture has approached the issue of property and democracy, and (b) makes a case for the viability of cooperative-type social modes of property. I propose these models can be very useful when developing constitutionally-friendly alternative approaches to economic organization at the state and local levels.

II. The Exception that Makes the Rule: The Death of the Dormant Commerce Clause as an Obstacle to a Public Approach to the Economy

A. Development of Dormant Commerce Clause Doctrine, Changes in Starting Points and the Rise of Public-Oriented Exceptions

Like many before me, I must start with the text of the 'neutral' Constitution. According to Article I, section 8, Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[33] As far as the text goes, that's it. If this were the command of a modern-day constitution, probably not much more would come from of it. The case *against* the programmatic Constitution that prescribes an economic model and *for dejudicialization* strengthens through silence. But, like most U.S. Constitutional Law, doctrine doesn't end with text.

As currently understood, this clause of the U.S. Constitution has two different, although importantly connected, effects: First, Congress' affirmative power to pass legislation on a broad range of economic issues, subject only to other substantive provisions of the Constitution, basic rules against arbitrary government and the limits of what could be considered 'economic'.[34] Fair enough.[35] As more relevant here, the second effect of this clause is what has been described as the dormant or negative Commerce Clause.

---

[33] Const. EE.UU, Art. I, § 8.

[34] *United States v. Lopez*, 514 U.S. 549 (1995). As Christie notes, "[s]ince [*Wickard v. Filburn*, 317 U.S. 111 (1942)], the Supreme Court has never struck down a federal law regulating economic activity on the grounds that the law in question exceeded Congress' Commerce Clause power –no matter how minimal or local in nature the economic activity may be."

[35] For the purposes of this Paper, I will take at face value the current, broad understanding of the Commerce Clause. It would be very interesting indeed how the hypothesis of this Paper would apply to federal economic policy. That is, what would be the constitutional consequences of transformative legislation under the Commerce Power to transcend the regulatory state and embark, at the federal level, on a road of comprehensive public-centered economic development. I dare propose that, as a constitutional matter, very little would stand in Congress's way were it to desire such a move. The *dejudicialization* approach I employ with respect to state and local government's police powers and its interaction with constitutional restrictions with regards to economic policy, may apply neatly to federal power. The only real direct challenge to federal economic power as a substantive matter is the Takings Clause. But, since that Clause applies to both state and federal power, I will discuss its implications in this Paper only as to states. A direct analogy may be inferred at the federal level. Yet, a direct look to see if the process of economic *dejudicialization* has rendered Congress constitutionally restraint-free –as a substantive matter– to pursue a public economy should be studied some day.

By the same token, as to individual states, a closer look would be needed to see if their particular state constitutions –as interpreted by state courts– have enough substantive qualifications so as to block the type of transcendental change in economic organization that is analyzed in this Paper on a national level. In the Puerto Rican case, it can be easily affirmed that its Constitution is one of the least *laissez-faire* minded. As such, I seriously doubt that the Puerto Rican Constitution can be used to block legislative efforts to transform the local economy in the direction of a public model.

That doctrine would seem simple enough. Even in the absence of express action on the part of Congress under its Commerce Power, the clause itself has *ex proprio vigore* force; that is, it limits the power of the individual states to adopt legislation that would seem to *invade* the sphere constitutionally left to Congress: the organization of the 'national' economy.[36] Stated in those general terms, it is easy to see why the doctrine has been a bumpy one.

The first objection is obvious enough: there is no direct textual support for the doctrine; the neutral Constitution strikes again. That is, the Commerce Clause is only an affirmative conferral of power on Congress.[37] Then, how and why did it come to life? Like most U.S. constitutional interpretations,[38] the doctrine sprang up because it was needed to advance a particular policy, in this case, economic nationalism and unification as opposed to locally-based protectionism.[39] As a consequence, the

---

[36] Curiously, as I will discuss later on, this is one of the few provisions of the federal Constitution where congressional statutory action simply eliminates the contours of the clause. For example, Congress can allow a state to violate the dormant Commerce Clause. At the same time, Congress can intervene and prohibit a state from carrying out a policy than by itself would not run afoul to dormant Commerce clause doctrine. *See* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1879 (2011). "The question posed in dormant Commerce Clause cases is whether, in the absence of congressional action, state laws that interfere with the free flow of commerce nonetheless stand." By taking Congress out of the picture, the Courts have had to fill the difficult role of passing judgment over state regulations. It was up to the court to serve as a "check on economic parochialism." Schragger, *supra* no. 9, at 1093.

37 Julian N. Eule, *Laying the dormant Commerce Clause to rest*, 91 Yale L. J. 425, 430 (1982). *The Commerce Clause does not expressly prohibits the states from enacting protectionist economic legislation. It merely gives Congress the power to rectify such excesses by superseding enactments*. Some have questioned whether this conferral of power is *exclusive*, inspired by *dicta* in *Ogden*. *See* Friedman & Deacon, *supra* n. 36 at 1882. In that sense, the dormant Commerce Clause doctrine serves as a sort of middle ground between 'no negative effect' and 'exclusivity' in the hands of Congress. Exclusivity, of course, must be discarded, otherwise, there would be no room for state police powers. See *Id*, at 1917.

Note that a trend emerges here. With the advent of the regulatory state (particularly at the local level), the doctrine move from exclusivity to shared space with regards to commerce. With the advent of the participatory state, constitutional doctrine has also shifted to make room for the new economic experiments.

[38] This Paper is *not* an argument against interpretation of constitutional gaps, silence or broad provisions as a legitimate tool of judicial review. Actually, quite the opposite, for it has been interpretation which has basically disarmed the few programmatic elements of the Constitution. My point is that, if the Supreme Court has been able to disarm textual protections of economic policy, like the Contracts Clause, then it is even *easier* to limit the non-textual dormant Commerce Clause. As with most constitutional doctrine, *but with even greater force with respect to economic issues*, it is social consensus, not text, which prevails. While privacy is non-textual, it is more firmly entrenched in doctrine than the textual Contracts Clause: Why? Social consensus has willed it so.

Furthermore, this situation speaks volumes to the extent, or more importantly lack thereof, to which the framers went to 'protect' their economic views.

[39] Friedman & Deacon, *supra* n. 36 at 1885. The original doctrine emerged in a time when states were viewed as foreign nations and engaged in interstate retaliation and discrimination. The need for a uniform trade policy created the dormant Commerce Clause. *Id.*, at 1887-1888.

'positive' Commerce Clause and its 'negative' manifestation became two weapons in the arsenal of the political objective of national economic consolidation. In that sense, "[t]he dormant or 'negative' Commerce Clause is a non-textual doctrine that evolved to serve the same basic principles as the Commerce Clause itself: to promote free interstate trade and commercial activity."[40] An interesting outstanding question that just recently resurfaced is whether the goal of this doctrine was the creation of a common market or a free market in the United States.[41] The difference between the two is not merely a matter of semantics.[42]

Some scholars have made the second obvious objection to the doctrine, in contrast with the abovementioned rationale for its adoption: not only is it textually unsupported, but it adds a programmatic element that the framers didn't wish to put in the first place. As Eule puts it in the context of the dual effects of the Commerce Clause, "[t]he Framers did not explicitly protect free trade."[43] It wasn't just an omission. The debate about the Constitution's commitment to a particular economic model haunts dormant Commerce Clause history. In that sense, many object the dormant Commerce Clause doctrine both on textual,[44]and purposive grounds.[45] Not only did the Framers omit it from the text; they did so on purpose. Even the Supreme Court of the United States has had to admit this extreme. As Eule suggests, "[t]he lack of any explicit articulation of a free market ideal in the United States Constitution has been described as one of the 'great silences' of that document."[46]

Yet, the dormant Commerce Clause is a constitutional rule that exists; and, again, the particulars of the rule seem simple enough. Although the states still possess broad police powers to address issues related to the morals, health, safety and general welfare of its citizens, that power cannot *always* be deployed at the expense of interstate commerce. In order to determine if the state's action runs afoul of the dormant Commerce Clause, a two-prong test is used.

First, the Court will ask if the state action –be it statutory, regulatory or otherwise– discriminates against interstate commerce.[47] If it does, it will be subject

---

[40] Daniel R. Ray, *Cash, Trash, and Tradition: A New Dormant Commerce Clause Exceptions Emerges From United Haulers and Davis*, 61 Tax Law 1021, 1034 (2008).

[41] Until recently, these terms were used interchangeably. See Schragger, *supra* no. 9, at 1092.

[42] At some point, more care should be given to distinguish between concepts like free market, common market, single economic unit, free trade, and others. They are not synonyms.

[43] Eule, *supra* n. 37 at 429.

[44] "Surprisingly, few words were spent on the subject of free trade at the Constitutional Convention." *Id*, at 430. As we saw in Part I, this has two explanations. First, that the nascent capitalist system was still too young so as to make its way into the constitutional text. Second, that in the particular issue of the Commerce power, there was division amongst the Framers as to the proper role of state regulation.

[45] Eule also comments on the difficulty of assigning original intent in constitutional silence, particularly with respect to economic policy. *Id.* at 429.

[46] *Id.*, citing *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

[47] As we will se when we analyze the holdings in *United Haulers* and *Davis*, this formulation becomes misleading. What began as a prohibition on discriminating *against interstate commerce* has become

to a *per se* rule of invalidity very similar to strict scrutiny. In order to survive, the state must demonstrate it is advancing a legitimate interest and that there is no other reasonable alternative to advance that interest but to discriminate.[48] In turn, that discriminating action may be facial or direct –that is, expressly stated– or in its application or indirect –that is, a seemingly neutral scheme that is discriminatory when actually put into practice-.[49]

Second, if the challenged state action does not discriminate against interstate commerce –whether directly or indirectly-, the Court will engage in a balancing act to determine whether the local benefits of the action outweigh any incidental burden on interstate commerce.[50] This is the so-called *Pike* test,[51] which has been severely

---

a prohibition on *favoring local **private** commerce*. That difference in approach is neatly manifested in the views of Justice's Kennedy and Souter. While Justice Kennedy asks who was discriminated by the state action, Justice Souter asks who was benefited. Stated in those terms, it is easy to see why Justice Kennedy objects to the public/private distinction in terms of the benefited party, for the fact still remains that interstate commerce was discriminated against. By the same token, the value he wishes to protect is *access to markets*. *See* Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. Davis L. Rev. 1505, 1520 (2005). "Many interpret this clause as establishing a fundamental right to federal protection of free trade and a national market."

For his part, Justice Souter's approach allows him to grasp the central issue of dormant Commerce Clause doctrine: by asking who the benefited party is, he gives the dormant Commerce Clause full force when it comes to private parties. At the same time, he avoids *Lochner* type results that would require the Court to apply private/private rules to public/private scenarios. By avoiding the access to markets approach, he correctly emphasizes the purely non-justified discrimination angle.

[48] Although it is a *per se* rule of invalidity, note the difference between this test and regular strict scrutiny. Here, the state interest need not be compelling, just legitimate. However, like strict scrutiny, it must be the least onerous alternative. The importance of the difference between these tests should not be overlooked, for it reinforces the idea that what the dormant Commerce Clause wants to avoid is *discrimination*; not to advance a particular economic model. When the test requires a legitimate, instead of compelling, interest, it only targets discrimination for its own sake. Once a legitimate interest has been identified, the substantive inquiry ends and it becomes a means test. *See also*, Bradford Mank, *The Supreme Court's New Public-Private Distinction under the Commerce Clause: Avoiding Traditional versus Nontraditional Classification Trap*, 37 Hastings Const. L. Q. 1, 54 (2006). "[Kennedy's majority opinion in *Carbone*] mistook the Commerce Clause prohibition against discrimination by a statute within an open market for a requirement that states maintain open markets." citing 108 Harv. L. Rev. 139, 153 (1994).

[49] This is similar to a disparate impact analysis: when a seemingly neutral policy's effect is to actually discriminate against a particular group, the law presumes it was designed to have such an effect. Therefore, it is discriminatory in itself. This facial/in its application dichotomy should not be confused with facial/as applied challenges typical in First Amendment cases.

[50] While the *per se* rule has been likened to strict scrutiny –a problematic analogy since, as we have seen, there is no need for a compelling interest-, the *Pike* test has been likened to an undue burden analysis. *See Friedman & Deacon*, *supra* n. 36 at 1926. But, as with the *per se* rule, that analogy fails. By all means, the *Pike* test allows the state more freedom than does the undue burden standard. Friedman & Deacon characterize the *Pike* test as "far more permissive of state authority than when the line-drawing exercise began . . . .[T]he doctrine calls for the invalidation of state laws in only the narrowest of circumstances." *Id*.

criticized on two self-negating fronts. First, because it allows Courts to second guess state legislatures as to the benefits of a particular policy, forcing judges to asses the effectiveness of legislative schemes without substantive guidance or democratic authority. Second, because if Courts recognize this problem and use the *Pike* test to routinely validate state action, then it becomes a superfluous, *pro forma* fiction that must be discarded.

In simple terms, that's the test. Yet, that's not the whole story. I propose two related readings of the test. First, the test –and the doctrine in general– *only* makes sense when based on a free-enterprise, private ownership system where states are mere regulators of economic activity. Therefore, as regulators, they may not favor one private interest over another for the simple fact that the former is local and the latter is from out-of-state. When private parties are involved, the playing field must be the same for local and non-local actors. In that sense, the dormant Commerce Clause doctrine helps further an economic policy based on a free *private* marketplace. Before the advent of the participatory state, "[f]or nearly two centuries, the U.S. Constitution, through the dormant Commerce Clause, has protected the American common market from protectionist commercial state regulations and taxes."[52]

Yet, that doctrine can only be applied *when there is a private-centered economy to begin with*. Once the foundation for that approach changes, the doctrine becomes inapplicable. The second proposal is that the first prong of the test –the *per se* rule– and the second prong –the *Pike* test– must be seen as what they really are: a constitutional rule against (1) unjustified discrimination and (2) arbitrary government; nothing more. After all, the *per se* rule's only goal is to make sure private local businesses are treated *the same way* as out-of-state businesses, unless it becomes necessary to treat them differently in order to further a legitimate interest. On the other hand, while almost a toothless tiger, the *Pike* test still has some residual value: it becomes the tool a Court can use against a purely irrational economic decision by a state government. Seen in this light, an economic constitutional rule against unjustified private discrimination and arbitrary government is not only consistent with *substantive deconstitutionalization* or *dejudicialization* of economic policy, it is a healthy approach to constitutional economic policy: the Courts will only intervene to stop unjustified discrimination and purely irrational acts. In that sense, *substantive dejudicialization* is independent from basic constitutional norms against abuses of power, which still prevail. In the particular context of dormant Commerce Clause doctrine in a non-private economy setting, only the *Pike* test remains, and only as a last resort against what all societies should avoid: pure arbitrary government.[53]

---

[51] *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970).

[52] Norman R. Williams & Brannon P. Denning, *The 'New Protectionism' and the American Common Market*, 85 Notre Dame L. Rev. 247 (2009).

[53] As we will see, *United Haulers* eliminated the *per se* prong of the test in cases where the regulation being challenged is in favor of a state economic entity.

My first proposed reading of the dormant Commerce Clause is not purely original. On the contrary, it is the basis for almost *all* of the so-called *exceptions* to the dormant Commerce Clause doctrine ***not coincidentally*** *based on public economic models*. But, it does offer an honest and unifying explanation of that phenomenon which the Court, and even less scholars, is hesitant to articulate. It is *not* a coincidence that *every time* there is a challenge against a state action in which the underlying economic circumstances are *not based on a classic private ownership model*, the Court miraculously finds an *exception* to the dormant Commerce Clause. Actually, there is no real exception *that is not based* on the public economy issue. My explanation is simple: the Court has realized that the dormant Commerce Clause doctrine was designed for a capitalist economic system. When applied in those circumstances, the doctrine applies well and actually does reflect some sort of inherent economic preference as to policy: in a private economy, free markets and national unity prevail over protectionism. But, when the economic system changes, the doctrine misfires and exceptions are born. In that sense, the creation of exceptions is the only way the Court can preserve the doctrine in the private arena while allowing for new economic approaches by the states. Seen from another perspective, without the exceptions, the dormant Commerce Clause's effect would be to basically outlaw a public economy. From that point of view, the journey from the *market participant* exception of the 1970's to the *self-regulation* exception of 2007 is totally logical and natural. After all, socialism, for example, is not just based on public economic participation alongside private forces as equals (market participant), but on public dominance of the economy (favorable self-regulation, including public monopolies).

