

1-1-2009

Business and Constitutional Originalism in the Roberts Court

Vikram David Amar

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Vikram David Amar, *Business and Constitutional Originalism in the Roberts Court*, 49 SANTA CLARA L. REV. 979 (2009).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol49/iss4/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

BUSINESS AND CONSTITUTIONAL ORIGINALISM IN THE ROBERTS COURT

Vikram David Amar*

In this essay,¹ I briefly explore Roberts Court cases in two areas where business law intersects with my primary field of scholarship, the United States Constitution. Specifically, I examine the extent to which the two newest Justices, Chief Justice Roberts and Justice Alito, have seemed unwilling to embrace the stances articulated by the two Justices most often associated with the interpretive philosophy of originalism, Justices Thomas and Scalia. My examination takes place in the context of the limits the Constitution has been held to place on punitive damages and on state commercial regulation that runs afoul of the so-called “dormant Commerce Clause” idea. I then discuss a few reasons why, at least in the dormant Commerce Clause setting but perhaps more generally as well,² the strong form of constitutional originalism embraced by Justice Thomas—and to a slightly lesser degree, Justice Scalia—might not be entirely appealing to the newcomers.

*Associate Dean for Academic Affairs and Professor of Law, University of California, Davis, School of Law.

1. This piece is a modified version of remarks given at the Santa Clara Law Review Symposium entitled “Big Business and the Roberts Court: Explaining the Court’s Receptiveness to Business Interests,” held at Santa Clara University on January 23, 2009. I thank the organizers of the Symposium for their hard work, and my fellow Symposium participants for their input into my thinking.

2. Let me be clear that I think originalism, properly understood and consistently applied, is an important component of legitimate constitutional interpretative methodology, notwithstanding my substantial disagreement with the way Justices Thomas and Scalia seem to have understood and implemented the originalism idea in various settings.

I. PUNITIVE DAMAGES

I begin with punitive damages and the *Philip Morris USA v. Williams* decision handed down by the Roberts Court in early 2007.³ The ruling invalidated as unconstitutional a \$79.5 million punitive damage award by an Oregon jury against tobacco titan Philip Morris on the ground that the jury instruction given by the trial judge violated the defendant's Fourteenth Amendment due process rights. Specifically, the Court held the damage award was improper because the instruction permitted the jury to punish Philip Morris for harm it may have inflicted on persons other than the plaintiff, and such punishment is impermissible.⁴ The majority opinion did go on to explain that it *is* legitimate for the jury to consider harm done to non-plaintiffs in determining how "reprehensible" a defendant's conduct was—a permissible factor to take into account when deciding how large a punitive award should be.⁵

To be sure, the line the majority draws here—between considering something to punish and considering it as part of the reprehensibility assessment—seems fine. As Justice Stevens says in dissent, "[t]his nuance eludes me."⁶ One would reasonably fear that the distinction will elude any jury that is directed to take into account harm to non-parties when deciding the appropriate level of a punitive award, but that is admonished not to punish the defendant for inflicting such harm.

In addition to being fuzzy, the majority's test seems less than completely coherent. Justice Breyer's opinion for the Court criticizes what the Oregon courts had allowed because there is no way to know "how many such [non-plaintiff] victims [there] are," and because the jury cannot know "[h]ow seriously [such non-parties] were injured," or "[u]nder what circumstances [the] injury occur[red]."⁷ All of that may be

3. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

4. *Id.* at 353 ("In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.").

5. *Id.* at 355 ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . .").

6. *Id.* at 360 (Stevens, J., dissenting).

7. *Id.* at 354 (majority opinion).

true. But these things would appear equally true—and seemingly equally unfair to the defendant—when we allow the jury to consider these nonparty potential victims for purposes of “reprehensibility” rather than for purposes of direct “punishment.”

