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The Neglected Port Preference Clause and the Jones Act

ABSTRACT. The Port Preference Clause, which restricts Congress’s ability to favor “the Ports of one State over those of another,” is rarely litigated and largely neglected in legal scholarship. But the Clause provides the key to invalidating the Jones Act, which prohibits foreign vessels from transporting goods between U.S. ports and is a major contributor to the high cost of living in Alaska and Hawaii. This Note argues that the Jones Act violates the Port Preference Clause by favoring West Coast ports over those of Alaska and Hawaii.

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INTRODUCTION

Suppose you want to order a cabinet for your home. The cabinet is made in Taiwan, let's say, and costs approximately \$1,000. If you live in the forty-eight contiguous states, shipping adds another \$200. But the situation is different if you live in Hawaii. As one native Hawaiian recently discovered to his chagrin, shipping the cabinet would cost him almost \$1,000—just less than the cabinet itself.¹

At first glance, this state of affairs might make sense. Hawaii is the most isolated population center on Earth.² But further consideration reveals something curious: Taiwan is much nearer to Hawaii than it is to California. Yet shipping from Taiwan to California is far less expensive than shipping from Taiwan to Hawaii, even though the former trip is over 1,400 miles longer.³ How can this be?

The answer lies in what has been described as “one of the most poorly-designed laws in effect today,” “universally reviled,” and “an archaic, protectionist boondoggle”: Section 27 of the Merchant Marine Act of 1920, also known as the Jones Act.⁴ The Jones Act, which prohibits foreign vessels from transporting

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1. John Wesley Nakao, *Jones Act Great for Some but Most of Us Here Suffer*, HONOLULU STAR-ADVERTISER (Dec. 23, 2015), <https://www.staradvertiser.com/2015/12/23/editorial/island-voices/jones-act-great-for-some-but-most-of-us-here-suffer> [https://perma.cc/39RW-LFJS].
 2. *Top 10 Things You Didn't Know About Hawaii*, TIME, https://content.time.com/time/specials/packages/article/0,28804,1917838_1917835_1917827,00.html [https://perma.cc/5ZRJ-3DLZ].
 3. Cf. Thomas Grennes, *An Economic Analysis of the Jones Act*, MERCATUS CTR. 1, 22 (2017), <https://www.mercatus.org/system/files/mercatus-grennes-jones-act-v2.pdf> [https://perma.cc/S6DM-UG99] (“[T]he cost of shipping from Los Angeles to Hawaii has been higher than the cost of shipping the same product from Los Angeles to Shanghai.”). Compare *Distance from Taiwan to California*, DISTANCEFROMTO, <https://www.distancefromto.net/distance-from-taiwan-to-california> [https://perma.cc/GFB5-3F3F], with *Distance from Taiwan to Hawaii*, DISTANCEFROMTO, <https://www.distancefromto.net/distance-from-taiwan-to-hawaii> [https://perma.cc/LR7F-F76W].
 4. Merchant Marine Act of 1920, ch. 250, § 27, 41 Stat. 988, 999 (codified as amended at 46 U.S.C. §§ 55102, 55116, 55119); see Mario Loyola, *100 Year-Old Jones Act Shipping Restrictions an “America Last” Policy*, COMPETITIVE ENTER. INST. (June 23, 2020), https://cei.org/news_releases/100-year-old-jones-act-shipping-restrictions-an-america-last-policy [https://perma.cc/9E6E-FD9X]; Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U.S.F. MAR. L.J. 95, 110 n.113 (2009) (citing Tony Gray, *Time to Topple This Act of Folly: Enemies of the Universally Reviled Jones Act May Never Have a Better Chance to Rid Themselves of Its Oppressive Influence*, LLOYD’S LIST, Oct. 10, 1991, at 5); Scott Lincicome, *If You Like Higher Prices, Enriched Cronies, and Weak National Security, Then You’ll Love the Jones Act*, CATO INST. (Jan. 22, 2015), <https://www.cato.org/commentary/you-higher-prices-enriched-cronies->

goods between U.S. ports, is a major cause of the exorbitantly high cost of living in Hawaii, Alaska, and Puerto Rico.⁵

In practice, the Jones Act protects the domestic shipping industry by making it economically unfeasible for foreign vessels to deliver cargo directly to Hawaii or Alaska. If someone in Hawaii orders an item from Taiwan, the most economical option would be to drop it off in Hawaii en route to the West Coast, where the Taiwanese carrier would eventually deliver the rest of its cargo.⁶ But because the Jones Act prohibits unloading goods at multiple U.S. ports, the carrier is left with two unpalatable options. It can travel directly to Hawaii or Alaska and unload all of its goods there. But foreign carriers rarely choose that option, for good reason: the difficulty in loading a container ship entirely with Hawaii- or Alaska-bound goods is a money-losing proposition, given the comparably small sizes of these markets.⁷ Instead, a foreign vessel will travel from Taiwan to a major U.S. port, like the Port of Seattle, unload all of its cargo there, then reload the Hawaii-destined cargo on a U.S.-owned vessel, which doubles back to (finally) unload

weak-national-security-then-youll-love-jones-act [<https://perma.cc/4JAW-AJ4L>]. This Note uses the term “Jones Act” in reference to Section 27, but the term can also refer to Section 33 (personal injury actions brought by seamen), or the entire Merchant Marine Act itself.