Before diving directly in to the pair of cases that are the center of this analysis, it is necessary to say something more about the dormant Commerce Clause in general and about the exceptions in particular. Especially, how the scholarship has analyzed that interaction and why some scholars still live in denial as to the real reasons behind four decades of exceptions. By focusing on each exception individually, they have missed the point or have come short of it. Such narrow readings are at the heart of the total misrepresentation of the *United Haulers* and *David* decisions and represent an economic policy preference disguised as constitutional doctrine.[54]

If the modern version of the dormant Commerce Clause was designed to aide the nationalist economic unification of the United States, that goal was well achieved by the middle of the twentieth century.[55] That's why, from 1953 to 1975 there were only eight (8) dormant Commerce Clause opinions issued by the U.S. Supreme Court.[56] Suddenly, between 1976 and 1982, ten (10) cases were

---

[54] Eule, *supra* n. 37 at 434. "Those who favor deregulation couch their nest in the language of desirability, not constitutionality."

[55] The Supreme Court was instrumental in this goal by becoming a spokesman for a national free market under the guise of the dormant Commerce Clause. *Id.* at 435.

[56] *Id.* at 425.

decided.[57] Yet, during those 30 years, the dormant Commerce Clause ceased to be an interest amongst constitutional scholars, probably because the doctrine had remained steady since the 1930's and no normative change was on the horizon.[58] But, like many other interesting aspects of the 1970's, many paradigmatic changes were brewing. Among them was state experimentation with public-oriented economic activity. A clash between those experiments and the traditional Commerce Clause was imminent.[59] On one side, a democratically agreed departure from classic capitalist economic theory. On the other, a judicially created rule based upon private commerce. One of them had to give.

From the late nineteenth century on, the doctrine transcended the old national/local versus direct/indirect analysis of state economic action and embraced the general principal of antidiscrimination.[60] The age of state regulation between 1930 and 1975 settled into the doctrine of the times. But, the move from regulation to direct participation created a new problem. Thus, the market participant exception was born.[61] What has the scholarship made of all of this?

The reaction to the market participant exception has been varied. Like with the *United Haulers* and *Davis* decisions, political objections were disguised as constitutional reservations. Many feared a flood-gate of state participation in the economy as the result of the green light given in *Hughes*. *Oh the horror!* Yet, the exception has resulted to be workable and has not resulted in any disruption of the American economy.[62]

---

[57] *Id.* at 426. The rise in cases during this period has been referenced by some to be demonstrative of a bumpy development of the case law, instead of simply a new paradigmatic shift in state economic activity, from regulation to participation. See Timothy J. Slattery, *The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle*, 17 WM. & Mary Bill Rts. J. 1243, 1279 (2009).

[58] Eule, *supra* n. 37 at 426.

[59] Slattery, *supra* no. 57, at 1255.

> As the Supreme Court expanded Dormant Commerce Clause doctrine, it *necessarily collided* with the needs and practicality of the State in participating in the marketplace. (Emphasis added). Curiously enough, while being one of the few scholars who recognize the inevitability of this clash, Slattery suggests as a solution to roll back on the exceptions by using strict scrutiny even in situations where the state is an economic actor.

[60] Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417, 441 (2008).

[61] *See Hughes v. Alexandra Scrap Corp.*, 426 U.S. 794 (1976); *Reeves Inc. v. State*, 447 U.S. 429 (1980).

[62] For a detailed analysis on how state and federal courts have followed the dormant Commerce Clause in general since the creation of the market participant exception, *see* Mehmet K. Konar-Steenburg & Annie F. Peterson, *Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior under the dormant Commerce Clause doctrine*, 80 UMKC L. Rev. 139 (2011). Their findings are very interesting in terms of identified variables. As to judicial forum, they find that state courts are more likely to uphold state regulation, while federal courts tend to find violations of the doctrine. As to ideological considerations, they explore an interesting dichotomy. For conservatives, the clash is between the values of state rights versus free market ideology. For liberals, the clash is between the

Brannon Denning paints the following alternative vision for the recent developments of the doctrine: "[T]he alleged incoherence and unpredictability of the dormant Commerce Clause doctrine is rooted in the Supreme Court's search, through the years, for a stable set of rules enabling it to distinguish permissible from impermissible state regulations of interstate commerce and commercial actors."[63] He suggests the Court's lack of success is "due in large part to the [its] inability to settle on the Constitutional command the doctrine was to enforce."[64]

As to the first proposal, I believe he both underestimates and overestimates the current state of the doctrine. On the one hand, *as to private commerce*, the doctrine is not as inconsistent as it would seem. There have been no great normative developments or changes in that direction. It only becomes inconsistent when mixed with the development of the exceptions, which, in turn, are based on *public economic activity*. Seen together but viewed through the same lens, it would seem there is no internal coherence to the doctrine. But if *not* viewed together, each is perfectly consistent. This, in turn, is the basis for the underestimation, because the Court has moved on from the basic permissible/impermissible *regulation* of private commerce paradigm to an entire new field of independent public economic activity which simply escapes dormant Commerce Clause concerns.

As to the second proposal, I believe Denning is correct is calling out the Court for its constant rationale change.[65] But that change is perfectly legitimate and is part of the *dejudicialization* process as to economic policy at the basic level. What we should emphasize is the Court's clear reluctance to insert into the "constitutional command" a substantive element that would require a particular mode of economic activity. I think a close look at *United Haulers* and *Davis* allows us to see where the Court currently is and that the current state of the doctrine is the logical consequence of the *market participant* revolution of *Hughes*. While the Court continues its debate about the rationale on the scope of the doctrine as to private economic activity and state regulation of it, one thing is clear: a private enterprise

---

values of federalization/economic nationalism and progressive economics. According to them, the dichotomy "brings into play the familiar liberal-versus-conservative debates about the proper level of regulation and taxation in a capitalist society[,] with liberal political ideology tending to be more tolerant of government regulation and taxation than conservative ideology, which tends to be more laissez-faire about these issues." *Id.* at 148. As to the conservative clash, the authors express that "free market trumps federalism." *Id.* at 158.

[63] Denning*, supra* no. 60 at 417.

[64] *Id*. This is reminiscent of the debate between Kennedy's discrimination against interstate commerce and protection of access to markets approach versus Souter's view of discrimination in favor of local private business and total avoidance of *Lochner* results.

[65] Denning assigns to the Court a classic common-law approach to its dormant Commerce Clause doctrine: "Historically, the Court would promulgate a set of rules, apply them for a time, then alter or modify them as the rules became unsatisfactory". *Id.* at 417. What he fails to see is that the exceptions revolution is not merely a modification of the doctrine because it became unsatisfactory, but a wholesale departure from its basic underpinnings when confronted with public economic activity.

system is not constitutionally required and the dormant Commerce Clause will not be the Due Process Clause of the post *Lochner* era. Actually, what a steady majority of the Supreme Court has done is to *desubsantivize* the dormant Commerce Clause in the same way it did with economic substantive due process.

Again, I think the main mistake scholars have made is to try to create an overarching explanation for the dormant Commerce Clause regardless of the economic underpinnings of the different cases. Sure, some overarching norms exist. Like we have seen, there is a *general* goal in the doctrine to prevent unjustified discrimination and arbitrary government. Yet that is the extent to which the *private economy* and *public economy* dormant Commerce Clauses meet doctrinally. Once we dig into specifics, we must relinquish an attempt to treat both situations the same. Such has been the failed attempts of the scholarship, which is satisfied to point out the seemingly inconsistency of the Supreme Court on this issue. Others have limited themselves to the anti-*Lochner* result rationale, but fall short of explaining how this has been normatively incorporated into the doctrine.[66] For example, Barry Friedman and Daniel Deacon state that "the doctrine has actually evolved to be more protective of the states over time."[67] That sounds like an understatement. The doctrine may have evolved somewhat so as to give states some flexibility with regards to their regulatory regimes, but in terms of state participation in the economy, the doctrine has simply steered clear. In the same direction, Williams and Denning criticize the new public-based exceptions, arguing that there is "no coherent distinction between public and private actors."[68] But actually, the distinction is not only coherent but necessary: its absence would allow the application of private-economy rules to public actors which may want to replace the purely private economy as a matter of policy.

There are other examples of scholarly resistance to view the market participant exception as a *new and independent* string of constitutional doctrine, and insist it's merely that: an exception. As Richard Schragger expressed it, "[p]rotectionist effects have been countenanced by the Court, however, when they come *in certain forms*," such as the market participant exception.[69] Yet, this narrow view I think, again, misses the point. The market participant exception is not merely a particular form of protectionism; it can also be a new approach to economic development.

---

[66] "Chief Justice Roberts, Chief Justice Rehquist, and Justice Souter have all opposed *particular* applications of the antidiscrimination principle on the ground that it involves the Court in enforcing its *own vision of the market economy* at the expense of state and local government's visions. . . .Chief Justtice Rehquist once chided the majority in a [dormant commerce clause doctrine] case for its "messianic insistence on a grim sink-or-swim policy of laissez-faire economics." *Id.*, at 461-462, citing *West Lynn Creamery*, 512 U.S. 186, 217 (1994) (Rehquist, C.J., dissenting) (*Emphasis added*).

[67] Friedman & Deacon, *supra* n. 36 at 1882. They suggest the effect has been to give "greater room for states" and a "correspondingly lesser role for the judiciary." *Id*.

[68] Williams & Denning, *supra* n. 52 at 247.

[69] Schragger, *supra* no. 9, at 1118.

The market participant exception is merely a beginning, for even that doctrine is predicated on the basis of the existence of a private market in which the state merely participates as would any other private party.[70] The same thing happens with Ray, who states that "[t]he 'market participant' rule provides states with a *safe harbor* from dormant Commerce Clause liability."[71] In that sense, the market participant exception seems to be some sort of copout for states in the sea of the free market. Others, like Slattery, have come to terms with its need and, even, benefit: "The market participant exception *continually demonstrates its importance* as states become players in various industries, including state production of products for consumers and manufacturers." What remains to be seen is if that same type of acceptance will follow the self-regulation exception that will be discussed below. After all, it is not difficult to see the connection between a progression from state regulation –*West Coast Hotel*– to public participation as an economic actor –*Hughes*– and, finally, to public displacement or domination of an economic area –*United Haulers*-.

2. *United Haulers* and *Davis*: What Do They Actually Mean?

a. Background to the Opinions

Since the creation of the market participant exception, an outstanding question remained: public monopoly over an economic activity. One the one hand, when the state participated as *just another* economic actor in the marketplace, the market participant exception covered its operation. On the other hand, the United States had dealt with the concept of so-called 'natural monopolies', mostly in the realm of public utilities such as water and power. In order to see how these two areas converge in the issue of self-regulation/economic public monopolies, we must take a look at the legal treatment of natural monopolies.[72]

Natural monopolies may be either public or private "when…only one company can efficiently provide a certain service."[73] The best example is a public utility such as local power grid. In cases of private ownership of these, they have been historically "subject to heavy regulation", by both federal and state governments.[74] Since a monopoly will emerge naturally from the inherent characteristics of the activity itself, the dormant Commerce Clause offers little aid, except that

---

[70] *Id*.

[71] Ray, *supra* n. 40 at 1035. (Emphasis added)

[72] In turn, the issue of natural monopolies is closely related to municipalization. *See* Ross Saxer, *supra n. 4. See also*, *Schragger*, *supra* n. 9 at 1094 and his interesting analysis of "the *free trade* Constitution from the perspective of the city." (Emphasis added).

[73] Darien, *The Supreme Court and the New Old Public Finance: a New Old Defense of the Court's Recent Dormant Commerce Clause Jurisprudence*, 43 Urb. Law 659, 669 (2011). These monopolies are not designed, but a byproduct of the free market itself. *Id*.

[74] Ross Saxer, *supra* n. 47 at 1508.

competition for that monopoly must be even between out-of-state interests as well as local ones. The same applies as to the actual components used in the servicing of these entities: the norm of nondiscriminatory open access also reigns.[75] So, as long as the decision to give the monopoly between out-of-state and local private interests is nondiscriminatory, the eventual exclusion after the creation of the monopoly is permitted, due to the inherent nature of the activity.

However, the seeds of what eventually would be the extension made in *United Haulers* and *Davis* where present when the issue was a *publicly-owned* utility which operated as a natural monopoly. Until the direct challenge as to 'artificial' monopolization, public utilities were analyzed under the market participant exception of *Hughes*.[76] That is, the decision to select public ownership over private had little to do with the monopoly itself, because the monopoly was not created by an act of political will; instead, it came naturally. As such, the decision was limited to that of a normal market participant; just that this particular market was inherently monopolistic.

What about *private* monopolies that are outside the 'natural monopoly' doctrine? That is, designed monopolies instead of those that are inherent to the particular economic activity. Before *United Haulers* two thinks looked clear: Non-natural private monopolies that benefited local businesses to the exclusion of out-of-state ones were contrary to the dormant Commerce Clause. Also, that "the creation of a local or state-wide territorial monopoly provider was understood to constitute an impermissible burden on interstate commerce."[77]

As to the first proposal, mention must be made to *Carbone* as the key to understanding *United Haulers*, not as an anomaly or contradiction, but as perfectly coherent outcome.[78] In *Carbone*, a local government agreed with a local private party that the latter would build and initially run a waste disposal center. After a few years, ownership of the center would be transferred to the government but, until then, would be in private hands. This mechanism was designed by the local government as a new mode of flexible financing of public works, so as to spare the locality the burdens of outright public expenditure. In order to guarantee the profits of the center –so as to entice the private entity to participate in the endeavor-, the local government passed a flow control ordinance that required that all garbage collected within its jurisdiction be processed at the recently created center. In essence, it created a waste disposal monopoly, for it eliminated competition in that area. However, the monopoly would be, for the first couple of years, private. And, the private party selected was local, thereby excluding private out-0f-state entities

---

[75] *Id*.

[76] *Id.* at 1537. "A states or municipality's operation of a public utility may be exempted from dormant Commerce Clause scrutiny based on either the market participant or the public utility exception. See also Mank, supra n. 48 at 56".

[77] *Schragger*, *supra* no. 9 at 1119.

[78] *C&A Carbone, Inc. v. Town of Clarkstown*, 551 U.S. 383 (1994).

from offering the same service. In other words, the local government created a private, non-natural, monopoly in favor of a local business interest. A constitutional challenge was presented, arguing that such scheme violated the dormant Commerce Clause. Under the *private economy* dormant Commerce Clause, it did, for it was benefitting a local entity over out-of-state ones. But how the question was drafted made all the difference: was it contrary to the dormant Commerce Clause because it *favored* a local private business of because it *discriminated against* interstate commerce? In *Carbone*, the issue was not yet clear, but the Opinions in the case set the stage in that direction. Eventually, Justice Souter's dissenting views in *Carbone* would command a majority in *United Haulers*, rejecting the 'who is discriminated' test and adopting the 'who is favored' approach.

Some scholars missed the Court's indifference to the murky public/private distinction in *Carbone*.[79] Others viewed it as the application of a "strict free-market interpretation of the [dormant Commerce Clause doctrine]."[80] In fact, the most *Lochnerian* approach –which was not as important in this case because of the fact that the contending parties were all private– came from Justice Kennedy himself, particularly with respect to the "access to markets" as a constitutional value.[81] If all private out-of-state entities have a constitutional right to enter a particular market, then there can never be public control thorough ownership of an economic activity.