For purposes of this essay, what bears attention is not simply the correctness *vel non* of the ruling, but the lineup that it generated and the roster of dissenters. In *Philip Morris*, Justices Breyer and Souter—two of the more “liberal” members of the Court (Justice Souter, in many respects, being the most liberal)—are both in the majority (with Justice Breyer authoring the majority opinion), along with Justice Kennedy and the (seemingly quite conservative) Chief Justice Roberts and Justice Alito. Among the members of the majority, Justices Souter and Breyer would not be expected to favor, as a political matter, big business over personal injury fraud victims.

The dissenters—Justices Stevens, Scalia, Thomas, and Ginsburg—are also odd bedfellows. Like the vote of (retired) Justice O'Connor in *Gonzales v. Raich*⁸ (where she would have allowed California to permit medical marijuana free from federal governmental interference, notwithstanding her stated personal belief that California's experiment was bad policy),⁹ the vote lineup in *Philip Morris* is a good reminder that Justices sometimes appear to overcome their personal predilections when they perform the task of giving meaning to the Constitution.

And a concern for methodological consistency in constitutional interpretation *is* what likely explains Justice Scalia's and Justice Thomas's decisions in a number of recent punitive damage rulings to dissent. Although one might predict that “conservative” Justices like Scalia and Thomas might want to confine jury awards against big business, these jurists object to the very idea of expanding substantive due process doctrine to include new things. Why? Because a fundamental objection to newfangled substantive due process is the very crux of their argument against, among other cases, *Roe v. Wade*¹⁰ and *Lawrence v. Texas*,¹¹ the landmark

8. *Gonzales v. Raich*, 545 U.S. 1 (2005).

9. *See id.* at 57 (O'Connor, J., dissenting).

10. *Roe v. Wade*, 410 U.S. 113 (1973).

11. *Lawrence v. Texas*, 539 U.S. 558 (2003).

substantive due process cases involving abortion and consensual adult same-sex intimacy.

Since Justices Scalia and Thomas reject substantive due process in those “privacy” cases on the ground that in 1868 (when the Fourteenth Amendment’s Due Process Clause was enacted), states were free to regulate abortion and homosexual activity, states must also be free, these Justices say, to authorize punitive damages free from substantive due process limits, since states were unconstrained in 1868 with regard to such punitive remedies. If the very idea of substantive due process is unjustified and “made up” by jurists in the privacy context, then these two Justices don’t want to be accused of hypocrisy in votes in the punitive damages setting. And indeed, both Justices have called the entire doctrine in this area “insusceptible of principled application”¹² and have invoked the thoroughly discredited *Lochner v. New York*¹³ line of cases in order to demonstrate how improperly they think the Court has been acting in this area by essentially legislating limits and formulae for damages.¹⁴

In *Philip Morris*, Justice Thomas’s dissent made clear that he did not buy the majority’s characterization of the case as involving a “procedural due process” issue, calling the majority’s label and approach here “simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.”¹⁵

Importantly, Chief Justice Roberts and Justice Alito, both of whose views on substantive due process in the abortion and same-sex-conduct settings will likely be important for decades to come, felt comfortable in applying at least a variant of the substantive due process concept to strike down the jury award in *Philip Morris*. Perhaps Justice Breyer’s (not quite convincing, to me at least)¹⁶ use of the

12. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., joined by Thomas, J., dissenting).

13. *Lochner v. New York*, 198 U.S. 45 (1905).

14. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470–71 (1993) (Scalia, J., joined by Thomas, J., concurring).

15. *Philip Morris USA v. Williams*, 549 U.S. 346, 361 (2007) (Thomas, J., dissenting).

16. Certainly, the Court’s ruling that Oregon simply cannot punish defendants for wrongs done to non-plaintiffs certainly could be thought of as a *substantive* barrier to a punitive objective Oregon wants to accomplish. To see

adjective “procedural” in his majority opinion allowed these two newcomers to sleep a little easier after joining the opinion. But if the procedural/substantive dichotomy was doing any of the work for either of these two new Justices, then they certainly could have written separately to make that clear rather than simply joining Justice Breyer’s majority opinion.¹⁷ Instead, the two newcomers seem not to embrace the same aversion that Justices Scalia and Thomas have repeatedly voiced concerning legislation-like rules forged by judges to regulate punitive damages.