5. 46 U.S.C. § 55102(b) (2018); see *infra* Section I.B.
6. Cf. Matthew Yglesias, *The Jones Act, the Obscure 1920 Shipping Regulation Strangling Puerto Rico, Explained*, VOX (Oct. 9, 2017, 4:41 PM EDT), <https://www.vox.com/policy-and-politics/2017/9/27/16373484/jones-act-puerto-rico> [<https://perma.cc/G4ND-UMMP>] (“Puerto Rico, in particular, is so close to the United States that the most cost-effective way to transport many goods there would be for ships to stop off en route to a mainland port. But under the Jones Act, foreign-originating goods must be dropped off in Jacksonville and then shipped to Puerto Rico via an exorbitantly expensive Jones-compliant vessel.”).
7. See Mar. Admin., *U.S. Waterborne Foreign Trade by U.S. Customs Ports 2000-2017*, U.S. DEP’T TRANSP. (Oct. 24, 2018), <https://www.maritime.dot.gov/outreach/data-statistics/us-waterborne-foreign-container-trade-us-customs-ports-2000-%E2%80%932017> [<https://perma.cc/TC4V-WLBH>] (indicating the virtual absence of foreign container-ship activity in the ports of Alaska and Hawaii); see also *Webinar Makes Powerful Case for Jones Act Reform*, GRASS-ROOT INST. HAW. (July 13, 2021), <https://www.grassrootinstitute.org/2021/07/webinar-makes-powerful-case-for-jones-act-reform> [<https://perma.cc/57WU-AXK4>] (statement of Bob Gunter) (“Of course, there, at the time, was no reliable or timely method of shipping directly from Hawaii to Australia, so we had to ship that container to the West Coast and then from the West Coast on to Sydney.”). Indeed, Congress was aware of this fact at the time the Jones Act was enacted. See 58 CONG. REC. 3520 (1919) (statement of Jonah Kūhiō Kalanianaʻole, Haw. Cong. Del.) (noting that a Japanese carrier preferred “mak[ing] more money by cutting out Honolulu and running its principal vessels directly between San Francisco and the Orient”).

the goods at the Port of Honolulu.⁸ Taiwan to Washington, Washington to Hawaii. Thus, U.S. carriers – which can ship directly between U.S. ports – stay in business despite the prohibitively high costs of domestic vessel construction, maintenance, and labor that make them uncompetitive on the global maritime market.⁹

This protectionist statute comes at a steep cost. The cabinet with the \$1,000 shipping fee is no anomaly: every good, from household items to industrial machinery, shipped between U.S. ports is subject to the Jones Act.¹⁰ That is why prices are higher in Alaska, Hawaii, and Puerto Rico than virtually anywhere else in the country.¹¹ And to make matters worse, the Jones Act also costs these places hundreds of millions in lost wages annually.¹²

The Jones Act's unique combination of protectionist trade inefficiency and disproportionate impact on formerly colonized states and territories with significant nonwhite and Indigenous populations – Alaska, Hawaii, and Puerto Rico – has made for unlikely bedfellows calling for its repeal. The conservative-libertarian Cato Institute has called it “a burden America can no longer bear,” while writers for left-leaning publications like *Vox* and the *New York Times* deride

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8. See *Business Council Ponders War Effects on Economy*, PAC. BUS. NEWS (Oct. 4, 2002, 9:27 AM HST), <https://www.bizjournals.com/pacific/stories/2002/09/30/daily90.html> [<https://perma.cc/8LBQ-FUYZ>]; cf. Colin Grabow, Inu Manak & Daniel Ikenson, *The Jones Act: A Burden America Can No Longer Bear*, CATO INST. 1, 15 (June 28, 2018), <https://www.cato.org/sites/cato.org/files/2022-02/policy-analysis-845.pdf> [<https://perma.cc/44W2-LKF8>] (“A non-Jones Act compliant ship steaming from Japan to Los Angeles, for example, will not [] be able to stop in Hawaii on the way there (nor the reverse).”).
 9. JOHN FRITTELLI, CONG. RSCH. SERV., R45725, SHIPPING UNDER THE JONES ACT: LEGISLATIVE AND REGULATORY BACKGROUND 15 (2019) (“The oceangoing Jones Act fleet is almost entirely engaged in domestic trade routes where overland modes are not an option, serving Alaska, Hawaii, and Puerto Rico. In other words, it operates in markets where shippers have little alternative.”).
 10. See 46 U.S.C. § 55102(b) (2018) (applying the Jones Act restrictions to “merchandise”); 19 U.S.C. § 1401(c) (2018) (defining “merchandise” as “goods, wares, and chattels of every description”); Customs & Border Prot., *What Every Member of the Trade Community Should Know About: Coastwise Trade: Merchandise*, DEP’T OF HOMELAND SEC. 1, 3 (Jan. 2009) [hereinafter CBP, *Coastwise Trade: Merchandise*], <https://www.cbp.gov/sites/default/files/documents/CoastwiseTradeMerchandise%20ICP.pdf> [<https://perma.cc/QA4Z-URRC>].
 11. See *infra* Section I.B.
 12. See Grabow et al., *supra* note 8, at 14; *Quantifying the Cost of the Jones Act to Hawaii*, GRASSROOT INST. OF HAW. 3, 10 (July 2020), https://www.grassrootinstitute.org/wp-content/uploads/2020/08/200626_policybrief_jonesact_0731.pdf [<https://perma.cc/3YKZ-37S2>].