This *Lochnerian* possibility plus the stated second proposal –that *all* non-natural local monopolies would constitute an impressible burden on interstate commerce– was, in fact, at the very heart of *United Haulers*. Let us now turn to that case.

2. *United Haulers*

United Haulers Association, Inc. v. Oneida-Herkiner Solid Waste Management Authority seemed to be a repeat of *Carbone*.[82] But appearances can be deceiving and indeed were in this case. After failed experiences with the privately-run waste management system, which, in fact, created a real crisis that included illegalities,

---

[79] "[In *Carbone*, the Supreme Court] struck down an ordinance requiring that all local waste be processed at a *municipality owned* waste processor". (Emphasis added) Ross Saxer, *supra* n. 47 at 1528. Actually, the Court would clarify in *United Haulers* that it considered the *Carbone* facility to be *privately owned*, and that made all the difference. This mistaken reading of *Carbone* explains statements such as: "[U]sing municipalities to avoid dormant Commerce Clause scrutiny under a market participant theory has not *yet* been successful." (Emphasis added) *Id*, at 1533. True. . . not yet; not until *United Haulers* more than ten years later.

[80] Mank, *supra* n. 48 at 21.

[81] *See* Kellen S. Dwyer, *Dormant Commerce Clause Review of Public-Private Partnerships, after United Haulers: A Competitive Bidding Solution*, 18 Va. J. Soc. Pol'y & L. 203, 225 (2011). *See also,* Mank, *supra* n. 48 at 22. "[The *United Haulers*] Court view on this point [right of access to private markets as a feature of the dormant Commerce Clause] is contrary to the underlying free access to markets reasoning in *Carbone*."

[82] 550 U.S. 330 (2007).

price fixing, economic and environmental problems, health and safety concerns, and high public costs, the citizens of two New York counties made a political decision: they wanted to centralize, socialize and monopolize in public hands the processing of garbage in their communities. As such, they requested the state legislature for authorization for that endeavor, and thus the Oneida-Herkiner Solid Waste Management Authority was born. Like in *Carbone*, a flow control ordinance was passed that required *all* garbage to be processed at the new center, subject to a tipping fee.[83] *Unlike Carbone*, the center was, from day one, "owned and operated by a state-created, public benefit corporation."[84]

A challenge was raised making the same argument presented in *Carbone*: by creating a monopoly in favor of a 'local' entity, the counties –and the state– had discriminated against out-of-state commerce by excluding them from the waste disposal market. To the challengers of the ordinance, the fact that *Carbone's* center was privately owned while the one here was public in nature made no difference, for the issue was not that *other* local entities were *also* excluded as well as the out-of-state ones, but that the favored party was 'local'.[85] Yet, a majority of the Supreme Court found the fact that the facility in *United Haulers* was publicly owned "to be constitutionally significant."[86] Let's see why that is, and must be, so.

Chief Justice Robert's Opinion for the Court offered a barrage of reasons why the public authority should prevail in the case.[87] The first target of the Opinion was: what is the objective of the dormant Commerce Clause itself?[88] In particular, the dichotomy between focusing on the benefited party or on if the excluded parties were all out-of-state. The Chief Justice starts by defining discrimination against interstate commerce as "differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter."[89] By stating it in those

---

[83] The tipping fee also included other services that were not offered by the previous private system. *United Haulers, supra*, at 335.

[84] *Id.* at 334.

[85] Both the challengers and the dissent in *United Haulers* made reference to Justice Souter's dissent in *Carbone* which mentioned the fact that the facility there, although it would be nominally private for a few years, was "essentially a municipal facility." *Id.* at 339. That allowed an *initial* reading of *United Haulers* as favoring the issue of ownership over actual function of the facility. *Davis* is key to clarifying this situation.

[86] *Id.* at 334.

[87] The Opinion was joined by Justices Souter, Ginsburg and Breyer. Justice Scalia joined the Opinion in all but Part II-D and wrote a separate Concurrence as to Parts I and II-A. Justice Thomas wrote an Opinion concurring in the Judgment. Justice Alito authored a dissent joined by Justices Stevens and Kennedy. Some of the rationale used in *United Haulers* would be clarified in *Davis*.

Before diving into the new developments of the doctrine, the Opinion mentions some of the classic and accepted elements of dormant Commerce Clause case law ('We have long interpreted the Commerce Clause as an implicit restraint on state authority even in the absence of a conflicting federal statute.") *Id.* at 338. It also makes reference to the *per se* rule against protectionism. *Id.* at 338-339.

[88] This refers to the debate discussed in n. 47.

[89] *United Haulers*, *supra* at 328.

terms, he positioned himself to assert that the determining factor in this case was that *all **private** entities were treated the same way*,[90] whether local or out-of-state. According to the Court, "[c]ompelling reasons justify treating these laws differently from laws favoring particular *private* business over their competitors."[91]

The alleged compelling reasons first stated by the Chief Justice are interesting, but problematic. He says that "[s]tates and municipalities are not private businesses –far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety and welfare of its citizens…Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism."[92] He then adds an explosive element which was both the subject of harsh scholarly criticism, as we will discuss shortly, and, eventually, clarification by *Davis* in a direction that reinforces our thesis here. According to the Chief Justice, the Court must be "particularly hesitant" in this case because waste disposal is "typically and historically a local government function."[93] These statements require some digesting before we continue on summarizing the Opinion and discussing the scholarship's reactions to it.

It is true that governments are not like businesses; well, it depends on how you define each one. It is one thing to say, as the Opinion appears to do, that the *nature* of government is different from private businesses, in that is it not *motivated* by issues of profit and gain, but by values related to public welfare. However, we must be careful not to fall into the trap of an inflexible view that government is different from businesses because it merely provides services. Actually, sometimes *government is business*; that is, it is an independent economic actor that produces, engages in commerce and even makes a profit. Of course, that profit is not for the benefit of stockholders or other private parties, but society as a whole. *That is the whole rationale for the market participant exception*: government *acts* like a private economic actor. As long as the Court's statement is not construed as to mean that government, *by its nature*, is not an economic entity in itself, the distinction *for other purposes* between government and private business is valid and positive; greed is not a government interest. In the private arena, profits are an end in themselves. In the public sphere, it is a way to generate revenue for the government for the common benefit, be it through services or direct participation in the gain. This possible confusion is facilitated by the reference to "traditional government functions." Yet, this issue deserves more analysis, so I will come back to it later on.

It is in this part the Opinion that the Chief Justice makes the most important point of the decision. Curiously enough, it is stated in the *negative*. That makes perfect sense, for the real reason behind this decision is not that there is a coherent

---

[90] *Id.* at 342.

[91] *Id*. (Emphasis added)

[92] *Id.* at 342-343.

[93] *Id.* at 344.

explanation for it, but because *the opposite result was intolerable*: "The contrary approach of treating public and private entities the same under the dormant Commerce Clause *would lead to unprecedented and unbounded interference by the courts with state and local governments*. The dormant Commerce Clause is not a revolving license for federal courts to decide what actions are *appropriate for state and local governments to undertake, and what activities must me the province of private market competition*."[94] That is, it is not up for the Courts, as interpreters of the Constitution, to decide what sectors of the economy must be private or social. In that sense, the Chief Justice addresses the petitioner's "invitations to rigorously scrutinize economic legislation passed under the auspices of the police power" by stating that "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause See *Lochner v. New York*, 198 US 45 (1905)."[95] There would be no repeat of that here.[96]

Then if deciding which parts of the economy are to be private and which are to be public-centered is not a matter for the courts as constitutional interpreters, who does this task fall onto? The Court answers: "In this case, the *citizens* of Oneida and Herkiner Counties *have chosen* the government to provide waste management services, with a limited role for the private sector in arranging for the transport of waste from the curb to the public facilities. The *citizens* could have left the entire matter for the private sector, *in which case any regulation they undertook could not discriminate against interstate commerce*. But it was *also* open to them to vest responsibility for the matter with their government, and to adopt flow control ordinances to support the government effort. *It is not the office of the commerce clause to control the decision of the voters on whether the government or the private sector should provide waste management services*."[97] In other words: democracy.[98]

While the Chief Justice professes *constitutional* substantive economic neutrality, he still shows his veins. In the same tone as some of the scholars we will discuss shortly, Roberts lets us know where he stands: the natural, default state is private economy; social or public economic models are exceptional. The fact that the says it is not up to the courts, but to the political process, to place limits on the scope of state intervention in the economy as a direct participant, signals that he believes it

---

[94] *Id.* at 343. (Emphasis added)

[95] *Id.* at 346.

[96] The substantive economic policy issues weighed heavily on the majority. "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values." *Id.*, at 344, citing *Maine v Taylor*, 477 U.S. 131, 151 (1986); "Commerce Clause does not protect the particular structure or methods of operation of a market." *Id.* citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978).

[97] *Id.* at 343-344. (Emphasis added)

[98] "There is no reason to step in and hand local businesses a victory they could not obtain through the political process." *Id.* at 345.

should be limited. After all, only negative things are allowed as 'necessary evils'; there's no such thing as too much of a good thing. I doubt the same tone would be used in a constitutional challenge for a statutory policy of total deregulation and *laissez-faire* economics. The Chief Justice's view is that the *political process* will determine what *too much* intervention is. His political process theory is based on the premise that when governments treat local private businesses more favorably than out-of-state ones, the local population will not intervene to control the government's move. That is, the out-of-state interests are not politically represented in the local government's decision-making, which warrants federal judicial intervention under the dormant Commerce Clause. In this case, by favoring a local *public* entity over *all* local *private* entities, the reasoning is that the *local* political process will be the adequate forum to make substantive decisions with respects to the organization of the local economy.

A final note must be made in this direction. It is obvious the Chief Justice has an internal tension: his constitutional role demands substantive neutrality while his policy preferences require characterizing socialized economy as a necessary evil which democracy will be able to effectively check. For example, during oral argument, the petitioners suggested that to completely exempt public entities from dormant Commerce Clause constraints as to favorable self-regulation, would allow the counties in this case to create the dreaded Oneida-Herniker hamburger stand authority, and pass an ordinance requiring that only that stand may sell the hamburgers.[99] The Court, while confessing aberration to that scenario, again declines to use the Constitution to strike it down and, again, places the responsibility for that decision on the political process and democracy. The Chief Justice addresses the possibility of a "law requiring citizens to purchase their burgers only from the state-owned provider" with this answer:

> We doubt it…"Recognizing that local government may facilitate a *customary* and *traditional* government function such as waste disposal, without running afoul of the Commerce Clause, ***is hardly a prescription for state control of the economy…***In any event, Congress retains the authority under the Commerce Clause as written to regulate interstate commerce, whether engaged by private or public entities. It can use this power, as it has in the past, to limit state use of exclusive franchises."[100]

Again, while showing restraint in the constitutional arena, the Chief Justice reminds both local voters and, if need be, the Congress, that they can always

---

[99] Again, this type of example reflects a value judgment. It is used as a sort of terrible extreme than should be avoided. *Oh the horror!* It would not be the first nor the last time a government will hold an economic monopoly, and I argue there is nothing inherently dysfunctional about that. But that, *precisely*, is an issue for the political process, not constitutional law.

[100] *United Haulers*, *supra* n. 1 at. fn. 7.

'reign in excesses'. Yet, for our purposes, the issue is perfectly clear: there is no *constitutional* prohibition against state control of the economy. While it is true that *United Haulers* is not a prescription for it, it is evident that the dormant Commerce Clause is not a *bar to it*. Roberts is quite clear that it is all up for the democratic process; the Constitution does not care *either way*.[101]

Well, the Constitution does care a little bit. Although the *per se* rule is inapplicable when the favored local party is public, the Court still clings to the *Pike* balancing test; but only in its minimum manifestation, that is, protection against purely arbitrary action. In its application of the *Pike* test to the present case, the majority concluded that "any incidental burden [the state actions] may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herniker Counties."[102] Of course, this creates a sort of self-perpetuating cycle, for it's up to the local government to identify how to serve its constituents.

It is this last part of the Opinion, which definitely has the feeling of *pro forma* lip-service to the *Pike* test –since the Court actually gives full deference to the local government in determining that there is, in fact, a local benefit to be had– that most strikes Justices Scalia and Thomas. In his concurrence, Scalia reaffirms his belief that the *Pike* test has demonstrated its uselessness, and would limit *all* dormant Commerce Clause analysis to the *per se* rule in cases of facial discrimination or in those instances where the challenged action is on all fours with past precedent.[103] For his part, Justice Thomas appears to be the ultimate fan of the economically silent Constitution. According to him, *all of the dormant Commerce Clause doctrine* "turns solely on policy considerations, not on the Constitution."[104] This proposition is very interesting, for it attacks the doctrine not only as it applies to public entities –actually, he believes there should be no public exceptions at all because their simply should not be any doctrine in general–, but as it applies to *private* parties. In that sense, he disagrees with my view that the *minimum* substantive constitutional provisions manifested through the dormant Commerce Clause only apply to a private economy. To him, there simply are none.[105]

---

[101] Justice Thomas is thus wrong in stating that our approach might suggest a policy-driven preference for government monopoly over privatization. . .*That is instead the preference of the affected locality here.* . .Our opinion simply recognizes that a law favoring a public entity and treating all private entities the same does not discriminate against interstate commerce as a law favoring local business over all others. (*Emphasis added*)

[102] *Id.* at 334.

[103] *Id.* at 348 (Scalia, concurring).

[104] *Id.* at 349 (Thomas, concurring in the judgment).

[105] In other words, while agreeing with me that the dormant Commerce Clause is the product of economic nationalism that wanted to unify the American common market, he rejects it as a matter of constitutional policy. He appears to be the ultimate economic dejudicializer. *Id.* at 351.

> "Many of the above-mentioned cases (and today's majority and dissent) rest on the erroneous assumption that the Court must choose between economic protectionism and the free market.

Justice Alito led the dissenter's charge. To him, the issue was simple: it is just a repeat of *Carbone*: a local ordinance that deprived out-of-state competitors access to a local market.[106] To him, the "public-private distinction drawn by the Court is both illusory and without precedent."[107] Even more, *he makes the case for the substantive Constitution*: "This Court long ago recognized that the Commerce Clause can be violated by a law that discriminates in favor of a state-owned monopoly."[108] For Justice Alito, the issue under the dormant Commerce Clause is if the monopoly is in favor of a local private or public entity, but whether out-of-state parties are excluded from the market.[109] That rationale, apparently, would also reject the market participant exception, which is based on the notion that when government is the economic actor, it is not subject to the dormant Commerce Clause.[110] Finally, like the Chief Justice, Justice Alito expresses his value judgment as to the wisdom of a public economy: "Experience is other countries, where state ownership is more common than in this country, teaches us that government often discriminates in favor of state-owned businesses" by shielding them from both private national and international competition.[111] To him, both smell of protectionism and, thus, run afoul of the dormant Commerce Clause. The difference between Roberts and Alito is that the latter's substantive views take on constitutional rank, while the former leaves it to the political process to sort out.[112]

Thus ends the first part of the tale of *United Haulers*. The list of issues and questions that emerge from this decision deserves recapitulation: (1) What does

---

But the Constitution vests that fundamentally legislative choice to Congress. To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States' power to regulate commerce. In the face of congressional silence, the States are free to set the balance between protectionism and the free market." *Id.* at 352. Since he rejects *Carbone*, he finds the public/private distinction unnecessary. *Id.* at 354. To him, the dormant Commerce Clause rests on the same problematic footing as Lochner. *Id.* at 355.

106 *Id.* at 356 (Alito, dissenting).

107 *Id*. at 358. He also questions the Court's premise that *Carbone's* entity was purely private in an attempt to establish that the Court had previously struck down a public monopoly. To him, nominal title is not determinative. *Id*, at 359.

108 *Id*, at 361, citing *Scott v. Donald*, 165 U.S. 58 (1897) and *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898). Note the dates of these precedents and their historical context as it pertains to the belief in an economic-programmatic Constitution.

109 "There is, of course, no comparable provision in the Constitution authorizing states to discriminate against out-of-state providers of waste processing and disposal services, either by means of a government-owned monopoly or otherwise." *Id.* at 362.