Crucially, even Justices Scalia and Thomas have made clear that their aversion to judge-made, nuanced, policy-driven, cost-benefit-balancing rules is limited to constitutionally derived doctrine. In the other of the two most significant punitive damages cases handed down by the Roberts Court thus far, *Exxon Shipping Co. v. Baker*,¹⁸ Justices Scalia and Thomas joined a part of the Court’s opinion that limited damages in federal maritime to a presumptive one-to-one ratio between the punitive and

that, ask yourself what additional procedures, if implemented, would enable Oregon to punish for harm to others in this context. What those “procedures” might be is far from obvious.

Justice Breyer himself also has some methodological explaining to do. While he has not rejected, but rather has embraced, substantive due process in the sexual privacy setting—and thus does not face the same quandary the more conservative jurists confront—he has written recently in his book, *ACTIVE LIBERTY*, that the Court should regularly defer to democratic majorities and that Justices should be “restrained” in their exercise of judicial review. What Judge/Professor Michael McConnell has written about Justice Breyer’s approach to interpretation in a different context (so-called “partial birth abortion”) applies to the *Philip Morris* case as well: “Active liberty—the right of the people [of Oregon] to deliberate and enact [and implement] legislation—played no evident role in the decision.” See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2401–02 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

17. Of course, it is always adventurous to infer much from what a Justice decides *not* to write. But the reports of oral argument in the *Philip Morris* case when it came back to the Supreme Court in the 2008 Term also suggests that Chief Justice Roberts, at least, has no qualms about imposing absolute substantive limits on state punitive damages in the name of the Constitution. See Anthony J. Sebok, *The Unusual Story of Williams v. Philip Morris, and Its Third Trip to the Supreme Court—Including Some Predictions about What the Court Will Do This Time*, WRIT, Dec. 16, 2008, <http://writ.news.findlaw.com/sebok/20081216.html>.

18. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

compensatory components.¹⁹ To deflect any charge of inconsistency, Justice Scalia wrote a concurrence, joined by Justice Thomas, driving home the distinction between constitutional and common-law judicial functions: “I join the opinion of the Court, including the portions that refer to constitutional limits that prior opinions have imposed upon punitive damages. While I agree with the argumentation based upon those prior holdings, I continue to believe the holdings were in error.”²⁰

Does such a distinction between constitutional and common-law roles make sense here? The *Exxon* majority opinion (which, again, was joined by Justices Scalia and Thomas) succinctly explains why it does: “maritime law . . . falls within a federal court’s jurisdiction to decide in a manner of a common law court, *subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.*”²¹

This important power of Congress to fix judicial mistakes is adequate to distinguish the legitimacy of policy-based judicial balancing in the constitutional setting from the common-law setting, but, as will be discussed below, this important distinction is one that Justices Thomas and Scalia do not seem to fully appreciate in the dormant Commerce Clause setting.

II. DORMANT COMMERCE

The Roberts Court has handed down two noteworthy dormant Commerce Clause rulings in the past two Terms. Both cases involve the extent to which state or local government can favor state government entities and activities—rather than private in-state entities and activities—over out-of-area entities and activities without running afoul of the dormant Commerce Clause ban on protectionism. In *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*,²² county regulations in New York required that all solid wastes and recyclables generated within Oneida and Herkimer counties (located

19. *Id.* at 2632–33.

20. *Id.* at 2634 (Scalia, J., joined by Thomas, J., concurring).

21. *Id.* at 2619 (majority opinion) (emphasis added).

22. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

upstate) be delivered to one of several waste processing facilities owned by the Oneida-Herkimer Solid Waste Management Authority, a municipal corporation.