the statute as “[p]rotectionism and exploitation at its worst” and an instance of “crony capitalism.”¹³

But powerful special interests continue to thwart efforts to repeal the Jones Act, claiming that its protectionist effects are necessary for the U.S. shipbuilding industry. The affected areas’ lack of congressional clout—in the case of Alaska and Hawaii, due to their small populations, and in the case of Puerto Rico, because it has no voting congressional representation—exacerbates the current legislative stagnation.¹⁴ In 2017, three Republican Senators cosponsored a bill to repeal the Act.¹⁵ In the same year, a group of House Democrats proposed amending the Jones Act to make it easier to waive its requirements following natural disasters.¹⁶ Both efforts failed. And given that President Biden has signaled his “unwavering support” for the Jones Act, a veto will likely meet attempts to repeal it or water it down, at least in the near term.¹⁷

This Note argues that advocates may have been looking in the wrong place for a way to finally sink the Jones Act. The key lies not in Congress or the executive branch but rather in one of the most neglected provisions of the Constitution: the Port Preference Clause.¹⁸ The Port Preference Clause—Article I, Section 9, Clause 6—prohibits Congress from giving preference to one state’s ports over another’s. And that is exactly what the Jones Act does. Washington’s and California’s ports thrive, while Hawaii’s and Alaska’s ports suffer.

In the handful of times the Port Preference Clause has arisen in court, it has been interpreted not to apply to federal statutes with merely incidental effects on states. But the Jones Act’s discriminatory effects are not incidental. As this Note shows, they are intentional and instrumental to accomplishing its purpose.

There are several compelling reasons that a Port Preference Clause challenge to the Jones Act would succeed. First, the circumstances of the Port Preference Clause’s adoption, in which fears of large-state oppression of small states figured prominently, support the view that the Founders intended the Clause to bar statutes precisely like the Jones Act. Second, a more expansive conception of the Port Preference Clause accords with the federal courts’ unwillingness to interpret any provision of the Constitution as mere surplusage. Finally, the Supreme Court

13. Grabow et al., *supra* note 8, at 1 (capitalization altered); Yglesias, *supra* note 6; Nelson A. Denis, Opinion, *The Jones Act: The Law Strangling Puerto Rico*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/hurricane-puerto-rico-jones-act.html> [<https://perma.cc/BG8V-SR88>].

14. See Grennes, *supra* note 3, at 19.

15. Open America’s Waters Act of 2017, S. 1561, 115th Cong. (2017).

16. Humanitarian Disaster Relief Act of 2017, H.R. 3852, 115th Cong. (2017).

17. Proclamation No. 10401, 87 Fed. Reg. 31705 (May 20, 2022).

18. U.S. CONST. art. I, § 9, cl. 6.

has signaled its interest in reining in the scope of the Commerce Clause, and the Port Preference Clause is one of the few constitutional provisions that restrict the Commerce Clause.

Part I of this Note offers a detailed examination of the Jones Act—its key provisions, the context of its passage, and its economic impact. Part II introduces the Port Preference Clause, including an account of its adoption at the Founding and what I argue are the two strands of jurisprudence that have emerged from the few cases that examine the Clause in detail. Part III explains how the Jones Act violates the Port Preference Clause, and Part IV explains why the federal courts will likely receive such a challenge favorably. Part V responds to possible objections.

I. THE JONES ACT: “AN ARCHAIC, PROTECTIONIST BOONDOGGLE”¹⁹

Congress passed the Jones Act as Section 27 of the Merchant Marine Act of 1920.²⁰ The Jones Act prohibits foreign vessels from conducting coastwise trade—that is, transporting cargo from one location in the United States to another.²¹ The relevant provision in its current form reads as follows:

(b) . . . [A] vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel—

- (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
- (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.²²

19. This heading’s quote is taken from Lincicome, *supra* note 4 (capitalization altered).

20. Merchant Marine Act of 1920, ch. 250, § 27, 41 Stat. 988, 999 (codified as amended at 46 U.S.C. §§ 55102, 55116, 55119).

21. *Id.*; see Mar. Admin., *Domestic Shipping*, U.S. DEP’T TRANSP. (Mar. 26, 2022), <https://www.maritime.dot.gov/ports/domestic-shipping/domestic-shipping> [https://perma.cc/QC2D-8JVG].

22. 46 U.S.C. § 55102(b) (2018). Congress has since tweaked the provision, but it does not differ in substance from the 1920 provision, which reads:

Section (b)(2)'s mention of a "coastwise endorsement" refers to certification of a vessel as a domestic one: that is, not only that the vessel was built and is owned by U.S. citizens, but that it is crewed by U.S. citizens as well.²³ Section (b)(2) also permits Congress to exempt specific ships from these requirements, which it does on rare occasions.²⁴ But by and large, the provision prevents vessels that are not U.S.-owned, U.S.-operated, and U.S.-built from shipping goods unless they are traveling directly between a foreign port and a U.S. one.²⁵ The statute is one of the United States's two main laws governing cabotage (domestic trade and passenger transport).²⁶ Many other countries also have cabotage laws that limit who can conduct domestic commerce, but the Jones Act is the most restrictive.²⁷

A. *A Brief History of Cabotage*

The Jones Act did not appear out of nowhere. Protectionist efforts to favor domestic carriers over foreign ones long preceded America's Founding. Britain's seventeenth-century Navigation Acts, a product of the country's mercantilist trade policies, restricted its colonies from engaging in foreign trade and required trading vessels to be British-built.²⁸ The newly independent United States likewise recognized the importance of protectionist laws to nurture its domestic

That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act.