110 The relationship between the self-regulation exception and the market participant rule is better discussed in law favoring a private nonprofit organization, where the debate rages on whether the former is a manifestation of the latter, of if they are separate.

111 *Id.* at 364.

112 Justice Alito also devotes a great part of his dissent to criticize the majority's use of the traditional government function concept to justify its holding.

did Court mean with its reference to traditional government functions?; (2) What is the relation between the market participant exception and this apparently new self-regulation exception? That is, are they separate, related or the same?; (3) Is this case limited to flow ordinances?; (4) Is this just another exception in a seemingly incoherent sequence of them; (5) Is this the end of the *Pike* test as we know it?; (6) How should be analyze the opinions' approaches to substantive economic policy issues, such as the nightmare hamburger stand scenario?; (7) What is a 'public' entity?; (8) How do we address joint ventures?; (9) Is there a role for other forms of non-government social property like cooperatives, workers' corporations, and non-profit entities?; (10) How does this new rule interact with the Taking Clause, particularly with respect to regulatory takings? From these questions I wish to reaffirm my original proposal: the Court's decision in *United Haulers* should not be seen as an isolated incident that simply carved out a new exception. On the contrary, it is part of a decade-long process of taking the Constitution out of the business of substantive economic policy decisions and designs.

The scholarship reacted to this ruling *en masse*. To some scholars, *United Haulers* is simply another example of a doctrine that has lost its way by constantly carving exception after exception.[113] Others took aim at the specifics of the new exception, failing to see the forest for the trees.

For example, Denning states that in this case, the Court "created a heretofore *unknown* exception to the antidiscrimination rule: the rule does not apply if a state or local government discriminates in favor of a publicly owned facility –here a waste disposal unit that all persons served by the waste management district were obliged to use to process their garbage."[114] He also echoes the dissent's view that the Court basically ignored the fact that the *Carbone* facility was not entirely private in nature. Denning believes the key to understanding *United Haulers* are: (1) the responsibility of governments to protect the health, safety, and welfare of their citizens that private entities do not exercise; (2) the presence of legitimate non-protectionist goals furthered by such forced-use rules, aside from simple economic protectionism; (3) respect for federalism, *especially* when traditional government functions were involved; and (4) the political process rationale that the most affected people are the ones who made the decision.[115]

But this vision is too narrow and doesn't connect the dots. As to (1), this is not merely an issue of *classic* police powers, normally identified with regulation of private activity. This is the government as an economic actor regulating itself. As to (2) the issue here is not whether the state is acting purely from simple economic protectionism, but whether it is *private* protectionism. Again, the

---

[113] *See* Denning, *supra* 52 at 417, calling the current state of the doctrine a superficial stability that is "largely an illusion." He also comments on the decay of the *per se* rule and the *Pike* test.

[114] *Id.* at 469.

[115] *Id.* at 470.

public-private distinction is not an issue of service-versus-profit, but of different modes of economic development that must be allowed as a constitutional matter. As to (3), two things: first, the same things that the Court wants to avoid by using the dormant Commerce Clause as to the states apply to the federal government. It is not just about federalism, for the same type of substantive restrictions could not be placed on Congress; second, as to the traditional government function, I will discuss as a separate question. And (4), I resist the insistence that this is just a cost-benefit analysis of citizens who are willing to make a *sacrifice*. I reject the premise that, *per se*, public participation in the economy is a burden we decide to incur in particular circumstances and which the political process is called upon to curtail.

For his part, Schragger comments on the Court's identification of revenue generation as a legitimate interest of local governments under the *Pike* test.[116] This choice of words clearly corresponds to a *passive* vision of government as a recipient of revenue. Why not simply say that the government is *actively* generating profits for the public good? For his part, Tichenor suggests that, "[e]ssentially, what the Supreme Court has done in *United Haulers* is provide local governments with an *end run around* [d]ormant Commerce clause considerations to pursue whatever goal they like, as long as it's not protectivism through discriminatory means."[117]

3. *Davis*

In order to adequately discuss the different issues raised by *United Haulers* and their treatment –mainly erroneous in my judgment-, attention must be given to another case decided just a year later. *Department of Revenue of Kentucky v. Davis* was, like *United Haulers*, a pretty boring case.[118] In order to incentivize the purchase of its bonds, the state of Kentucky excluded as taxable income the interests generated on state bonds. Thus, a citizen of the state benefited from the purchase of Kentucky bonds by not having to pay taxes on the interest received. However, they did have to pay taxes on the interest made on bonds from *other states*. A Kentucky couple who held out-of-state bonds challenged the statutory regime as a violation of the dormant Commerce Clause. They alleged that by favoring their bonds and excluding from the same benefit other states' bonds, Kentucky was facially discriminating against out-of-state interests.

---

116 Schragger, *supra* n. 9 at 1119.

117 Ryan Tichenor, *The Public Entity End Run: Government Actor's Exception to Dormant Commerce Clause Considerations*, 15 Mo. Envtl. L. & Pol'y Rev. 435, 451 (2008) (Emphasis added). Note the pejorative approach to the holding of the case, characterizing the new exception as an end run. Again, scholars insist on viewing public economic models as anomalies in the grand scheme of things that somehow evade the dormant Commerce Clause.

118 553 U.S. 328 (2008).

After going into the history of the bond regime in the United States, a majority of the Court, led by Justice Souter, upheld the tax regime.[119] The Opinion reaffirmed the basic purpose of the doctrine, which is to prevent economic isolation if it discriminates against interstate commerce.[120] Immediately though, as if it were *part of the doctrine* –or, better yet, as a different doctrine in itself-, Justice Souter made reference to the string of exceptions to the *per se* rule of the dormant Commerce Clause that started more than 40 years ago. In particular, he referenced the rationale behind these exceptions, stating that there is "no indication of a constitutional plan to limit the ability of the State themselves to operate freely in the free market."[121] The question was, which exception governed this case? Two options were available: (1) the market participant exception, given that Kentucky, by engaging in the bond market, was performing as an economic actor; (2) the self-regulation exception of *United Haulers*, given that Kentucky was not only participating in the economic arena –market-, but it was *regulating* it in its favor.

A solid *majority* of the Court agreed that, at least, the *second* exception settled the matter. The Opinion stated that Kentucky, because of *United Haulers*, must, *a fortiori*, prevail. Like in the former case, here the state had regulated in favor, not of a local *private* entity at the expense of out-of-state ones, but of a local *public* activity to the exclusion of all else: bonds. By doing that, it had treated all *private* entities the same.[122] Thus, it seems to reaffirm the proposal that the central question under the doctrine is *not* if local is favored over out-of-state, but if there is a distinction made between private parties in favor of the local one. Again, it appears that the dormant Commerce Clause doctrine is only operational when the economic actors are private. When one of the economic actors is public, almost all bets are off.

A *plurality* of the Court *also* found that the *first* exception –the market participant exception– applied in Kentucky's favor.[123] According to Justice Souter's Opinion, the state had acted in "two roles at once", that is, as market participant and regulator.[124]

---

[119] This Opinion was joined in full by Justices Stevens, Ginsburg and Breyer. Chief Justice Roberts concurred as to the part of the Opinion that relied on *United Haulers*. Justices Scalia and Thomas concurred as well. The dissent was penned by Justice Kennedy, joined only by Justice Alito.

[120] Davis, *supra* n. 1 at 338.

[121] *Id.* at 339. Note the dual reference: (1) state's liberty to be independent economic actors; (2) the taken for granted that there will be a free market system. The same can be seen in this statement in Part III-B (plurality): "[O]ur cases on market participation with regulation (the usual situation) prescribe *exceptional* treatment for this direct governmental activity in commercial markets for the public's interest." (Emphasis added) *Id*, at 348. Note the dual reference: (1) public participation requires different treatment; (2) yet this type of participation is the exception, not the rule.

[122] *Id.* at 343. "[I]n the paradigm of unconstitutional discrimination the law chills interstate activity by creating a commercial advantage for goods or services marketed by *local private actors*, not by governments." (Emphasis added) *Id.* at 347.

[123] Dwyer proposes that, in *Davis*, the Court described the market participant exception "far broader than the traditional notion." Dwyer, *supra* n. 81 at 244. I surely hope so.

[124] Davis, *supra* n. 1 at 344.

Justice Souter also hinted that the same was true of *United Haulers*; that is, that that case could also be seen as a market participant controversy: "[In *United Haulers*] we upheld the government's decision to *shut down* the old market. . . only because it created a new one all by itself, and thereby became a participant in a market with just one supplier of a necessary service."[125] As such, "[i]n each of the cases the commercial activities by the governments and their regulatory efforts complemented each other."[126]

After ruling that the *per se* rule is not applicable because of either the self-regulation or the market participant exception, the Court moves on to the *Pike* balancing test. Yet, by doing so, it nearly kills it, stating that they doubt "whether the *Pike* test *even applies to a case of this sort*".[127] This is very interesting indeed, because the Court explains that there is a difference in treatment between the market participant exception and the recent self-regulation exception of *United Haulers*: the latter is still subject to the *Pike* test; the former is not.[128] While this sounds like an interesting and puzzling distinction, the Court solves the issue in practice: by making the *Pike* test, as applied to the self-regulation exception, a nonissue. It held that, even if the *Pike* test applied –the use of the conditional 'if' in reference to the split rationale of the decision between the market participant and the self-regulation exceptions-, "the current record and scholarly material convinces us that the Judicial Branch *is not institutionally suited to draw reliable conclusions of the kind that would be necessary*."[129]

In response to the dissent's *substantive* constitutional views on free market values, the majority states: "The dissent *rightly* praises the *virtues* of the *free market*, and it warns that our decision to uphold Kentucky's tax scheme will result in untoward consequences for that market."[130] However, it calls that warning "alarmism" and expresses that "[w]e have been here before."[131] This debate recalls the discussion between Chief Justice Roberts and Justice Alito in *United Haulers*. It seems that all four justices directly involved in these cases –Roberts and Souter on the one hand and Kennedy and Alito on the other– actually *agree as to their substantive economic views*. They all praise the free market, private enterprise and non-public economic models, and let it know in their Opinions. Yet the difference lies in that Roberts and Souter –and a majority of the Justices who joined their respective Opinions– don't believe their particular preferences are *constitutionally required*.

---

125 *Id.* at 346-347.

126 *Id*. at 347.

127 *Id.* at 353. (*Emphasis added*)

128 *Id*.

129 *Id*. Justice Souter comments on how the *Pike* test has been severely criticized. This results in the test being almost dead in the private arena, and simply inapplicable or useless in the public exceptions. (Emphasis added)

130 *Id.* at 356. (Emphasis added)

131 *Id*.

Like Roberts in *United Haulers*, Souter trusts the warnings will not materialize. But, even if they did, their words suggest that the courts will not be required to step in and defend a free market that is not constitutionally required. *Whether such a conclusion emanates from constitutional silence or* ***the Court's long held belief that democratic decisions should triumph over substantive constitutional provisions on economic organization****, becomes almost immaterial.*

Finally, the *Davis* Court revisited an issue left open in *United Haulers* that was, as we will see shortly, the center of much concern among scholars. In *United Haulers*, the Court mentioned, as an added element, that garbage disposal was a traditional government function. The same thing was said in *Davis* as to bonds.[132] Some cried out that that concept had been historically problematic and rightly discarded by courts.[133] My concerns, on the other hand, came from a different place: by emphasizing the idea of a traditional government function, the Court could have been seen as signaling that *only* those functions traditionally associated with government would be legitimate under the self-regulation exception. This, of course, has two related problems. First, it requires a substantive definition of what a government is *supposed to do*, and that is an ideological question; some believe government is merely here to provide essential services such as police, fire and schools, while others believe that government should be at the center of economic activity. Second, traditions, by definition, change. Therefore, how does the 'traditional government function' concept interact with state and local government experimentation? However, we must not forget that *United Haulers* merely mentioned the idea of traditional government functions as an emphasis, not an independent reason for the decision.[134]

The Court gives an answer to these questions: The *United Haulers* reference to traditional government functions was not meant to "draw fine distinctions among government functions, but to *find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local*."[135] That is, it reaffirms the position that the correct inquiry in cases of dormant Commerce Clause challenges to public participation in the economy, particularly in the realm of participation with *regulation*, is who the benefited party is, not who the affected parties are.

In *Davis*, Justice Kennedy penned the dissent, joined only by Justice Alito, and made a very clear, direct and unapologetic defense of a substantive programmatic constitution: "Eighteenth-century thinkers, even those most prescient, could not

---

[132] *Id.* at 341.

[133] *See National League of Cities v. Usery*, 426 U.S. 833 (1976).

[134] The Court in *United Haulers* stated that it was "particularly hesitant" to rule the other way because the challenged action was related to a traditional government function. United Haulers, *supra* n. 1 at 344.

[135] Davis*, supra* at ft. 9

foresee our technological and economic interdependence. Yet, they understood its *foundation*. *Free trade* in the United States, unobstructed by state and local barriers, was indispensable if we were to unite to ensure the liberty and progress of the whole Nation and its people…History, *as we know*, vindicates their judgment."[136] Then, he drops the constitutional bomb: "The police power concept is simply a shorthand way of saying that a State is empowered to enact laws *in the absence of constitutional constraints*."[137] To the dissenters, the Constitution does bar states from socializing their economies.

C. Some Open Questions and Issues

1. The Dual fear of Infamous *Lochner* and the Dreaded S-word

Both the Supreme Court and most of the scholars that have written about the recent developments in the dormant Commerce Clause doctrine have their respective boogeyman. For the Supreme Court, the double specter of *Lochner* lives on after more than a century after its issuance and seventy years after it was overruled. That double specter consists of (1) the idea of a judicially imposed economic recipe for the United States supposedly required by the Constitution, and (2) the characterization of the substantive recipe itself –*laissez-faire*– as a reactionary view on socio-economic development and organization. For the scholars who I studied for the purposes of this Paper, the specter has an opposite feel. They fear the counter-*Lochner* intuition of a majority of Justices of the Court may lead to socialist results, even if democratically made. *Oh the horror!* Both these concerns must be analyzed at the same time, for they actually confirm what the Court has *really* tried to do: get the Constitution out of the substantive economic models business and limit itself to reviewing economic decisions for evident signs of unjustified discrimination and arbitrary governance.

Avoiding *Lochner*-type results is not just an inference I make from the *United Haulers* and *Davis* decisions, but it is actually and expressly laid out by the Court itself.[138] By doing so, the Court tells us why the newly carved exception is actually *necessary*, even if it seems theoretically unsound; that is, the alternative was worse. The scholarship has picked up on these comments, yet fails to realize their actual importance and transcendence: they are the real *ratio decidendi* behind the holdings. In other words, that the Court is consciously avoiding giving substance to the Constitution as to systematic economic policy matters. As Schweitzer explains, "[g]iven the disdain with which *Lochner* is generally viewed in the legal community, Chief Justice Robert's comparison of an aggressive use of the dormant Commerce

---

[136] *Id.* at 362 (Kennedy, dissenting) (*Emphasis added*).

[137] *Id.* at 366. (*Emphasis added*)

[138] *See* n. 81.