An out-of-state waste processor challenged these regulations, arguing that the county ordinances impermissibly discriminated against interstate commerce by requiring garbage delivery to an in-state facility—thus necessarily prohibiting the use of facilities outside the state, and thereby diminishing the interstate trade in waste disposal services.

Arguably, an earlier Supreme Court precedent was directly on point. A decade and a half ago, in *C & A Carbone Inc. v. Town of Clarkstown*,²³ the Court invalidated a seemingly similar so-called “flow control” town ordinance because it had “require[d] all solid waste to be processed at a designated [privately-owned] transfer station before leaving the municipality.”²⁴ The Court in *Carbone* reasoned that the ordinance discriminated against interstate commerce and was invalid under the dormant Commerce Clause doctrine because it “depriv[ed] competitors, including out-of-state firms, of access to a local market.”²⁵

Despite the *Carbone* precedent, the *United Haulers* Court upheld the local regulations, distinguishing *Carbone* on the ground that the processing facility in *United Haulers* was owned and operated by a municipal governmental entity, rather than a private concern. According to the majority, the dormant Commerce Clause’s per se prohibition against “hoard[ing] solid waste,” as recognized in *Carbone*, is inapplicable when the “preferred processing facility” is owned by a public entity: “it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.”²⁶

There is a legitimate question whether the majority’s (limited) reading of *Carbone* is the best one. As the plaintiffs in *United Haulers* pointed out, the processing station involved in *Carbone* had many public attributes. The station was privately built, but built pursuant to an agreement with a town. Under the terms of the agreement, the facility was to

23. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

24. *Id.* at 386.

25. *Id.* at 389.

26. *United Haulers*, 550 U.S. at 343.

be purchased by the town itself for the sum of one dollar after five years. The town guaranteed that the facility would, during the five years of private ownership, receive enough waste and revenue to operate profitably by forcing all waste generators to use the facility and by authorizing the plant to charge a "tipping" fee of eighty-one dollars per ton, a rate higher than the going market rate.²⁷ As the Supreme Court in *Carbone* noted, "[t]he object of this arrangement was to amortize the cost of the station: [t]he town would finance its new facility with the income generated by the tipping fees."²⁸

This quasi-public character of the plant in *Carbone* was thus quite apparent from the facts and the record in the case. Indeed, Justice Souter's dissenting opinion (joined by the odd combination of Chief Justice Rehnquist and Justice Blackmun) highlighted the facility's public dimension as grounds for arguing that the law requiring the facility's use should be upheld. According to Justice Souter's dissent, there was no unconstitutional favoritism because "the one proprietor . . . favored [by the flow ordinance] is essentially an agent of the municipal government."²⁹ Since the ordinance did not result in "the sort of entrepreneurial favoritism we have previously defined and condemned,"³⁰ the dissenters concluded, the case should have come out the other way.

And yet, this line of reasoning did not move the majority in *Carbone* to change its mind, or even to respond to the dissent's reasoning directly. There is thus some argument to be made that the public/private distinction, raised at least somewhat by the facts and opinions in *Carbone*, was implicitly rejected by the majority there.

But it is also apparent from the facts and record that the facility in *Carbone* was, as a technical matter, privately owned and operated for private profit for at least five years. Moreover, the majority there never explicitly *rejected* the dissenters' suggestion that publicly owned facilities should fare differently under dormant Commerce Clause principles than privately owned ones. Rather than such a rejection,

27. *Carbone*, 511 U.S. at 386-87.

28. *Id.* at 387.

29. *Id.* at 416 (Souter, J., joined by Rehnquist, C.J. & Blackmun, J., dissenting).