See Merchant Marine Act § 27.

23. See FRITTELLI, *supra* note 9, at 5-7 (elaborating on the crewing, ownership, and build requirements).
24. See *id.* at 10-12; see, e.g., Act of Oct. 7, 1980, Pub. L. No. 96-387, § 1, 94 Stat. 1545, 1545 (exempting six named vessels from the Jones Act).
25. See FRITTELLI, *supra* note 9, at 1, 5-7.
26. See *Cabotage*, BLACK'S LAW DICTIONARY (11th ed. 2019). The other is the Passenger Vessel Services Act of 1886, ch. 421, 24 Stat. 79 (codified as amended at 46 U.S.C. § 55103), which pertains to cabotage of passengers rather than merchandise.
27. *Enabling Trade: Valuing Growth Opportunities*, WORLD ECON. F. 48-49 (2013), https://www3.weforum.org/docs/WEF_SCT_EnablingTrade_Report_2013.pdf [<https://perma.cc/XHB7-T8L5>]. The domestic-build requirement is particularly anomalous. See *id.* at 48; Mar. Admin., *By the Capes Around the World: A Summary of World Cabotage Practices*, U.S. DEP'T OF TRANSP. 4, <https://rosap.ntl.bts.gov/view/dot/15947> [<https://perma.cc/DW76-H42J>].
28. OLIVER M. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* 7-8 (1951).

shipping and shipbuilding industries.²⁹ To this end, the First Congress enacted several laws that granted special privileges to domestic vessels, though none went so far as to afford them a monopoly on coastwise trade.³⁰

Blanket prohibitions on foreign vessels engaging in coastwise trade date to 1817, when Congress passed an early, less-stringent precursor to the Jones Act.³¹ The statute remained in force until World War I began in 1914. Congress temporarily eliminated the cabotage restrictions to address a merchant-vessel shortage that the United States faced: during wartime, many European countries kept their ships from crossing the Atlantic due to submarine attacks and because they were necessary to supplement their countries' navies.³² After World War I ended, Congress determined that stronger cabotage laws were needed for the United States to maintain a domestic merchant marine fleet large enough to avoid becoming dependent on foreign vessels.³³

But instead of appropriating funds toward constructing a merchant marine fleet, Congress sought to accomplish its goal indirectly, as the legislative and statutory history of the Jones Act reveals.³⁴ The Jones Act prohibits foreign vessels from engaging in domestic commerce, thereby subsidizing the regular construction and upkeep of U.S. vessels to do the work that foreign vessels cannot—and in the case of shipping to Alaska and Hawaii, where direct foreign commerce is economically unfeasible, that foreign vessels *will* not.³⁵

B. *The Impact of the Jones Act*

The Jones Act's protectionism has been hugely beneficial to the domestic shipping industry, which lobbies aggressively to keep the Act in place.³⁶ But the protectionist benefits come at the expense of exorbitant shipping costs, imposing

29. Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1429-31 (2019); Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 25 n.90 (2004).

30. *E.g.*, Act of July 4, 1789, ch. 2, § 5, 1 Stat. 24, 27; Act of July 20, 1789, ch. 3, § 1, 1 Stat. 27, 27; Act of Sept. 1, 1789, ch. 11, §§ 1, 5, 1 Stat. 55, 55-56. *See generally* 8 Stat. 690-703 tbl.3 (1846) (listing statutes from 1789 to 1845 relating to imports and tonnage).

31. *See* Navigation Act of 1817, ch. 31, 3 Stat. 351. Notably, the 1817 Act differed in several ways from the Jones Act. *See infra* text accompanying notes 252-254.

32. *See* FRITTELLI, *supra* note 9, at 5; Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. Congress also waived the cabotage restrictions during World War II. FRITTELLI, *supra* note 9, at 12.

33. *See* FRITTELLI, *supra* note 9, at 5.

34. *See infra* Sections III.B-C.

35. *See supra* notes 6-9 and accompanying text.

36. *See* Grabow et al., *supra* note 8, at 9.

a net drag on the economy.³⁷ Even setting aside the circuitous trips of Hawaii-, Alaska-, and Puerto Rico-bound goods, operating a U.S. vessel is roughly three times more expensive than operating a foreign one.³⁸ The added expense is due to domestic vessels' significantly greater labor, maintenance, and regulatory costs.³⁹ It is also why even purely domestic shipping is so expensive: a foreign vessel could make trips between U.S. ports far more cheaply, but only domestic vessels are permitted to do so.⁴⁰ The cost differential when it comes to manufacturing is even more dramatic: building a container ship may be up to five times more expensive in the United States than abroad.⁴¹

The Jones Act's costs are indefensible considering that the Act has not even been effective in accomplishing its ostensible purposes.⁴² The Act was enacted to maintain a sizeable merchant marine and to protect the country's shipping industry.⁴³ Yet the number of Jones Act-qualified large cargo ships in the U.S. merchant fleet has dwindled to fewer than one hundred, with less aggregate carrying capacity than the fleet in 1950.⁴⁴ This small fleet size results in what has been described as a "coastwise monopoly" on domestic shipping, in which a small number of U.S. shipping companies reap massive windfalls at the expense of Hawaiian, Alaskan, and Puerto Rican citizens, who are forced to pay higher prices for everything from food to energy.⁴⁵