Clause to that decision is *striking*."[139] I don't know why that is so striking; actually, it is perfectly natural. If the Court had said that the dormant Commerce Clause prohibits a state government from creating a local public monopoly over a previously private segment of the economy, then it would be saying that capitalism is constitutionally required and unavoidable.[140] Again, that is a bridge too far.[141] Maybe what is striking is the *tone* of Robert's warning, which he describes as a "closing peroration that clearly sought to send a message to the legal community."[142]

This *Lochner* debate with regards to the dormant Commerce Clause traces back to *Carbone*, where Justice Kennedy, then in a majority, attempted to cement a free access to markets view of the doctrine that would have prevented states from parting ways from the common private system. As Mank explains in reference to Souter's dissent in *Carbone*, "[i]mplicitly criticizing the majority's free market interpretation of the [dormant Commerce Clause doctrine], Justice Souter argued the Commerce Clause does not endorse the *laissez-faire* assumptions in the Court's long-discredited 1095 decision *Lochner v. New York*."[143] That view was later vindicated in *United Haulers*. As Mank goes on to say, "[w]hile Chief Justice Robert's majority opinion sought to emphasize that the Court's approach was consistent with [dormant Commerce Clause doctrine], the *United Haulers* decision *rejected Carbone*'s free market access principle…[The] *United Haulers* decision's acceptance of local government monopolies was philosophically at odds with the *Carbone* decision's free market access principle."[144] Again relying of the difficulty of the alternative as the Court does, Mank correctly explains that if *United Haulers* had followed *Carbone* in all respects, it would appear that local governments were required to "open their services to private contractors and ignored a long history of local government monopolies in the United States."[145] According to him, the Court realized that *Carbone* looked like it would prohibit state monopolies under the dormant Commerce Clause; a result to close to *Lochner*

---

[139] Dan Schweitzer, "The Different Approaches of Chief Justice Roberts and Justice Alito on the Scope of State Power", 9 Engage: J. Federalist Soc'y Prac. Groups 52, 56 (2008). Curiously enough, as Denning indicates, it is Justice Thomas how most militantly picks up on the *Lochner* concern point. Denning, *supra* n. 111, at 475.

[140] Oddly enough, Schweitzer does say that "[s]tate ad local monopolies –of services ranging from trash collection to electricity distribution– are not a novel concept." Schweitzer, *supra* n, 139 at 56.

[141] However, it is not a bridge too far for two current members of the Court: Justices Kennedy and Alito. *Id*.

[142] *Id*.

[143] Mank, *supra* n.48 at 19.

[144] *Id.* at 52-53. Mank agrees with the *United Haulers* rationale in this matter: "The *United Haulers* decision appropriately rejected *Carbone*'s excessively free market interpretation of the [dormant Commerce Clause doctrine]." (*Emphasis added*)

[145] *Id.* at n. 382, referencing Jenna Bednar & William N. Eskridge, Jr., "Steading the Court's unsteady Path': A Theory of the Judicial Enforcement of Federalism", 685 Cal. L. Rev. 1447, 1489-1490 (1995) and others.

for comfort.[146] Yet Mank, like others, seems to attempt and limit these types of *Lochner* results only to services linked with health and welfare, not economic activity as a general matter.[147] When the issue changes from health and welfare to direct economic activity, the socialist boogeyman makes an appearance.

The socialist menace is also present in Robert's opinion in *United Haulers*, albeit as a far off possibility that is seemingly used only as a scare tactic he rejects. That is, while apparently agreeing with the substantive disdain with the policies of a socialist economy, the Chief Roberts dismisses it as bait.[148] But some scholars insist on the horrors of the apparently constitutional green light given in these cases for a non-capitalist approach to the economy. Examples, unfortunately, are aplenty. Actually, some of those examples *pre-date* these cases. Ross Saxer expressed in her assessment of the eminent domain power of local governments and its interaction with the dormant Commerce Clause that "when the government decides to municipalize a industry, citizens should *rightfully be concerned* about how this government 'takeover' will impact the free market and private property rights."[149] Why? We would think they had a say in the matter as voters! But Ross Saxer goes on: "Second, when the government uses its eminent domain power to accomplish this municipalization, citizens *should be wary* of the involuntary nature of the transaction between the government and the private property or business owner. When municipalities use the coercive power of eminent domain to nationalize a private industry, *it should cause our capitalistic society to shudder, at least slightly*."[150] Again, *the horror!* What Ross Saxer should be saying is that capitalist interests should be wary of democracy. *Lochner* anyone?

After *United* Haulers, scholars also reacted. Tichenor states "[l]et's just *hope* that Oneida and Herniker Counties are content with regulating trash flow and stay out of the hamburger business."[151] The dreaded Hamburger Stand example lives on, as Mank characterizes it, not as a legitimate policy choice by a local government attempting to transform its economic model, but "more likely that it is a subterfuge

---

[146] *Id.* at 54. For his part, Dwyer states that *United Haulers* swallowed up *Carbone*. Dwyer, *supra* n. 81 at 216. Others even go on to say that *United Haulers* actually overruled *Carbone*. Shanske, *supra* note 73, at 668. The problem with this view is that *Carbone* is alive and well with respect to public regulation of a private market. Each operates in different spheres on the economic plain.

[147] Mank, *supra* n.48 at 63.

[148] See United Haulers, *supra*, n. 1 at ft 7 . The same thing appears in Souter's Opinion in *Davis*: "The dissent *rightly* praises the *values* of the *free market.*" (Emphasis added), Davis, *supra* n. 1 at 356. Still, he, like Roberts, dismisses it as "alarmism." *Id*. Compare with Dwyer's view: "There is venerable authority for the proposition that the dormant Commerce Clause has served the country will." Dwyer, *supra* n.81 at 205.

[149] Ross Saxer, *supra* n. 98, at 1507. (*Emphasis added*)

[150] *Id*. (Emphasis added)

[151] Tichenor, *supra* n. 117 at 451, in reference to the hypothetical Hamburger Stand example used by Justice Alito during Oral Argument in an attempt to give a chilling example of state participation in the economy. *Id*, at 450. (Emphasis added)

for improper purposes like promoting local business interests."[152] More explicitly, Shanske characterizes that example as a "horrible."[153] For their part, Williams and Denning, while using the nationalization of Coca-Cola as an example, state tat "[i]nstinctively, we *recoil* from the suggestion that these measures would be *constitutional*, but there is nothing in either *United Haulers* or *Davis* itself to give us *comfort* in that regard."[154] Really? Not only do they recoil from the thought as a policy matter, but from the notion that it wouldn't be unconstitutional! Although more a Takings question, the idea that government would not be able to nationalize Coca-Cola as a constitutional matter is to me recoiling, for it would take that *policy* choice away from the democratic process with regards to economic organization. Yet, scholars like Ray seem convinced that the Court merely tolerated the waste disposal monopoly, but would draw the line at the Hamburger Stand: "The Court seems to be concerned that if states were expressly allowed to regulate with their market activities, there would be no way –outside, perhaps, *of the political process*– to limit a state's ability to monopolize *any market it chooses*. Recall that in *United Haulers*, Chief Justice Roberts ***disavowed the claim that the Court new rule might sanction the 'Oneida-Herniker Hamburger Stand'***."[155] First, the Chief Justice made no such claim; he merely stated that the decision was not likely to produce an all out race to nationalize everything in sight. But nowhere does he say that the Court would block it as a constitutional matter. Second, Ray offers no principle that would allow the Court to make a substantive distinction between waste disposal and hamburger production, in that the former was constitutional while the latter was not. The only possible distinctive factor that could have been used was the 'traditional government functions' concept which *was completely buried in Davis*.

Slattery goes even further and uses Justice Thomas' concurrence to echo his concern "over a *slippery slope into a* ***socialist mindset*** for states and localities, suggesting that a bright-line rule that discrimination benefiting public entities and excluding private participants encourages excessive government intervention into free markets."[156] Although his main concern, like Mank, maybe that, while the dormant Commerce Clause applies to regulation of private forces while excluding public monopolies, it will tempt localities to do via the public sector what it cannot do through the private one –that is, to protect the local economy-, he turns that critique into an anti-socialist rant that has little to do with constitutional law.[157] Ross Saxer also warns about the socialist slippery slope: "Concerns about municipalization, on the one hand, and the use of eminent domain to force an

---

[152] Mank, *supra* n. 48 at 62.
[153] Shanske, *supra* n. 73 at 703.
[154] Williams & Denning, *supra* n. 52 at 291-292. (*Emphasis added*)
[155] Ray, *supra* n. 91 at 1040. (*Emphasis added*)
[156] Slattery, *supra* n. 108 at 1265. (Emphasis added)
[157] Not to mention that it trivializes an important issue: the usefulness of socialist approaches to economic activity.

involuntary sale of property to the government, on the other, give rise to a justified wariness on the part of citizens when the government combines those powers to condemn ongoing private enterprises. The coercive nature of eminent domain and the socialist aspect of a government-run business demand heightened scrutiny and constitutional constraints."[158] Others, like Schweitzer, disguise their disdain for the public monopoly as a policy choice: "Whether or not they are wise public policy, it would seem far too late in the day to hold them invalid under the Commerce Clause."[159] But whatever his policy preference, Schweitzer manages to distinguish those from constitutional analysis.

b. The Political Process Rationale: Validation or Limitation

The Chief Justice's reluctance to invalidate, as a constitutional matter, Oneida and Herniker counties' decision to displace the private waste disposal entities from that market was accompanied by signal on how the Hamburger Stand horror would be prevented: democracy itself; that is, the political process.[160] In that sense, the political process serves a double purpose: for proponents of a socialized economy, it becomes the ultimate validation; for its opponents, it symbolizes a wall of control, which signals a security in the political animosity of Americans against a public economy. It's up to all of us to see if that is, in fact, true or fiction.

As we have seen, even before *United Haulers*, Ross Saxer already thought of democracy as a tool against a socialist takeover of the economy; although sometimes it looks like citizens are not considered by her to be a part of the initial decision-making in the first place. If they were, the political process defense ceases to be a control tool and becomes the ultimate validation for that course of action. But, in any case, democratization has triumphed over constitutional economics as the source for policy. And in Ross Saxer's case, it is curious to see how, at the same time she expresses confidence in that citizens will eventually block their governments socialization actions, she encourages the use of constitutional challenges to prevent them as well. In particular and before *United Haulers*, she proposed that the dormant Commerce Clause be used as an "ideological barrier."[161]

---

[158] Ross Saxer, *supra* n. 47 at 1524. The issues of takings will be discussed in the next section.

[159] Schweitzer, *supra* n. 139 at 56. As a companion mechanism, the Court reminds us that Congress is always there to block a state's involvement with interstate commerce. As Congress is also a democratic institution, the political process rationale and it share the democratic argument that avoids the direct substantive constitutional question.

[160] The logic is as follows: when the issue is regulation that favors local private interests, the out-of-state interests are not represented in the local political process and, therefore, are defenseless to discrimination. When local private parties are treated the same as out-of-state ones, the local private forces serve as a proxy for the out-of-state interests. Therefore, if the local voters still prefer a public approach, it is assumed that the local private interests participated in the political debate.

[161] Ross Saxer, *supra* n.47 at 1524. As we will see later on, her proposal actually encompasses a combined used of a dormant Commerce Clause and Fifth Amendment Takings Clause challenge to nationalization (municipalization in her case).

After *United Haulers*, scholars took aim at the political process explanation that prevented the Court from striking down the counties' move to sort-of-nationalize the waste disposal industry. Denning starts by explaining the actual mechanics of the political process rationale and the distinction that exists when the regulation favors a public entity instead of a local private party:

> "Because regulation unduly burdening or discriminating against interstate or foreign commerce or out-of-state enterprise has been thought to result from the inherently limited constituency to which each state or local legislature is accountable, the Supreme Court has viewed with suspicion any state action which imposes special or distinct burdens on out-of-state interests unrepresented in the state's political process."[162]

That is, while it is safe to assume that voters in a determined locality will pass legislation to burden out-of-state interests while benefiting the local private ones, the same is not true when one of the affected parties are all the local private businesses. It is easier to place a burden on another state's interests than on your own; so goes the argument.[163] In that case, the Court places the burden on deciding the validity or the policy on the voters themselves.[164] By the same token, the political process will work itself out and it will be the voters themselves who will avoid the Hamburger Stand. It is here that all ideological and substantive objections to a socialized economy belong; they do not belong in the courtroom under the guise of the dormant Commerce Clause.[165]

For Coenen:

> "the Chief Justice seems to be saying that the holding of *United Haulers*, even if applicable to all state businesses, is unlikely to result in state control of the economy, not that the dormant Commerce Clause would prohibit states from imposing forced-use rules for government-owned hamburger stands and the like."[166] Countervailing political forces can

---

[162] Denning, *supra* n. 52 at 481, citing Lawrence Tribe, American Constitutional Law 1052 (3rd Ed. 2000).

[163] In some sense, this argument starts from the premise that the sort of policy carried out in these cases is inherently burdensome. In that case, if citizens are willing to bear that 'burden', there is no concern about them shifting the burden to interests that are not represented in the local political process.

[164] Denning, *supra* n. 52 at 484. "Process theory is intended to surmount the counter majoritarian difficulty by justifying judicial intervention when democracy 'breaks'." That allows the Court to intervene when democracy discriminates against out-of-state interests in favor of private local ones. Here, however, democracy didn't break, because many of the affected are local private forces; actually, *all* of them.

[165] *See* Ray, *supra* n.40 at 1068. "In *United Haulers*, the political process worked to match the benefits and burdens of a service the voters decided they wanted their government to provide."

[166] Dan T. Coenen, *Where United Haulers might take us: the future of the state-self-promotion exception to the Dormant Commerce Clause Rule*, 95 Iowa L. Rev. 591 (2010).

> always be counted upon to stop it. Of course, the fact remains that political forces can change.

If all else *fails*,[167] says the Court and scholars, Congress can always step in under its positive Commerce powers.[168] Yet this is not a constitutional issue; it is one of the political branches of the federal government using supreme role as economic designer and regulator to supersede a decision by a state or local government. *But if the same political will that allowed the state government to socialize its economy –or part of it– exists in the rest of the country*, it will be reflected in Congress; or, at least, enough for Congress not to intervene.[169] But, again, this is an issue of *politics*, not *constitutional law*.[170]

It should also be noted that, like with the birth of the market participant exception forty years ago, the new self-regulation rule has not yet taken flight, at least in terms of legal controversies. The data is not in on whether this is due to (a) lack of state action based on the new exception –which would vindicate the political process rationale-; (b) that the clarity of *United Haulers* and *Davis* has prevented new challenges to local public monopolies; or (c) that it is too soon to tell. Maybe it's all of them, but it is worth keeping watch to see if these holdings address mere anomalies or are part of a new area of economic policy.[171]

---

[167] It does not cease to amaze me how both the Court and scholars see a public approach to economic organization and development as something that must be constantly controlled by way of veto points: constitutional obstacles; local democratic process; Congress.

[168] *See Mank*, *supra* n. 48, at 7; *Eule*, *supra* n. 37 at 434. For their part, Williams and Denning don't hide their view that Congress can "statutorily prohibit the *most egregious* forms of state protectionism." (Emphasis added) *Williams & Denning*, *supra* n. 52 at 290. Again, they don't hide their limited tolerance for a socialized economy.

[169] *See* Ray, *supra* n.91, at 1057 ("Congress know what states are up to…Congress has chosen to remain silent.").

[170] Curious note: According to the GALLUP organization, Americans have a 36%-58% positive/negative view of 'socialism' (Democrats = 53%-41%; Republicans = 17%-79%), and a 61%-33% view of 'capitalism'. Those are not bad numbers for those who favor a public approach to economic development. See www.gallup.com/poll/1256451/socialism-viewed-positively-americans.aspx (feb. 4) (last visited October 16, 2012).

[171] Most of the published cases that cite *United Haulers* have to do, naturally enough, with flow control ordinances. Time will tell if *United Haulers* remains just a garbage case. *See Southern Waste Systems, LLC v. The City of Coral Springs, Florida*, 687 F. Supp. 2d 1342 (S.D. Fla., 2010) (Florida; § 1983 action for violating right to engage in interstate commerce); *Gray's Disposal Company, Inc. v. Metropolitan Government of Nashville*, 318 S.W. 3d 342 (2010) (Tennessee; flow control ordinance and government owned facility); *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F. 3d 241 (3rd Cir., 2008) (Pennsylvania; flow control ordinance; public-owned and run facility; remanded for *Pike* analysis); *Quality Compliance Services, Inc. v. Dougherty County, Ga*, 553 F. Supp. 2d 1374 (M.D. Ga., 2008) (Georgia; flow ordinance and public land-fill; passed *Pike* test); *Daviess County, Kentucky v. National Solid Wastes Management Ass'n*, 127 S.Ct. 2994 (2007) (Kentucky; flow ordinance); *State, Dept. of Revenue v. Hoover, Inc.*, 993 So. 2d 889 (2007) (Alabama; tax scheme that favored state transactions; pre *Davis*).