30. *Id.* Entrepreneurial favoritism is favoritism of one private business over another.

there was conspicuous silence: the majority (consistent with the opinion style of Justice Kennedy, who wrote for the Court in *Carbone*) simply never engaged the dissent in point-counterpoint style, back-and-forth.³¹

Assuming *Carbone* was not a constraint, was the *United Haulers* majority's analysis convincing? On one hand, perhaps favoring the counties' cause, there are cases in which dormant Commerce Clause principles have been held *not* to apply when the favoritism of local interests results from a state or city acting as a "market participant"—that is, a buyer or seller of goods or services.

In one ruling, for example, the "market participant exception" to the dormant Commerce Clause idea allowed a city to choose to hire for public works *only* contractors that used a workforce comprised of at least fifty percent residents of the city.³² In another case, the Court allowed a cement company owned by the State of South Dakota to charge less to in-state purchasers and more to out-of-state customers.³³ In these and other rulings,³⁴ the Court has held that where the state or city in question is a "market participant," rather than a market regulator, public favoritism of local businesses or citizens is constitutionally permitted.

There are arguments, on the other hand, that the market participant exception analogy might not be fully applicable in *United Haulers*. True, the government—the Waste Management Authority—is acting as a market participant in *United Haulers* by offering waste disposal services for sale. But the government in *United Haulers*—unlike in the paradigm market participant exception cases mentioned above—is *also* acting as a regulator, requiring private consumers to use only the designated waste treatment facilities. Thus, it is hard to argue that the market participant idea applies with full force.

If the market participant exception reasoning fails, are there other reasons to exempt publicly-owned facilities from the scope of the dormant Commerce Clause idea? Perhaps.

31. *See id.* at 420.

32. *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

33. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

34. *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *cf. United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984).

First off, because there are only certain, narrowly limited spheres in which the government owns and operates facilities that compete with the private sector, the potential for excessive protectionism and market disruption arising from protection of such facilities is limited. In other words, if we exempt public facility favoritism from the dormant Commerce Clause ban, we need not slide down a slippery slope of allowing all kinds of other local favoritism that drives up costs and disserves consumers across the national economic board.

Second, suppose, as some have argued,³⁵ the dormant Commerce Clause ban on local protectionism is less about ensuring unfettered national market operations, and more about promoting national political unity and identity. If so, then favoritism benefiting local public institutions (as opposed to private) may seem less constitutionally offensive. On this logic, if a state or city treats its private citizens better than out-of-staters, it really is sending a message of exclusion and faction. If it simply treats its own public entities favorably to ensure their continued viability, the message that is sent to the world about inclusion/exclusion seems somewhat less offensive.

United Haulers was revisited and reaffirmed by the Roberts Court the following Term in *Department of Revenue v. Davis*.³⁶ In rejecting a Commerce Clause challenge to a Kentucky regime that exempted from state income tax the interest on government bonds issued by Kentucky or its subdivisions, but that taxed interest income on bonds from other states and their subdivisions, the Court found the analysis of *United Haulers* completely on point:

It follows a fortiori from *United Haulers* that Kentucky must prevail. In *United Haulers*, we explained that a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors. . . . This logic applies with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially

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

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

public function, with the venerable history we have already sketched By issuing bonds, state and local governments “sprea[d] the costs of public projects over time,” . . . much as one might buy a house with a loan subject to monthly payments. Bonds place the cost of a project on the citizens who benefit from it over the years, . . . and they allow for public work beyond what current revenues could support Bond proceeds are thus the way to shoulder the cardinal civic responsibilities listed in *United Haulers*: protecting the health, safety, and welfare of citizens. It should go without saying that the apprehension in *United Haulers* about “unprecedented . . . interference” with a traditional government function is just as warranted here, where the [Respondents] would have us invalidate a century-old taxing practice . . . presently employed by 41 States . . . and affirmatively supported by all of them, see Brief for 49 States as *Amici Curiae*.

....