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37. See Grennes, *supra* note 3, at 6 ("Nearly all analytical studies of the Jones Act have found that it imposes net costs on the US economy.").
38. See *supra* note 8 and accompanying text; Mar. Admin., *Comparison of U.S. and Foreign-Flag Operating Costs*, U.S. DEP'T OF TRANSP. 4 (Sept. 2011), <https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/resources/3651/comparisonofusandforeignflagoperatingcosts.pdf> [<https://perma.cc/WJ46-XEKY>].
39. See Lincicome, *supra* note 4.
40. See Grabow et al., *supra* note 8, at 2; see, e.g., Stacy Yuen, *Keeping Up with the Jones Act*, HAW. BUS. MAG. (Aug. 5, 2012), <https://www.hawaiiibusiness.com/keeping-up-with-the-jones-act> [<https://perma.cc/27DP-ZQ8M>] ("[B]ecause of the Jones Act, it was cheaper for the [Alaskan] mill to send its product from Alaska to Seattle via Japan than from Alaska to Seattle directly.").
41. FRITTELLI, *supra* note 9, at 4. The U.S. shipbuilding industry is not competitive in the global market: between 2007 and 2017, over 90% of U.S.-built vessels were sold domestically. *Id.*
42. See *id.* at 14-15, 17.
43. *Id.* at 1.
44. *Id.* at 14; Mar. Admin., *Vessel Inventory Report January 2022*, U.S. DEP'T OF TRANSP. 6 (Jan. 16, 2022), https://www.maritime.dot.gov/sites/marad.dot.gov/files/2022-05/DS_USFlag-Fleet_2022_1_16Bundle.pdf [<https://perma.cc/L5NN-SQDG>].
45. CBP, *Coastwise Trade: Merchandise*, *supra* note 10, at 2; see *infra* text accompanying notes 54-70.

Further problems with the Jones Act abound. For example, it has significantly hampered environmental initiatives such as offshore wind projects. Creating an offshore wind farm requires wind-turbine installation vessels (WTIVs): massive, specialized ships engineered to set up turbines in the middle of the ocean. Since there are no domestic WTIVs, U.S. wind developers must either import the turbine equipment from foreign countries or employ domestic vessels to transport the equipment to the site, then use foreign WTIVs to install it at far greater cost.⁴⁶

The Jones Act has also impaired vessel safety. The domestic ships that constitute the U.S. merchant marine fleet are relatively old and in poor condition.⁴⁷ After the domestic cargo ship *El Faro* sank in a hurricane in 2015, Congress launched an inquiry into its sinking.⁴⁸ The ship was forty years old—more than double the lifespan of a typical ship in the global fleet.⁴⁹ At a congressional hearing, a Coast Guard official pointed out that the *El Faro*'s sinking is part of a larger problem with the U.S. merchant marine fleet, which is “almost three times older than the average fleet sailing around the world today.”⁵⁰

The Jones Act played a substantial role. The high cost of domestic-vessel construction drives U.S. carriers to continue using old vessels instead of replacing them with expensive new ones.⁵¹ It has also led to the popularity of cheaper vessels such as articulated tug barges (ATBs).⁵² An ATB essentially consists of a tugboat welded to the front half of a barge. If that sounds unsafe, that's because it is: ATBs have a tougher time handling storms, are less reliable, and must sail close to the coast, leading to a higher risk of running aground and the potential for greater damage to shorelines in the event of oil or chemical spills.⁵³

46. See Kevin Ashe, Brendan Connors, Mark Kalpin, Jacob Lawler, Gerald Morrissey III & Marne Sussman, *Biden Administration's Focus on Offshore Wind Energy: DOI's Plan and Other Recent Developments*, JD SUPRA (Dec. 14, 2021), <https://www.jdsupra.com/legalnews/biden-administration-s-focus-on-4080995> [<https://perma.cc/6H8Z-NCXH>]; FRITTELLI, *supra* note 9, at 9, 19; Grabow et al., *supra* note 8, at 10-12. The Jones Act imposes other environmental costs too. See Grabow et al., *supra* note 8, at 2 (“[A]rtificially inflated waterborne shipping rates increase demand for alternative forms of transportation, including trucking, rail, and pipeline services [This] generates greater environmental costs.”).

47. FRITTELLI, *supra* note 9, at 16-17; Grabow et al., *supra* note 8, at 8.

48. FRITTELLI, *supra* note 9, at 17.

49. *Id.* at 16-17.

50. *Id.* at 17.