3. Traditional Government Function

As we will recall, *one* of the elements mentioned by Chief Justice Robert in his *United Haulers* in order to uphold the flow ordinance was that garbage disposal was a traditional government function.[172] Seen in its context, that mention was one in passing; it was used as an additional argument to reinforce the underlying rationale for the decision. Yet, scholars reacted –one may say overly– to that reasoning. For my part, my main concern was that what the Court was avoiding with one hand it was doing with the other: while the Court stated it would not impose its own substantive visions on economic policy, it was passing judgment on what was –and therefore what was not– a legitimate government function under the guise of tradition. First, this would entail a value judgment on what government *should* do (Collect garbage? Fund schools? Hire police officers? Socialize medicine? Participate in economic activity? Make and sell merchandise?). Second, it could act as a limitation on *new* government activity that was not of the traditional sort in the past, basically derailing any new, creative and progressive economic project based on public ownership, aside from traditional natural monopolies and the like.[173]

Most of the studied scholarship mentioned this factor. Some did so out of concern the Court was reviving an ill-fated doctrine that had been previously overruled as impractical.[174] Others, like me, were wary of the Court deciding, as a constitutional matter, what government was *inherently* designed to do. Others still actually welcomed this as a limitation to what they saw as a dangerous incursion of government into economic activity. Before completing my analysis of this issue by referencing the clarification made in *Davis*, I will offer a sample of the position taken by the scholarship.

Schragger welcomed the traditional government function rationale, adding the element of "typical" to the equation.[175] By doing so, he complements the temporal issue –traditional– with a substantive one –typical–. Schragger then suggests this concept may be used "first as a way to distinguish legitimate public owned monopolies from illegitimate ones, and then by way of concluding that the exercise

---

For his part, Coenen emphasizes a narrow view of these cases. Referencing the now-famous Hamburger Stand example, Coenen states that, by focusing on this point, the Court "raised a flag about overhyping the holding in *United Haulers*." Coenen*, supra*, n. 224 at 558. Yet the raised flag is directed at political forces, not the courts.

[172] What he actually wrote was that the Court should be "particularly hesitant" to interfere with the counties' decision because it was related to a traditional government function.

[173] "To say that some governmental functions are traditional implies that there are some governmental functions that are nontraditional." Williams & Denning, *supra* n. 52, at 270. *See also*, Mank, *supra* n. 48 at 2. "[C]ourts should be very wary of focusing on whether a government function is traditional or nontraditional."

[174] Usery*, supra* n. 133.

[175] Schragger, *supra* n. 9 at 1119.

of the local police power in this instance was legitimate."[176] Hence, we are back at the substantive objection phase where a local government's decision to participate as an economic actor is *inherently and constitutionally* conditioned on the type of activity involved. It is obvious that Schragger is a partisan of judicially enforced, substantive constitutional limitations on state economic activity; and the master key seems to be a traditional government function test to the new self-regulation exception.

For his part, Ray echoes some Schragger's sentiments, but with a more restrained tone: "The introduction of traditional government functions is he Court's attempt to fix this perceived problem [lack of substantive limit to what a state can self-regulate] by creating a subset of market activity where the states can regulate free from dormant Commerce Clause restraint."[177] Yet, he objects to the use of this test because it is neither necessary nor sufficient to address the concerns about government avoidance of dormant Commerce Clause limits.[178] Seeing the new exception as a manifestation of the market participant rule, Ray suggests that it "can be adjusted to handle situations where governments, constrained by the check of the political process, engage in the business of government;"[179] what ever that may be. In that endeavor, Ray feels that the traditional government function becomes a "null set" or "a set with nearly limitless boundaries."[180] Curiously enough, while I recoil at the traditional government function test because it may limit government experimentation as an economic actor, Ray is concerned that it may not serve as an effective limit at all. Yet, Ray does recognize that "[t]he traditional government functions rule also tempts the Court to engage in policymaking under the cover of constitutional principles."[181] I couldn't agree more, particularly when the *United Haulers* opinion makes no mention of *what* is a traditional government function.[182] Ray also takes issue, as I do, with the idea of analyzing what is traditional or typical: "To decide whether a given function is 'traditional', courts must make judgments about what traditions have existed, *or should exist*, among the states. Decisions like these do not call for legal or constitutional decision-making. They revive the political and policy-making judgments that our constitutional system delegates to the political branches."[183]

John J Greffet, Jr. also took issue with the Court's mention of the traditional government functions factor, although he recognized the secondary nature of that part of the decision.[184] For his part, Greffet questions why the Chief Justice, when

---

[176] *Id*. at 1119-20.

[177] Ray, *supra* n. 91 at 1040.

[178] *Id*. at 1041.

[179] *Id*.

[180] *Id.*

[181] *Id*.

[182] *Id*. at 1043.

[183] *Id*. at 1047. (Emphasis added)

[184] John J. Greffet, Jr., "Factoring in Tradition: The Proper Role of the Traditional Government Function Test", 53 St. Louis U.L. J. 875 (2009).

referencing that test, failed to even mention the case that effectively overruled it as a constitutional issue.[185] This is due to the concern held by many scholars that the Court's mention of the traditional government functions test was some sort of revival of the discarded doctrine. By doing so, scholars failed to see what Roberts was doing: simply emphasizing that it was normal for a local government to attempt to monopolize an economic activity so closely related to what governments have historically done in the United States. But, Greffet, like others, took the opportunity to revise the ill-fated history of the traditional government functions test when used as a constitutional yardstick for limiting Congress' positive Commerce powers.[186] Yet, Gaffet was able to see the secondary nature of this factor: "Given that the public/private distinction was the primary basis…[the traditional government functions test] could be viewed as a benign passage merely intended to bolster his overall argument."[187]

But most of this debate was for naught: the *Davis* opinion laid the traditional government function test back to rest by limiting that factor to a 'who is the benefited party' analysis.[188] For Ray, after *Davis*, the traditional government functions standard "adds nothing of significance to the analysis," describing it as a "blunt object that will be used merely to distinguish public preference from private preference."[189] Yet, he attempts to suggest it may have a potential future as a limiting tool for government experimentation in the economic arena.[190] Mank also recognizes that, after *Davis*, the traditional government functions test is not meant to analyze the history of a particular government practice but to determine if the action serves a public interest instead of a private one,[191] and that the *United Haulers* reference to it merely served a reinforcement role.[192] For his part, Coenen, who apparently had hoped that "an important limitation…may apply when the processing service involves a nontraditional government activity,"[193] recognizes that the

---

[185] *Id*. at 876, referencing *García v. San Antonio Metropolitan Transit Authority*, 469 US 528 (1985).
[186] *Id*. at 876-878.
[187] *Id*. at 890, making reference to the "particularly hesitant" passage.
[188] Davis, *supra* at 9. "[The traditional government function test is not meant to] draw fine distinctions among governmental functions, but to find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local." It is Justice Souter's victory over Justice Kennedy as to the debate about who's benefited versus who's discriminated against.
[189] Ray, *supra* n. 91, at 1046, 1043.
[190] *Id*. at 1072.
[191] Mank, *supra* n. 48 at 4.
[192] *Id*. at 5. Yet, he still, like many others, thought the new test would help limit government economic experimentation. "The Court also suggested courts might be able to strike down a law regulating an area that is not a traditional governmental function, and thus unlike waste disposal." *Id*, at 38.
[193] Coenen, *supra* n. 166 at 564. He had placed high hopes on a conservative reading of the original traditional government functions test as stated in *United Haulers*: "By suggesting that the Court might confine the state-self-promotion exception to 'traditional' state activities, the Court moved to allay concerns that its ruling would encourage deeply problematic state takeovers of historically private

United Haulers decision, read after *Davis*, "hardly offers a ringing endorsement of a nontraditional function limit on the state-self-promotion doctrine."[194] Others, like Shanske, still cling to the traditional government function as a substantive limit on government economic activity with respects to self-regulation: "[I]t is doubtful whether the state-self-promotion doctrine will shelter discrimination rules associated with nontraditional government activities."[195]

For all the discussion, we must conclude that the traditional government function mention was a whole lot of nothing. In *Davis*, the Court had to retreat from what it had said in passing in *United Haulers* as an additional argument. By doing so, it regained what it had achieved in *United Haulers* to begin with: to get the Court out of the substantive economic activity discussion and leave it all to politics; that is, continuing with its *dejudicialization* process.

Still, some analysis must be made of Williams and Denning's treatment of what they consider to be 'public protectionism', which comes full circle when discussing the political process/traditional government function rationales. This is in addition to their view that the decisions will actually foster governments taking over larger parts of their local economies. According to them, "the Court embrace of taxes and regulations that favor public entities only *encourages* state and local governments to engage in more *public protectionism*."[196] For Williams and Denning, this constitutes and "endorsement of public protectionism" which "threatens to emasculate the constitutional protections for the American common market."[197] This, in turn, may lead to the end of the dormant Commerce Clause as we know it. While they say they reject a *Lochner* approach that would prohibit local governments from socializing sectors of their economy,[198] they nonetheless insist that the non-discrimination principle that permeates the entire dormant Commerce Clause doctrine is violated by the self-regulation exception.

With their public protectionism argument, Williams and Denning hit head-on the Court's position that the self-regulation exception is founded on the notion that when governments act in a direct –not merely regulatory– economic capacity, they are motivated by other goals independent from protectionism. The crux of their argument is that, when a government regulates in favor of its own participation, that is pure protectionism, it just happens to be public in nature.[199] They criticize the "Court's language and reasoning [that] suggests a much broader rule endorsing

---

businesses. In other words, the Court signaled than an important limitation might well keep the newly minted state-self-promotion doctrine from spinning out of control." *Id*. at 558-559.

194 *Id*. at 591.

195 Shanske, *supra* n. 73 at 711.

196 Williams & Denning, *supra* n. 103 at 251. (Emphasis added

197 *Id*.

198 *Id*. at 268. "Judicial review under the dormant Commerce Clause is not a roving, *Lochner*-esque license for the Court to sit as super-legislature second guessing the substantive merits of state and local laws."

199 *Id*. at 272.

governmental favoritism of itself generally."[200] As such, "[a]s a consequence, another likely impact of the Court's embrace of public protectionism will be to encourage state and local governments to adopt taxes and regulations that protect other government operations from competition."[201]

But what Williams and Denning constantly call encouragement and incentives, I call the Court simply saying that public protectionism is constitutional *because it had no other real choice*. While it is possible to distinguish *in a private economy* between a free market and prohibited local protectionism, such is impossible in a public economy, where socialization is a key ingredient in economic organization. Actually, it makes even more sense when seen from this perspective: in a private economy, free markets are the default rule; in a public economy, socialization is the classic option. What is still tricky –and will be discussed very shortly– is what happens with a *mixed economic model*.

d. What is a Public Entity?

The mixed economy problem requires us to step back for a moment. If the *United Haulers* and *Davis* decisions create a new self-regulation exception which allows local governments to favor themselves as an economic actor when regulating a particular sector, the question presented is: What constitutes a public entity that would be included under this doctrine?[202] This is reminiscent of the *Carbone*/*United Haulers* murky distinction in which the former facility was nominally private but part of a process that would eventually result in public ownership. Some believe that the determining factor will be simple enough: formal title.[203] Yet, in many cases, that will not be enough. Questions about joint-ventures (public-private partnerships), sub-contracting, non-profits organizations, cooperatives, worker-owned facilities, out-of-state public parties, quasi-public entities, social property and other ownership combinations present themselves immediately. We must also not forget the natural monopolies rule which does allow for this type of regulation, regardless of a public/private distinction, because of the inherent nature of the economic activity which, by itself, tends in favor of a monopoly.[204]

---

[200] *Id*. at 280.

[201] *Id*. at 280-281. To them, "[t]he practical impact of this exception could be huge. In modern America, state and local governments perform many functions and provide many services to state and local residents." *Id*, at 281.

[202] Dwyer, *supra* n. 132, at 211. "*United Haulers* does not define what constitutes a 'public facility'"; See, also, Dwyer, *Id*. at 203. That lack of a definition bothers some scholars: "State and local governments will no doubt actively seek to exploit the ambiguities in the doctrine." Williams & Denning, *supra* n. 103 at 290.

[203] *See* Tichenor, *supra* n. 168, at 448. For a contrary view, see Shanske, *supra* n. 73 at 607, calling the public/private distinction "formalistic at best", as part of his critique of the new exception. For her part, Dwyer warns against formalities such as title that can lead to manipulation. Dwyer, *supra* n. 132, at 204. To her, where the profits go is the key issue. Still, she doesn't discard title as an important factor. *Id*, at 214.

[204] Shanske, *supra* n. 73, at 671. In natural monopolies, "there is no competition to protect."

The easiest approach is "outright public ownership," as in *United Haulers*.[205] Yet, if that cases' reach is limited to purely public facilities, then it gave a public approach to economic organization the kiss of death. Issues of financing abound, and since local governments can't just go around expropriating private property because of the enormous cost of compensation,[206] if the self-regulation exception only covers purely and wholly public entities, then, in fact, the Supreme Court has severely limited it, and we would be back to square one. Therefore, in order for the Court to be consistent with its hands-off approach to substantive economic policy matters, a *broad* definition of what is a public entity is warranted. In that sense, 'public' should not be limited to pure and direct government ownership; social property is also 'public'. The challenge is squaring this proposal with *Carbone* which, unlike others, I don't believe to be directly overruled.

What opponents of a public economic model fail to realize is that it is not just a matter of acquiring government property or ownership. It is a policy choice based on many different elements, such as the public benefit of created wealth and a social view of economic activity that offers an alternative to individualism, greed and an *everyman for him* mentality. Therefore, a public economy cannot just rely on state ownership. Other forms of *social property* must be included in this new paradigm which, I feel, should be covered by the self-regulation rule.

The main examples are cooperatives, worker's corporations or collectives and non-profit organizations. These are substantively different from the classic profit-driven, privately-owned, capital-over-work entities; that is, *the type of entity that was involved in Carbone* (the fact that the *Carbone* scheme involved a process of eventual government-ownership should not obscure the fact that, at some point, a private, profit-driven entity was the real benefited party. The social and public benefit would be felt *after* the transformation). Although not wholly 'public' in the sense that they belong to the entire polity by way of the state, their nature maybe said to be *social* in nature and closer to a public approach than to a private one. In the end, it is not difficult to envision a public policy that, *as part of an alternative approach to economic development*, wants to further the creation and expansion of socially-conscientious economic entities that coexist side-by-side with state property in opposition to purely private forces. The *Davis* footnote clarifying the extent of the traditional government function analysis tells us that the main question in these types of cases is: who is the benefited party? In particular, if the benefited party is *public*. The question is: Is *public* the same as state-owned, or is it broader? If the Court is serious about avoiding inserting its own policy views as to economic development models, it should steer clear of a nineteenth century outlook that says 'government-is-government' while the rest is private. If government can grow

---

[205] *Id*, at 670.

[206] As some have suggested, a creative tax scheme can be designed to allow the expropriating government to recover some of its payments.

beyond its supposedly traditional functions to include economic activity, so too can nominally private actors become public in nature as part of an alternative model of economic organization.