Thus, *United Haulers* provides a firm basis for reversal. Just like the ordinances upheld there, Kentucky’s tax exemption favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests. This type of law does “not ‘discriminate against interstate commerce’ for purposes of the dormant Commerce Clause.”³⁷

As was true in the punitive damage realm, Justices Thomas and Scalia have staked out their own close-to-absolutist position in dormant Commerce Clause cases, rejecting the very idea of dormant Commerce Clause limitations. They wrote separately in *United Haulers* and in *Davis* to concur in the results, but they have made clear that they think the Commerce Clause is no more than an affirmative grant to Congress, and that the Constitution, by its own terms, does not foreclose any state regulation of commercial activity—even overtly protectionist state regulation—unless it falls within the terms of some other textual prohibition in the Constitution on state laws.³⁸ They

37. *Id.* at 1810–11 (citations omitted).

38. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610–20 (1997) (Thomas, J., dissenting); *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 259–65 (1987) (Scalia, J., concurring in part and

characterize the dormant Commerce Clause doctrine as a textual embarrassment and deny that it has any legitimate historical grounding. As faithful originalists, they reject it at its core.

Importantly, neither Chief Justice Roberts nor Justice Alito seems to embrace the originalist position here, at least as Scalia and/or Thomas articulate it. Chief Justice Roberts wrote the *United Haulers* opinion and joined in the majority opinion in *Davis*, both of which discuss, apply, and implicitly affirm existing dormant Commerce Clause cases even as they decline to extend such cases to instances of favoritism for state-owned entities. There is no hint in either majority opinion that the dormant Commerce Clause edifice should be reexamined, or even that existing cases are being applied only on account of *stare decisis*. In this regard, Chief Justice Roberts may embrace or accept dormant Commerce Clause thinking more than his predecessor and mentor, Chief Justice Rehnquist, did. Although Chief Justice Rehnquist may never have expressed the absolutist view challenging the legitimacy of all dormant Commerce Clause cases as do Justices Thomas and Scalia, he did express a great deal of skepticism (and sometimes sarcasm) about a doctrine that seemed so atextual.³⁹

Justice Alito seems even more ready to embrace dormant Commerce Clause thinking. He dissented in both *United Haulers* and *Davis*, and thus would have voted to invalidate, on dormant Commerce Clause grounds, the laws at issue. He authored the lengthy dissent in *United Haulers*, wherein his reading of existing dormant Commerce Clause precedent—including *Carbone*—was expansive and sophisticated. There was not a hint of questioning the legitimacy of any of the earlier cases, and there was no suggestion that *stare decisis* alone was doing a major part of the work.⁴⁰ He did write

dissenting in part).

39. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 689 (1981) (Rehnquist, J., dissenting) (“Casual readers of this Court’s Commerce Clause decisions may be surprised, upon turning to the Constitution itself, to discover that the Clause in question simply provides [affirmative congressional power.]”).

40. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 356–71 (2007) (Alito, J., joined by Stevens, J. & Kennedy, J., dissenting). Justice Alito’s dissenting opinion was not very conservative in other ways too. For example, it dismisses the idea that “traditional governmental functions”—an idea advanced by the “conservative” wing of the

separately in *Davis* to make clear that his dissent there, and in *United Haulers*, was based on the “assumption” that the existing cases should be followed.⁴¹ Justices Scalia and/or Thomas seem to have “talked to” him in the intervening year; there was no suggestion in the broad *United Haulers* dissent of any such “assumption.” Rather, he seemed to be reading past cases for what they were worth because they made sense to him.