51. Grabow et al., *supra* note 8, at 16.

52. FRITTELLI, *supra* note 9, at 16.

53. *Id.*

But the Jones Act's biggest impact is on prices — particularly those in Hawaii, Puerto Rico, and Alaska.⁵⁴ Thanks in large part to the Jones Act, Hawaii's cost of living is higher than any other state's.⁵⁵ Hawaii's energy prices, for instance, are more than two-and-a-half times the national average.⁵⁶

The Jones Act imposes similar effects on Puerto Rico, where the prices of energy and consumer goods are significantly greater than they would be if foreign vessels were not prohibited from coastwise trade.⁵⁷ The cost differential cannot be explained by Puerto Rico's island status, given that the cost of shipping goods from the contiguous United States to the Virgin Islands, which are exempt from the Jones Act, is half that of shipping goods to Puerto Rico.⁵⁸ The Act has had ruinous consequences for both the local economy and the territory's government, which is drowning in debt.⁵⁹ It has also sabotaged Puerto Rico's ports: the cost of shipping from the East Coast to Puerto Rico is nearly double the cost of shipping from the East Coast to Jamaica, even though Puerto Rico's population and economy are larger than Jamaica's.⁶⁰ In fact, the Port of Kingston, Jamaica recently overtook the Port of San Juan, Puerto Rico in container volume, while San Juan's container volume actually shrank between 2000 and 2010.⁶¹

54. See Lincicome, *supra* note 4; Grabow et al., *supra* note 8, at 15.

55. See Patrick Holland, *Help Puerto Rico by Repealing the Jones Act*, ECONOMICS21 (July 15, 2015), <https://economics21.org/html/help-puerto-rico-repealing-jones-act-1403.html> [<https://perma.cc/DQS4-T6B7>].

56. *Id.*

57. *Id.*; Denis, *supra* note 13.

58. Holland, *supra* note 55; cf. Anne O. Krueger, Ranjit Teja & Andrew Wolfe, *Puerto Rico – A Way Forward*, GOV'T DEV. BANK FOR P.R. 8 (June 29, 2015), <http://www.gdb-pur.com/documents/PuertoRicoAWayForward.pdf> [<https://perma.cc/F4WH-2T93>] (“All islands . . . suffer from high transportation costs. But Puerto Rico does so disproportionately, with import costs at least twice as high as in neighboring islands on account of the Jones Act . . .”).

59. See Joshua Sharp, Opinion, *Time to Repeal the Jones Act*, HILL (Oct. 2, 2015, 7:30 AM ET), <https://thehill.com/blogs/congress-blog/economy-budget/255645-time-to-repeal-the-jones-act> [<https://perma.cc/Y35D-XLRF>]; Timothy Gardner, *McCain Introduces Bill to Kill Puerto Rico Shipping Restrictions*, REUTERS (Sept. 28, 2017, 3:48 PM), <https://www.reuters.com/article/us-usa-puertorico-shipping-mccain/mccain-introduces-bill-to-kill-puerto-rico-shipping-restrictions-idUSKCN1C32ZL> [<https://perma.cc/G9QX-MNV3>].

60. *Report on the Competitiveness of Puerto Rico's Economy*, FED. RSRV. BANK OF N.Y. 13 (June 29, 2012), <https://www.newyorkfed.org/medialibrary/media/regional/PuertoRico/report.pdf> [<https://perma.cc/HSS2-C9LF>]; see also *id.* at 22 (“Jones Act restrictions may put the Port of Ponce at a competitive disadvantage in its potential role as a major trans-shipment port.”).

61. *Id.* at 13; cf. Colin Grabow, *Examining the Jones Act's Harm to U.S. Ports*, CATO INST.: CATO AT LIBERTY (Apr. 7, 2021, 10:27 AM), <https://www.cato.org/blog/transshipment-of-overlooked-cost-jones-act> [<https://perma.cc/W2PM-E395>] (“While neighboring Jamaica and the Dominican Republic have emerged as major transshipment hubs . . . Puerto Rico isn't even a part

Alaska has the sixth-highest cost of living among U.S. states, and its food prices are second-highest in the country after Hawaii.⁶² These high costs are directly traceable to the Jones Act.⁶³ The Act drives up not just the cost of imports, but exports as well—a serious problem given the Alaskan economy’s reliance on petroleum exports.⁶⁴ Shipping oil from Alaska to states in the Gulf Coast is three times more expensive than shipping oil to the Jones Act-exempt U.S. Virgin Islands—even when the latter option involves traveling all the way around South America’s Cape Horn instead of through the Panama Canal, a route that adds almost two months to the journey.⁶⁵

The extraordinary cabotage restrictions imposed by the Jones Act have led to other absurd outcomes. For example, the Jones Act exempts goods that travel in part over Canadian railways, so Alaskan fisheries began using a 100-foot-long railway created specifically to take advantage of this loophole.⁶⁶ The fisheries shipped their goods by foreign vessel from Alaska to New Brunswick, Canada, then loaded and unloaded the goods onto the miniature railway for a one-minute

of the transshipment conversation. The Jones Act figures prominently here.”). The Port of San Juan is not the only port that has been hurt by the Jones Act. Between 1997 and 2017, waterborne foreign trade in major U.S. ports grew by 136%, but major ports in Hawaii and Puerto Rico saw increases of only 46% and 15%, respectively. And waterborne foreign trade in major Alaskan ports during this period actually decreased by 66%. See Mar. Admin., *U.S. Waterborne Foreign Trade by U.S. Customs Ports 1997-1999*, U.S. DEP’T TRANSP. tbl.1 (Oct. 24, 2018), <https://www.maritime.dot.gov/outreach/data-statistics/us-waterborne-foreign-container-trade-us-customs-ports-1997-%E2%80%931999> [<https://perma.cc/NTF9-4LQW>]; Mar. Admin., *supra* note 7, at tbl.1.