Since the U.S. Supreme Court has historically deferred to states as to the substantive definition of 'property' when discussing, for example, Takings cases, it is difficult to pinpoint a federal constitutional definition of a public entity for the purposes of the self-regulation rule. The same goes with cooperatives, non-profits, and other alternative modes of ownership. Many are skeptical that non-purely-state-owned facilities would qualify for the *United Haulers* norm. Slattery, for example, suggests that a "law favoring a private nonprofit organization providing wireless technology services exclusively to a town", as opposed "to a state agency fulfilling the same objectives", would possibly be denied *United Haulers* protection.[207]

I disagree. State and local governments should have enough leeway to develop public policy choices to further nontraditional modes of ownership, as long as it is public in its outlook. Cooperatives, non-profits, community entities and workers' companies are the prime examples of the type of social property that should be protected by *United Haulers*, without running afoul of *Carbone*. Only this would give life to the self-regulation rule, since governments by themselves are not enough to create and sustain a whole new economic model. Needless to say, if a local government can regulate in its favor at the expense of local and out-of-state private entities, it can surely decide to benefit from the self-regulation rule when entering into a partnership with an out-of-state public entity.[208]

But, even if they were not treated the same as purely state-owned entities, that does not derail a state or local government's attempt to mix public property with nontraditional private entities to further a policy of socially-conscientious economic development. After all, what the dormant Commerce Clause doctrine prohibits is local favoritism. In that sense, a policy that says public entities are to combine with, for example, cooperatives *need not be limited to* ***local*** *cooperatives*. In other words, a government policy that favors cooperatives over other private entities as a partner does not run afoul of the dormant Commerce Clause if it does not distinguish between local or out-of-state cooperatives. The previous discussion arguing in favor of *United Haulers* treatment for cooperatives is meant only so that a government may include *local* cooperatives in exclusion of out-of-state ones as part of the self-regulation exception. If that doesn't work, a nondiscriminatory policy favoring cooperatives in general, irrespective of origin, is perfectly acceptable even under classic dormant Commerce Clause analysis. The question remains if a disparate treatment claim can be brought by an out-of-state private party that argues that the generic cooperative policy, in practice, only benefits local ones. Still, that same objection will be raised by local non-cooperative private entities that are also left

---

[207] Slattery, *supra* n. 108, at 1252.

[208] *See* Coenen, *supra* n. 224, at 560.

out in the cold. The Court should be very careful not to dig itself into a hole that undoes the progress of *United Haulers* and *Davis*.

Non-social private entities are somewhat easier to deal with. Issues concerning these types of parties arise when, for example, in order to adequately finance a given project, a local government creates a public-private partnership or joint venture. Can the local government also pass an ordinance or law granting the new mixed entity monopoly status? The answer seems to be: maybe. The key factor appears to be if the mode of selection for the non-public element in the project was competitive between local and out-of-state interests, just as would have been under normal dormant Commerce Clause analysis. While the mixed project itself would eventually benefit from the self-regulation rule, the fact that the selection process was nondiscriminatory allows for eventual displacement of the losing private entities, both local and out-of-state. This is the position taken by Dwyer and what she calls the "competitive bidding solution" when it comes to public-private partnerships.[209]

In particular, Dwyer, echoing an earlier proposal made by Coenen,[210] identifies three scenarios: (1) *Carbone* type design with public title, private financing, operation and profits for a specified period of time, and eventual return to full public management; (2) joint-venture with a 50-50 (or, I would argue, 51-49) distribution of ownership and profits; and (3) public title with private subcontracting.[211] She argues that "courts should apply the public entities exception to *public-private cooperatives, so long as the state or local government picks its private-sector party by means of a fair and competitive bidding process that does not discriminate between in-state and out-of-state firms*."[212] In essence, she proposes the same standard for joint-ventures and sub-contracting. For his part, Shanske focuses on subcontracting as a possible evasion tool for local governments that wish to benefit from the self-regulation exception.[213] But, like Dwyer, he proposes an open bid approach to these matters as a solution.[214]

5. Market Participant and Regulator

It all appeared to be clean and neat. When the state engages as an economic actor, it is not subject to dormant Commerce Clause constraints. In that sense, it can

---

[209] Dwyer, *supra* n. 132 at 204.

[210] *See* Coenen, *supra* n. 224, at 562-563.

[211] Dwyer, *supra* n. 132 at 215. Williams & Denning also ask if there is to be a distinction between the state as a shareholder and outright ownership. Williams & Denning, *supra* n. 103, at 282.

[212] *Id*, at 216. (Emphasis added)

[213] Shanske is adamant in separating natural monopolies from the type of subcontracting that could happen here. Shankse, *supra* n. 73 at 662-664.

[214] *Id*. at 712.

choose to buy or sell to –or treat in general– its citizens and other local interests more favorably as opposed to out-of-state citizens or private entities. As a market participant, the state is not regulating anything, merely participating in economic activity. Therefore, it is not using its regulatory power to alter the playing field in favor of its own. Hence, when acting purely as a regulator of a private market, the dormant Commerce Clause acts full force and the state may not use its police powers to favor its citizens or local private interests over the out-of-state ones.

In *United Haulers*, the state was not just acting as a market participant; it was using its law-making powers to favor *itself*. But what wasn't clear from that case was whether the self-regulation exception was a manifestation of the market participant rule, an independent norm, or, better still, if both of them acted simultaneously in a sort of impregnable rule. This issue was raised in *Davis* by Justice Souter, writing for a plurality, said that (1) *United Haulers* could be seen as a market participant case –which was not stated in the original decision-; and (2) that both rules combined in *Davis* itself. The effect of the combination is yet to be fully seen, because while the self-regulation exception is still subject to the *Pike* test, *the market participant rule is not*.[215] Therefore, it would appear that the combined effect of that mixture would be either the inapplicability of the *Pike* test, or just the most toothless nominal use, such as in *Davis*.[216] The scholarship is split as to (a) the fact that both exceptions can be fused; and (b) if it is wise.

Schragger, while accepting the Court's expressions in *Davis* as suggesting a fusion between the doctrines,[217] feels that they "are relatively robust encroachments on the free movement of goods across state lines: state and local government direct purchasing toward their own industries and residents can provide goods and services through the government-owned industries that are protected from the competition with the private sector altogether."[218] To which I reply: Exactly! So? That's just the constitutionally permissible road to allow democratic choice in economic design and development. Does has the government have to choose between being just a regulator or just an actor? To propose such a dichotomy is to cling to a classic liberal view that government –or better said, the public thing– is an either or proposition.

For Slepnikoff, the *Davis* plurality's view that the market participant and market regulator roles go hand-in-hand when there is self-regulation is erroneous.[219]

---

[215] This makes Justice Souter's position that *United Haulers* was also a market participant case seemingly unsupportable, since the Court used the *Pike* test there. But, did it really? One could easily argue that the use of the *Pike* test in *United Haulers* was purely *pro forma*.

[216] *See* Williams & Denning, *supra* n. 103, at 251.

[217] Slattery also recognizes the rationale that, in these cases, the state is acting in a dual role as participant and regulator. Slattery, *supra* n. 108, at 1257.

[218] Shragger, *supra* n. 9, at 1120.

[219] Lisa M. Slepnikoff, "A Bigger and Better Market-Participant Exception?: Examining Justice Souter's Revision of the Market-Participant Exception to the Dormant Commerce Clause in Department of Revenue of Kentucky v. Davis", 55 S.D. L. Rev. 356 (2010). That view is also shared by Shanske, *supra* n. 73, at 666.

As such, she proposes a more narrow view of *both* exceptions. As to the market participant rule, to Splenikoff it is merely the granting to public entities the same discretion that private businesses have.[220] Looks like to be continued.

6. The Takings Clause

"Nor shall private property be taken for public use, without just compensation."[221] Such is the textual command of the Takings Clause of the 5th Amendment of the U.S. Constitution. Although stated in negative terms, the Clause does recognize, as a starting premise, the eminent domain power of government. The question addressed here is if the Takings Clause stands as a substantive or practical obstacle to the public-oriented exceptions to the dormant Commerce Clause, by forcing state and local governments to pay great amounts as a consequence of displacing private industries from a particular market. But first, a general overlook on the operation of the Takings Clause must be made, as this is one of the few substantive provisions of the programmatic Constitution which stands in the way of economic democracy.[222] This reminds us of the previous discussion about the limits on the power of the *states* to regulate economic activity.[223] This is also linked to the idea of how democratization has severely weakened these substantive constitutional provisions.[224]

Four obvious issues arise when analyzing the Takings Clause: (1) what is property; (2) what constitutes a taking; (3) what would be considered a public use; and (4) the computation of just compensation. As relevant here, I will only focus on the middle two aspects. As to the rest, the definition of property is almost never a federal constitutional matter; also, the issue of just compensation serves as an *after-the-fact* matter. While it *does* constitute a practical obstacle for state and local governments –in that financial limitations will prevent it, in practice, from actually expropriating all private property in their jurisdictions– it is not a substantive restraint. Lack of funds, not judicially enforced value judgments, would prevent a taking in relation to the just compensation element.

What is a public use has been virtually settled by recent case law: it is a very broad concept. *Again, like we saw with other provisions such as the Contracts Clause*

---

220 *Id*, at 360. This view seems to stem from a private economy mentality where the only concern is to put the government in the same footing as private parties in a capitalist economy.

221 US Const., 5th Am.

222 "The rights of property would thus be at risk whenever the sheer numerical advantage of the poor was translated into political power through political rights." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 5, University of Chicago Press (1990).

223 "State governments were limited by specific prohibitions," like the Takings Clause. *Id*, 6. As to the federal government, Nedelsky says: "[B]ut the Federal government would rely primarily on a structure of institutions designed to check each other and to minimize the likelihood of effective majoritarian tyranny." *Id*.

224 *Id*, 9, 15.

and Due Process, rationality is the only substantive limitation on a legislative determination of public use. In *Kelo v. City of New London*,[225] the Supreme Court validated a city's decision to use its eminent domain power to expropriate several residential properties so as to, *as part of its development plan*,[226] hand it over for private development. Faced with the historical prohibition of taking property from one private party to another private entity, the Court nonetheless found a public purpose in the jobs, tax revenue and general economic revitalization that would be generated as a result of the taking.[227] The definition of public use, understood as public purpose, would cease to be an effective substantive objection to the decision by a state or local government to take over private property. The only protection still remains, as with all other potential substantive provisions, against irrationality.

As with the concept of just compensation, what constitutes a taking is not a substantive prohibition on state action. The determination that a particular action constitutes a taking only takes us back to the rational-analysis of public purpose and the practical issue of just compensation. Therefore, the real effectiveness of the Takings Clause is making government experimentation expensive, not impossible as a matter of policy. But, so as to better understand how this Clause interacts with dormant Commerce Clause doctrine, some discussion as to Regulatory Takings is warranted.

When government physically takes over property, an obvious taking has taken place. Yet the Supreme Court has also held that over-onerous regulations may be a taking, although no physical takeover has occurred.[228] That is, takings are "not confined to formal expropriations" and some regulations are "tantamount to expropriations."[229] These Regulatory Takings take place depending on (1) the character of governmental action, (2) the extent the regulations interfere with distinctive investment-backed expectations, and (3) the degree of the diminution in value.[230] Key to our analysis is the idea that for a Regulatory Taking to exist there must be a "total economic deprivation [of] all economically viable use" as to the affected property. The question is, when a government creates a public monopoly

---

[225] 545 US 469 (2005).

[226] The Court made constant reference to the existence of a "carefully considered development plan" as proof to the non-arbitrary nature of the government's action. *Id*, at 478, 483, 487. See also Schragger, *supra* n. 9, at 1135. According to him, *Kelo* was not solely about a taking. Instead, it is "better understood as a case about the structured choices that cities encounter in attempting to alter and affect their economic circumstances." In that sense, "[t]he debate in *Kelo* can be understood as a continuation of this historical skepticism of local political processes." *Id*, at 1137.

[227] The Court reaffirmed the notion that public use is equivalent to public purpose. *Id*, 480. By doing so, the Court departs from the apparent textual restraints of the Clause and adopts a considerably broader concept.

[228] Gregory S. Alexander, *The Global Debate on Constitutional Property: Lessons for American Takings Jurisprudence* 71, (University of Chicago Press (2008).

[229] *Id*.

[230] *Id*.

in an economic area previously occupied by private forces, has a Regulatory Taking taken place? If the Court is consistent in avoiding *Lochner*-type results and keeping these issues in the political arena, it shouldn't be: "It now seems clear that the takings clause will not be the constitutional tool that property-rights advocates had hoped it would become, on that ushers in a new *Lochner* age. Battles over property rights will continue to be fought in the courts, but the focus of the property-rights activists' energies will increasingly *shift from the Courts to the Legislatures*."[231] Still, we must confront the issue head-on.

Before *Kelo, United Haulers* and *Davis*, the issue was a murky one, as the Takings Clause derailed government regulation and the dormant Commerce Clause blocked expropriations.[232] Curiously enough, before these cases, Ross Saxen suggested that, *since the Takings Clause had ceased to be a substantive check over government economic regulation and participation, more attention should be given to the dormant Commerce Clause*.[233] Therefore, the question is: if the dormant Commerce Clause has also ceased to be a substantive check on economic policy, can the Takings Clause make a comeback? According to her, "[w]hile narrowing the public use definition would not limit the government's use of the eminent domain power to municipalize [or nationalize] privately owned utilities or businesses, at some point such municipalization [or nationalization] will not serve a public purpose *if it results in a government-run monopoly* that forecloses competition and leads to inefficiency."[234] In other words, that the formation of a government monopoly should not be considered to be "a valid public purpose."[235] You can't get more *Lochner* than this. But, in *United Haulers*, economic public monopolies were allowed. I seriously doubt that the Court will rule that government monopolies are not a valid public purpose as to the Takings Clause. So, the question remains: would a government's decision to displace a private market in favor of a public monopoly constitute a Taking that, although not substantively objectionable as a matter of constitutional law, makes state and local governments think twice because of financial considerations?

Writing before *United Haulers* and *Davis*, Ross Saxer proposes to use the dormant Commerce Clause, *in combination with the Takings Clause*, as a substantive check on a government's decision to socialize economic activity. She suggested that "[a] city's or state's efforts to municipalize an investor-owned public utility or ongoing

---

231 *Id.* 95. (Emphasis added)

232 For example, in 1985 a California court held that the city of Oakland's attempt to expropriate the Raiders football team violated the dormant Commerce Clause. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153 (Cal. Ct. App. 1985) cited in Ross Saxer, *supra* n. 98, at 1512. Ross Saxer welcomed the idea that the dormant Commerce Clause would stand in the way of otherwise legitimate takings. *Id*, at 1517.

233 *Id*.

234 *Id*. (Emphasis added)

235 *Id*.

enterprise, with or without the use of eminent domain [regulatory taking?], will be likely to be categorized as the government's attempt to preserve state resources after its citizens. Such efforts may burden interstate commerce and be challenged as a situation where the burden on interstate commerce outweighs the local benefits of the legislation."[236] Thankfully, *United Haulers* derailed that possibility.[237]

A state or local government that wishes to create a public monopoly over a particular sector of the economy has a few available tools in its arsenal. First, it can simply nationalize a particular enterprise. In that case, there is an obvious taking of private property; because the firm will be a public entity, that satisfies the public purpose test; and just compensation will be paid. But, what if a state government decides to use an alternative road? For example, create a public entity to compete side-by-side with private firms, and then decides to pass legislation to socialize that sector of the economy, as it did in *United Haulers* with respect to waste disposal? Will the legislation barring private firms from operating in that particular market constitute a Regulatory Taking subject to just compensation?[238] If the answer is yes, then something doesn't fell right. First, it would be easier to just expropriate the private firms and avoid the energy consuming process of setting up a public entity. If both are takings, why not just take it? This would make the self-regulation exception unnecessary and superfluous. Second, it puts the Court back where it does not want to be: forcing economic policy choices on state and local governments. I believe the key here is the third element of Regulatory Taking analysis: if there is a total economic deprivation of all economically viable use on the affected property.[239] Another alternative would be for the state or local government to subsidize the public facility and, through pure competitive advantage, drive out the private entity from the market. But, if it can do this, it should be able to simply skip to the finish line.

---

[236] *Id*. 1522.

[237] "It is unclear whether municipalization of a privately owned enterprise by condemnation should be scrutinized under the Commerce Clause based on the public purpose achieved by having the local government run the private enterprise, or on the means (ie, eminent domain), used to accomplish this purpose. If the focus is similar to the determination of whether the government action violates the Fifth Amendment, then a municipality's use of eminent domain to acquire an ongoing enterprise . . . should be examined under the *dormant Commerce Clause* based on the ends to be achieved, not by the means by which the business is acquired. If, on the other hand, the focus is on the means used (ie, the eminent domain power), then the condemnation must be evaluated to determine whether it impermissibly burdens interstate commerce." *Id*. 1523. Now the answer is clear: No.