III. THE PROBLEMS WITH JUSTICE THOMAS’S ORIGINALISM (IN THIS AREA)

There are, to my mind, some good reasons why Justice Alito would be well-advised to continue to resist the originalist position of Justice Thomas in the dormant Commerce Clause setting. Justice Thomas’s (and to a lesser extent Justice Scalia’s) originalism in that context suffers from some major flaws, many of which recur in other constitutional arenas in which Justice Thomas has staked out the most far-reaching of originalist positions.⁴²

First, Thomas’s originalism in the dormant Commerce Clause realm is one that completely disregards *stare decisis*. At least Justice Scalia seems willing, on respect-for-precedent grounds, to continue to invalidate overtly protectionist state laws and instances that are indistinguishable from past cases even as he wants the Court to get out of the business of judicially balancing in-state and out-of-state interests.⁴³ Justice Thomas, who once seemed willing to follow dormant Commerce Clause reasoning, and then at least seemed for a time to share Justice Scalia’s grudging acceptance of *stare decisis* in this realm,⁴⁴ more recently has written by himself⁴⁵ to make clear he would go back to square one notwithstanding the “vast number”⁴⁶ of

Court in *National League of Cities v. Usury*, 426 U.S. 833 (1976)—could ever be defined with coherence.

41. See *Davis*, 128 S. Ct. at 1830 (Alito, J., joined by Kennedy, J., dissenting).

42. See generally Vikram David Amar, *Morse, School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637, 647–58 (2009).

43. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., joined by Thomas, J., concurring).

44. See *id.*

45. See, e.g., *United Haulers*, 550 U.S. at 349 (Thomas, J., concurring).

46. See *W. Lynn Creamery, Inc.*, 512 U.S. at 209 (Scalia, J., joined by

Supreme Court cases in the way—cases Justice Thomas does not even acknowledge, let alone deal with. For example, in *United Haulers*, he tries to counter a few of the cases relied on by the majority, but he never grapples with all the cases that even Justice Scalia realizes are on the books. Also, Justice Thomas dismisses cases in his stare decisis discussion in *United Haulers* by simply saying they lack support in the Constitution, but that is not dealing with stare decisis at all; that is simply reiterating the originalist approach.⁴⁷

Second, and related, the zeal with which Justice Thomas applies his originalism causes him to miss a hugely important aspect of dormant Commerce Clause doctrine. Although dormant Commerce Clause cases are decided in the name of the Constitution, among constitutional rulings they are quite unusual in that they can be remedied, if they turn out to be mistaken, by simple congressional action. For example, if Congress explicitly said it wanted to permit favoritism for local publicly owned waste treatment facilities, then the dormant Commerce Clause problem would dissolve. In this regard, these cases are much more like statutory interpretation cases than they are like other constitutional rulings.

It may seem odd that Congress can make a constitutional problem go away, since the Constitution binds even Congress. But in the dormant Commerce Clause setting, what is constitutionally problematic about local favoritism is that we don't trust the local governments that engage in it. In particular, we don't trust those local entities to fully take into account the interests of people outside their jurisdictions. But if such favoritism has the blessing of the Congress—a national body that represents all the interests in the nation—then the skepticism about that favoritism largely disappears. Because ultimately it would be up to Congress, then, to allow or disallow local favoritism of the kind at issue in *United Haulers*, perhaps the Court should ask itself: what do we think Congress would do if it had time and space on its legislative agenda to take up this issue?

If the Court viewed the question in this way, it would be

Thomas, J., concurring) (referring to the “vast number” of cases decided over the last century plus).

47. See *United Haulers*, 550 U.S. at 350–51 (Thomas, J., concurring).

acting a bit like an administrative agency, rather than a pure court of constitutional law, in trying to anticipate what result best accords with congressional values. Its role would also be similar to the role the Court plays in interpreting federal statutes, rather than the Constitution. As to statutes, the Court recognizes that any errors it makes are ultimately up to Congress to fix if it wants. Here, instead of interpreting specific congressional text, the Court would be interpreting a broader sense of expected congressional intent.

Relevant questions under this perspective would include: What is this Congress's general attitude toward state and local autonomy in general, and in the area of waste management in particular? Are there federal statutes on the books that touch on waste processing that reflect a congressional attitude about the trustworthiness of local governments in this realm? And so on, and so forth.