62. Scott Cohn, *These Are America’s 10 Most Expensive States to Live in as Inflation Keeps Rising*, CNBC (July 13, 2022, 10:42 AM EDT), <https://www.cnbc.com/2022/07/13/these-are-americas-10-most-expensive-states-to-live-in.html> [<https://perma.cc/T77X-3R8N>]; *Cost of Living Data Series*, MO. ECON. RSCH. & INFO. CTR. (2022), <https://meric.mo.gov/data/cost-living-data-series> [<https://perma.cc/J42J-P3YX>].
63. See Colin Grabow, *Opinion, Alaska Lawmakers Must Get Serious About Jones Act Repeal*, HILL (Oct. 10, 2018, 8:10 AM ET), <https://thehill.com/blogs/congress-blog/politics/410659-alaska-lawmakers-must-get-serious-about-jones-act-repeal> [<https://perma.cc/VM6A-NXQU>]; Jonathan Helton, *Alaska: The Jones Act’s Original Victim*, GRASSROOT INST. OF HAW. 3 (Nov. 2021), <https://www.grassrootinstitute.org/wp-content/uploads/2021/11/Alaska-The-Jones-Acts-Original-Victim.pdf> [<https://perma.cc/6GJJ-Z5KB>].
64. *Alaska*, OBSERVATORY ECON. COMPLEXITY, https://oec.world/en/profile/subnational_usa_state/ak [<https://perma.cc/79D8-BB69>]; *State Benefits of Trade: Alaska*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/map/state-benefits/ak> [<https://perma.cc/428J-GX2V>].
65. U.S. GOV’T ACCOUNTABILITY OFF., GAO/RCED-99-191, *ALASKAN NORTH SLOPE OIL: LIMITED EFFECTS OF LIMITING EXPORT BAN ON OIL AND SHIPPING INDUSTRIES AND CONSUMERS* 23-24, 24 tbl.2.1 (July 1999), <https://www.gao.gov/assets/rced-99-191.pdf> [<https://perma.cc/LP7R-WR8P>].
66. *Kloosterboer Int’l Forwarding LLC v. United States*, No. 21-cv-00198, 2022 WL 1663505, at *1-2 (D. Alaska May 25, 2022) (discussing the exception, known as the “Third Proviso,” which is codified at 46 U.S.C. § 55116 (2018)).

journey, then drove them from New Brunswick to the East Coast.⁶⁷ And Hawaiian cattle ranchers, for their part, have been forced to ship their cows via air to domestic markets due to prohibitive domestic-vessel rates.⁶⁸

The mental images of a tiny “train to nowhere” or cows traveling on airplanes might be amusing. But evading the Jones Act is no laughing matter. For example, the bite-sized railway did not satisfy U.S. Customs and Border Protection (CBP), which fined the fish-shipping companies over \$300 million for Jones Act violations.⁶⁹ Though the penalties are big, the burdens that give rise to these attempts to evade the Jones Act are even bigger. Economic analyses of the Jones Act have estimated its annual damage to the economies of Hawaii, Alaska, and Puerto Rico to be in the billions.⁷⁰

Given the destructive effects of the Jones Act, individuals and groups of diverse political leanings have called for its repeal.⁷¹ Their pleas have not gone unheard: members of Congress regularly propose legislation to repeal or amend the Jones Act, most recently in May 2021 when Senator Mike Lee and Representative Tom McClintock sponsored the Open America’s Water Act.⁷²

But every effort so far has failed. Congressional gridlock and the powerful special interests in favor of the Jones Act mean that relief is unlikely to come from Congress. Though few in number, the special-interest groups that support the Jones Act, such as the domestic shipbuilding industry, are well organized and lobby hard for its continuation.⁷³ The late Senator John McCain, a longtime opponent of the Jones Act who introduced multiple unsuccessful bills to repeal the statute, once lamented, “I would like to see the Jones Act repealed, but I don’t think that’s likely. I don’t think I would get 20 votes if I were to bring it to the

67. *Id.* The matter is the subject of ongoing litigation. To view footage of the railway in action, see Paul Benecki, *Bayside Canadian Railway, Kloosterboer Terminal*, 2015, YOUTUBE (Sept. 15, 2021), <https://www.youtube.com/watch?v=w5Ov7MzcrRo> [<https://perma.cc/US6Z-K5AB>].

68. Planet Money, *Mr. Jones’ Act*, NPR, at 07:52 (Sept. 27, 2017, 6:44 PM ET), <https://www.npr.org/transcripts/554046425> [<https://perma.cc/UJ4S-9NN4>].

69. *Kloosterboer*, 2022 WL 1663505, at *2.

70. See Denis, *supra* note 13.

71. *E.g., id.* (*New York Times*); Grabow et al., *supra* note 8, at 3 (Cato Institute); Holland, *supra* note 55 (Manhattan Institute); Yglesias, *supra* note 6 (*Vox*); Patrick Tyrrell, *Permanent Repeal of the Jones Act Would Be a Winning Response to COVID-19*, HERITAGE FOUND. (Apr. 7, 2020), <https://www.heritage.org/trade/commentary/permanent-repeal-the-jones-act-would-be-winning-response-covid-19> [<https://perma.cc/Y6EA-EB3N>] (Heritage Foundation).