Ross Saxer *does* point to some interesting scenarios that still trigger the dormant Commerce Clause. For example, if a local government decides to use its eminent domain powers to *only expropriate out-of-state businesses*. *Id*. at 1539. Although very interesting indeed, I don't think a local government could be stopped if it decided to do so.

[238] "If a locality did nevertheless choose to enter the hamburger business, it may have to pay the private parties for the taking of private property (*say if it took over the existing hamburger stands*)." (Emphasis added) Shanske, *supra* n. 73 at 704.

I dare to guess that a decision by a government to displace a particular sector of the economy, while definitely affecting the private entities that previously participated in the market –*particularly the local ones that can't just relocate*– will not totally devastate all the economic value of the affected interests. But that is just a guess. I only hope the Supreme Court remains consistent and doesn't kill *United Haulers* and *Davis* by way of Regulatory Takings. It would make no sense to create a self-regulation exception and then eliminate it in practice by characterizing it as a Regulatory Taking.

g. After the Dust Settles: The Dormant Commerce Clause As it Now Stands

Obviously, this Paper has not even pretended to discuss all the different doctrines related to the dormant Commerce Clause. I particularly steered cleared from tax-related issues that normally come up when analyzing this provision of the Constitution, so as to keep my focus on economic areas in which the state becomes a direct economic actor. How do we characterize the current state of the dormant Commerce Clause in this respect?

First, before any analysis on the constitutionality of a state action under this provision is made, one must determine if the state has acted, *in any fashion*, as a direct economic actor and not *just* as a regulator.[240] What constitutes direct state participation –in particular, what is a public entity– should be construed broadly so as to allow a state or local government to creatively develop alternative models of non-private economic organization. Still, the Supreme Court has yet to directly tackle this matter, so the issue of title seems like, for now, to be the determinative element.

Under either the market participant exception or the new self-regulation rule, the *per se* rule is out, whether the alleged discrimination is facial or indirect. In these cases, discrimination is accepted, but constitutionally justified. A local government is entitled to democratically decide for itself it a particular element of its economy will be in private or public hands; whether coexisting or exclusive. Only as to a purely private economy will the dormant Commerce Clause have full force; that is, when the state has no direct participation in the economic activity at issue and merely acts like a regulator under its police powers. Once we accept this distinction, we can come to terms with the current state of the doctrine and find out that it is perfectly coherent.[241]

---

[239] Let us not forget that, as a use of the police power, a state can simply ban a previously legal economic activity without violating the Takings Clause. *Ferguson v Skrupa*, 372 US 726 (1963). The question is if it can ban it only in the private sphere while allowing it in the public one.

[240] "The act of entering and engaging in market activity is sufficient, so long as the accompanying regulation benefits the government when it undertakes that activity, and not some private in-stater who engages in the same activity." Ray, *supra* n. 40, at 1050.

[241] I feel that the countless alternatives proposed by the scholarship are totally unnecessary and signal an ideological resistance to the public/private, participation/regulation distinctions. For instance,

The problem of the current state of things is that we don't know if the *Pike* test really is applied in these circumstances. Under the market participant rule, the test is wholly inapplicable.[242] But in *United Haulers* it was used. This of course, spells trouble for Justice Souter's assertion in *Davis* that *United Haulers* was a market participant case. It also creates a problem as to his position that the self-regulation exception forms a hybrid with the market participant rule. Yet, in *Davis* he commanded a plurality, and the Justices in the majority who didn't join this part of the Opinion are known to be *wholly hostile to all* Pike *test analysis*.

It is probable that these exceptions will reinforce each other. After all, the so-called *Pike* analysis applied in *United Haulers*, and especially in *Davis*, was purely *pro forma*. More so, one can actually say that there was actually no analysis at all under *Pike*;[243] it was close to automatic validation. We can safely say that these cases have considerably weakened *Pike* in general, and almost completely eliminated it in particular cases of government economic engagement.[244] What we can say is that, whether because out of pure considerations of federalism,[245] a positive view of state power,[246] or substantive *dejudicialization*, the dormant Commerce Clause is no longer a credible obstacle to a public approach to economic organization and development.

III. Some Final Thoughts About Doctrine

This Paper has not been an argument against programmatic Constitutions by which peoples may wish to enshrine their social and economic achievements in their fundamental text. My point has been that what really give force to those programmatic provisions are not legal remedies alone, but a strong social consensus that backs it up. When that social consensus cracks, programmatic provisions weaken considerably. While courts may be able to give legal force to them for

---

Denning suggests a broad and deferential discrimination analysis. Denning, *supra* n. 52 at 418. Slattery proposes using traditional strict scrutiny. Slattery, *supra* n. 57, at 1256. According to him, the *United Haulers* controversy would have passed that level of scrutiny. *Id*. at 1265.

[242] For his part, Ray suggests that the *Pike* test does apply to the market participant rule. Ray, *supra* n. 91, at 1053. He also states that, since the *Davis* statements, the future of this test is not clear as to these types of cases. *Id*. For a contrary view to Ray's, see Slepnikoff, *supra* n. 219 at 371.

[243] According to Ray, the Court simply did not conduct a *Pike* test. *Id,* at 1036. I agree. For his part, Tichenor emphasizes the Court's statement that "any arguable burden" was superseded by the local benefits. Tichenor, *supra* n 117 at 447. Note the lack of effort by the Court to even identify the burden. It simply noted that the action survived the *Pike* test.

[244] As Williams and Denning remind us, there has been no *Pike* based invalidation by the U.S. Supreme Court in nearly 25 years, although lower courts have. Williams & Denning, *supra* n. 52 at 304. Still, others, like Coenen, have hope that the *Pike* test will stand the test of time. Coenen, *supra* n. 166 at 566.

[245] Mank, *supra* n. 48, at 8; Coenen, *supra* n. 166 at 595.

[246] Schweitzer, *supra* n. 139 at 52.

a while, eventually the clash between the Constitution and democracy becomes irreconcilable, and the latter tends to be victorious.

The United States does not have a programmatic Constitution in the modern sense, precisely because it is not a modern document. It is a statutory, 'silent' text that does have *some* (few) substantive provisions as to economic issues. Most of them have to do with property.[247] After the fall of the individual programmatic constitutional provisions as *substantive* obstacles to government experimentation with the economy –from regulation, to participation, to outright socialization-, some turned to the dormant Commerce Clause. But, like its predecessors, it met the same fate. As to *public approaches to economic organization and development*, the only real constitutional protection is against irrationality (arbitrary government) and unjustified discrimination (also a form of arbitrary government).

Therefore, the debate going forward as to what type of economy we want –be it at the federal, state or local level– is purely a policy choice that must be made in the democratic political arena. The Supreme Court of the United States has consistently rejected analyzing those decisions by way of substantive review. It's all up to us.

IV. The Puerto Rican Context

From the above discussion, we can conclude that, *instead of a dormant Commerce Clause doctrine that has exceptions for public economic activity,* ***there are two different doctrines: a public one and a private one***. This distinction is fundamental in order to decide what types of economic development jurisdictions like Puerto Rico are going to carry out. The case of *Northwestern Selecta* is crucial to understand this dilemma.[248] My main concern is not, however, the particular facts of that case, but the description of current dormant Commerce Clause doctrine made by the Puerto Rican court. Still, facts are relevant, so a brief narration is required.

The Commonwealth of Puerto Rico approved a statute that, among other things, established a Fund to encourage the consumption of meat. In turn, that Fund was financed by taxes imposed on local producers and out-of-state importers of meat. In order to treat them equally for tax purposes, the statute established a comparable tax rate based on headcount for the local producer and a per pound rate for the importers. The controversy arose when the Fund started carrying out a campaign encouraging the consumption of *local* meat. The importers filed a suit challenging the constitutionality of the statute, arguing that the *use* of the recollected tax was discriminatory, for it used money raised from both local and out-of-state entities to favor the locals over the out-of-staters.

---

[247] Mention must again be made also to the Contracts Clause; probably the most substantive of all the programmatic provisions and definitely the most toothless of tigers in actuality.

[248] *Estado Libre Asociado v. Northwestern Selecta, Inc.*, 2012 T.S.P.R. 56.

A majority of the Supreme Court of Puerto Rico struck down the statute, holding that the discriminatory use of the special tax revenue ran afoul of the dormant Commerce Clause under the as applied *per se* rule. By doing so, the Supreme Court reversed a decades old decision that had previously held that the dormant Commerce Clause was not applicable to the Commonwealth. I have to quarrel with that holding, which takes up most of the Opinion. My objection is that, by investing so much of the Opinion in deciding whether the clause applied or not to Puerto Rico, the Court forgot to focus on *what is the actual doctrine behind that Clause*. By oversimplifying the doctrine the Court made two important mistakes: (1) it offered a very strict version of the doctrine, which tends to paralyze government efforts to encourage economic activity, especially private; and (2) it offered an insufficient distinction between private and public economic activity. As we will see, it is very curious that, *by attempting to offer a very free market oriented decision, the Supreme Court has fortified the idea that a public approach to economic development is actually more feasible from a constitutional standpoint than encouraging local private industry.*

Although the majority Opinion does offer an accurate *historical* description of the doctrine, it fails to take into account the far reaching impact of recent developments, particularly with regards to the doctrine *in general*, and with regards to the public dimension *in particular*. In other words, as to the general doctrine –as applicable to *private* economic activity– the Court clings to a strict free market view long-ago relaxed, and, as to the particular public version of the doctrine, it offers insufficient distinction. For example, as to the market participant exception, the Court offers only a single sentence.[249]

Even though the main fuzz of the debate amongst the Justices in that case was whether the *use* of the tax constituted an *as applied discrimination against out-of-state interests in favor of local private interests*, thus in violation of the dormant Commerce Clause,[250] what we must analyze is which ***substantive*** version of the doctrine was adopted.

The main mistake made by the majority Opinion is simple enough: *it confuses the **public** version of the doctrine with the **private** one*. In other words, it uses doctrine that stems out of the public exception cases to describe the private doctrine.

---

[249] *Id*, at 17. Actually, the Court seems to confuse the concept of the police power of the state to *regulate* private economic activity with the concept itself of the market participant, which is not just the state using its police powers to regulate, but directly *engaging* in economic activity. *Id*. at 50.

[250] As to the particulars of the case, the main disagreement can be summarized in the following way: for the majority, the fact that the practical use of the funds resulted in discriminatory behavior, made the statute unconstitutional *as applied*. For the main dissent, the *as applied* analysis does not reach the *use* of the funds, but whether the scheme under which it was collected, although facially neutral, is discriminatory as applied because the disparate impact it created is evidence of a discriminatory purpose. *See* Dissenting Opinion by Justice Fiol-Matta.

For the majority, the analysis is very simple: a special tax was collected from local and out-of-state participants in the meat industry, and the proceeds were used for the benefit of one interest over the other.

In that sense, I believe the approach taken by Justice Liana Fiol-Matta in dissent is absolutely right: instead of talking about a general dormant Commerce Clause doctrine which has some quirky public exceptions, such as the market participant or self-regulation, *there are two separate doctrines*: a public one and a private one. Therefore, the threshold question when facing a dormant Commerce Clause controversy has to be: what is the nature of the economic activity that has been challenged? Is it only government regulation of private economic activity or is the main focus direct public economic activity? The answer will make all the difference.

When that question is not posed, then confusion may reign, *just as it did with scholars who tried to come up with a* ***unified*** *description of dormant Commerce Clause doctrine without taking into account the private-public distinction*. In doing so, the Supreme Court of Puerto Rico has actually created an anomalous result: the doctrine is so narrow as to the ability of the Commonwealth to favor local private economic interests –the product of an overemphasis on the importance of national economic unity within the United States, which is part of the annexation agenda of many of its current members– that it has basically left no other alternative for the Commonwealth *but to embark on a strategy of economic development based on public activity*. No complaints here. But let's take a peak on what that would look like.

First, even the majority in *Northwestern Selecta* recognized that the government *may* encourage private economic activity through direct subsidies or other programs "directed at strengthening local industry," whatever that means.[251] The Court provides no answer to what those programs would look like, and the general tone of the Opinion signals that the Court will leave the government on a very tight leash. Still, it is something that could be used to those who wish to pursue a private road.

Second, it is worth mentioning that the market participant doctrine actually does have a private angle: as a purchaser, the Commonwealth can choose to buy only from local private firms, be it pencils or meals for the schools or other goods for prisons, hospitals and other activities. By itself, the government can actually encourage local production by "buying Puerto Rican," which can have an enormous effect on economic activity. But the market participant doctrine offers much more when added to the self-regulation exception: the ability of the Commonwealth to engage directly in economic activity on favorable terms for itself! Imagine a government-owned factory that makes a particular product and, through a combination of subsidies and self-regulation, has a definite *and constitutional* market advantage, ***which the government could not give to a local private firm***. This could result in lower costs, broader services and revenue for the government, which faces a stagnant private economy.

---

[251] Nortwestern Selecta, *supra* at 50.

Yet, there is an additional angle that I wish to explore: privatization, public-private partnerships and cooperatives. I propose that privatization is a bad word in Puerto Rico, particularly after the transfer of the public-owned telephone company to private hands in 1998. Yet, aside from the ideological objection many of us have to the idea of privatization, as relevant to this Article, my concern is that the government should not take advantage of the public exceptions to set up a productive public entity, drive out the private competition, only to hand it over to private interests for their benefit. *The goal of the public exceptions is to benefit the public, not private interests*; it should not work to hurt the public by depriving it of its own economic forces through privatization.

But, in terms of constitutional concerns, the plot thickens when addressing the issue of private-public partnerships (PPP). As discussed in Part I, an attempt by the government to use the self-regulation exception to benefit local private firms as *junior* partners in a PPP would raise *private* dormant Commerce Clause concerns as to that part of the equation. As stated before, in order to comply with doctrine, the government would have to treat potential junior partners equally, whether they are local or out-of-state: unless the argument can be made that, ***as a market participant, the government can decide who it partners up with***. Ironically, the public exception meant to favor public entities and, therefore, the pubic as recipients of the benefits acquired by those entities– could be used to favor local private firms. Still, I seriously doubt that the U.S. Supreme Court would swallow that obvious attempt to circumvent the private dormant Commerce Clause doctrine so as to favor local private interests. So we come back to the public domain.

Then comes the question of cooperatives, which have a strong history in Puerto Rico and which, in my view, offer an untapped source of financing that is both socially responsible and local in character. As stated in Part II, there are two avenues of exploration as to this issue: (1) attempting to acquire for cooperatives the full protections of the self-regulation doctrine by characterizing them, not as local private entities, but as social entities that offer a public benefit, although still technically private. That is, that by their nature, they are more akin to public entities than private firms, because of the social function they serve, which is the main thrust behind the analysis in *United Haulers* and *Davis*. And (2) if this road fails, and cooperatives are deemed to be just another local private firm subject to the private dormant Commerce Clause doctrine, then the government can still determine, as a policy matter, that it will prefer cooperatives over corporations, independent of their local or out-of-state origin. In that case, even if only local cooperatives come up to the plate, there is no discrimination being deployed, because the government would have given the same access to out-of-state cooperatives than it did to local ones, thus not running afoul the private dormant Commerce Clause. After all, there is nothing in that doctrine that says that the government cannot discriminate between corporations and cooperatives. As long as the out-of-state cooperatives are treated in the same manner as local ones, out-of-state corporations or other similar entities

are out of luck.

From the above discussion, I believe that Puerto Rico, even under *Northwestern Selecta*, has a lot of options to improve its economy. And until the Supreme Court of Puerto Rico fixes the strict construction it gave to the dormant Commerce Clause doctrine as related to private industry, it looks like the public road will be the easiest one. Why not just take it?