Indeed, it seems quite clear that *some* federal instrumentality is needed to police state favoritism in the commercial regulation realm, and that Congress is ill-suited to the task because of the large number and context-specific nature of local attempts to disadvantage out-of-staters. It seems quite likely that if the Court were to say it was getting out of the dormant Commerce Clause business because the kind of constitutional balancing of interests it has been doing is not appropriate for courts, Congress might very well respond with a statute explicitly authorizing the Court to keep doing what it has been doing.⁴⁸ In this regard, the common-law maritime realm at issue in the *Exxon* punitive damages case is very relevant to the dormant Commerce Clause debate.

Indeed, and this brings us to a third and related point: if we ask whether Congress is unhappy with the Court's work in dormant commerce, there is no evidence to so suggest. Congress has not in recent memory legislatively reversed a judicial invalidation of a state law that was done on dormant Commerce Clause grounds, and indeed seems to legislate against and in reliance on a backdrop of federal judicial vigilance here. Such reliance by Congress explains why stare

48. This is precisely what Congress did in enacting the Religious Freedom Restoration Act after the Court rejected constitutional balancing in the free exercise of religion realm in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

decisis has traditionally been very forceful in statutory interpretation cases. Interestingly, even Justice Thomas seems to accept a strong version of stare decisis in statutory cases.⁴⁹ Justice Thomas simply seems so intent on vindicating originalist-first principles that he fails to recognize the nuance in the constitutional doctrine of dormant commerce.

Fourth, Justice Thomas's originalism here, like elsewhere, seems not to fully take account of the implications that his other originalist positions would have. Justice Thomas thinks the Commerce Clause does no more than authorize Congress, that it does not invalidate state protectionist regulation, and that it is up to Congress to deal with such protectionism. Yet his reading of how broadly Congress can act under the affirmative Commerce Clause idea calls into question how easily Congress could police state protectionism in the first place. In cases like *Raich*,⁵⁰ Justice Thomas's brand of originalism would seem to prevent Congress from regulating local "production" or "manufacture" matters.⁵¹ And yet, if a protectionist local law took the form of regulating production (e.g., no entity may produce widgets in town unless its owners reside in town), it is not clear how Justice Thomas's understanding of congressional powers would allow federal regulators to get at this parochial regulation. Nor could Congress regulate the city government who passed the law, under the so-called anti-commandeering doctrine.⁵²

These inconsistencies are why Justice Thomas's invocation of *Lochner* in the dormant Commerce Clause realm⁵³ (and remember that he and Justice Scalia invoke the spectre of *Lochner* in the substantive due process punitive damage realm as well) seems so unpersuasive. One overwhelming problem with the *Lochner* era was that the Court was telling states they could not regulate workplace excesses because of the "liberty of contract" and also telling

49. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 401–02 (2005) (Thomas, J., dissenting) ("It is true that we give stronger stare decisis effect to our holdings in statutory cases than in constitutional cases.")

50. *Gonzales v. Raich*, 545 U.S. 1 (2005).

51. See *id.* at 58 (Thomas, J., dissenting).

52. See, e.g., *New York v. United States*, 505 U.S. 144, 161–62 (1992).

53. See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 354 (2007) (Thomas, J., concurring).

Congress that it could not intervene because it lacked Commerce Clause power over local matters. That meant that decisions would stay in the hands of employers and employees, who arguably could not be trusted, because of unequal bargaining power, to always do what was in the public good.

In the dormant Commerce Clause realm, Justice Thomas would seem to keep courts out (because the dormant Commerce Clause idea has no grounding in the text or history of the Constitution) and keep Congress out in at least some cases (because Commerce power does not reach local matters), leaving the decisions in the hands of state and local governments, who (like employers and employees) presumably cannot be trusted—because of their particular incentives and accountability—to do what is in the larger public interest.

One can hope, at least, that Chief Justice Roberts and Justice Alito will understand these potential problems with originalism, at least in this setting, before joining Justice Thomas's crusade.