72. Open America’s Water Act, S. 1646, 117th Cong. (2021); Open America’s Water Act, H.R. 3205, 117th Cong. (2021).

73. See Grabow et al., *supra* note 8, at 2; Holland, *supra* note 55.

floor.”⁷⁴ And no President since Johnson has called for its repeal; indeed, President Biden recently affirmed his strong support for the statute.⁷⁵

Serious barriers to relief in two of the three branches of the federal government make a challenge to the Jones Act in the federal courts more attractive. But as Justice Gorsuch noted in *Epic Systems Corp. v. Lewis*, the Supreme Court “is not free to substitute its preferred economic policies for those chosen by the people’s representatives.”⁷⁶ The judiciary can’t invalidate the Jones Act just because it is bad policy. But this Note argues that the Jones Act is more than bad policy. It is also unconstitutional.

II. THE CONSTITUTION’S PORT PREFERENCE CLAUSE

Article I, Section 9, Clause 6 of the Constitution restricts Congress’s commerce power over domestic ports.⁷⁷ It states: “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.” The provision is rarely written about; the most recent scholarship addressing it in any detail, written in 2005, dismisses it as a “largely

74. R.G. Edmonson, *Domestic Shipping Faces Choppy Waters*, J. COM. (May 2, 2011, 10:31 AM EDT), https://www.joc.com/maritime-news/domestic-shipping-faces-choppy-waters_20110502.html [<https://perma.cc/7S94-6FTL>]; see also J. Michael Cavanaugh, *Sen. McCain’s New Jones Act Repeal Effort Not Likely to Progress*, HOLLAND & KNIGHT LLP (Aug. 30, 2017), <https://www.hklaw.com/en/insights/publications/2017/08/sen-mccains-new-jones-act-repeal-effort-not-likely> [<https://perma.cc/PVB4-WXR2>] (“[The Open America’s Waters Act of 2017] is Sen. McCain’s fourth effort to eliminate or sharply pare back Jones Act cabotage restrictions in the past eight years.”).

75. Proclamation No. 10401, *supra* note 17; see Nick Blenkey, *Biden Executive Order Reaffirms Jones Act Support*, MARINELOG (Jan. 26, 2021), <https://www.marinelog.com/news/biden-executive-order-reaffirms-jones-act-support> [<https://perma.cc/VG2D-LWWE>]; FRITTELLI, *supra* note 9, at 14.

76. 138 S. Ct. 1612, 1632 (2018).

77. *United States v. Ptasynski*, 462 U.S. 74, 80 & n.10 (1983); see 3 WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 35:19 (3d ed. 2021). The Clause applies to Congress but not the states. See *infra* note 159 and accompanying text. In contrast, the dormant Commerce Clause operates as the primary restriction on the states’ power to pass discriminatory port legislation. See *infra* notes 179–182 and accompanying text.

forgotten” provision.⁷⁸ And it is rarely litigated: fewer than one hundred reported cases in the history of the republic have mentioned the Clause at all, and only a handful have given it more than a passing mention.⁷⁹

This Part will first recount the adoption of the Port Preference Clause at the Philadelphia Convention. Then, it discusses two strands of jurisprudence that have emerged since its adoption: one interpreting the Clause broadly, the other narrowly. Finally, it argues that the Clause is not, and should not be considered, a dead letter. In fact, if a Port Preference Clause challenge to the Jones Act comes before the federal courts, they are likely to favor the Clause’s broad interpretation.

Before delving into the Clause’s history, a threshold note on terminology is necessary. Somewhat confusingly, the term “Port Preference Clause” is sometimes used to refer to Clause 6’s first subclause (“No Preference shall be given”), while its second subclause (“[N]or shall Vessels bound to”) is termed the “Enter and Clear Clause.”⁸⁰ Others group these two subclauses together as the “Port Preference Clause.”⁸¹ In the interest of precision, this Note uses “Port Preference Clause” to refer to the first subclause and “Enter and Clear Clause” to refer to the second.

A. *The Port Preference Clause at the Founding*

1. *Adoption of the Port Preference Clause*

In the late summer of 1787, the Philadelphia Convention was coming to a close. Delegates had successfully resolved the major structural questions that crafting a new constitution presented: the Connecticut Compromise apportioned congressional representation among large and small states, the Supremacy Clause enshrined the principle that federal law trumps state law, and delegates agreed on life tenure for federal judges.⁸²

78. See Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 261 (2005).

79. See, e.g., *Pac. Ref. Co. v. DOE*, 455 F. Supp. 1091, 1093 (D. Del. 1978) (“Few reported cases have involved the Port Preference Clause.”); *Kansas v. United States*, 797 F. Supp. 1042, 1048 (D.D.C. 1992), *aff’d*, 16 F.3d 436 (D.C. Cir. 1994) (“The Clause has been interpreted only rarely over the last two hundred years . . .”).

80. See, e.g., *Amoco Oil Co. v. United States*, 23 Ct. Int’l Trade 613, 620-21 (1999), *aff’d*, 234 F.3d 1374 (Fed. Cir. 2000).

81. See, e.g., *Kansas*, 16 F.3d at 439; *Thomson Multimedia Inc. v. United States*, 26 Ct. Int’l Trade 958, 965 (2002), *aff’d*, 340 F.3d 1355 (Fed. Cir. 2003).

82. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22, 38, 129-33 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

But to the great concern of the Maryland delegation, one matter remained unaddressed. On August 25, Maryland delegates Luther Martin and Daniel Carroll rose to express “their apprehensions, and the probable apprehensions of their constituents” that Congress could pass legislation favoring the ports of particular states over others.⁸³ Specifically, Martin and Carroll worried that the populous and powerful state of Virginia would enact legislation requiring Baltimore-bound ships to enter and clear – that is, dock and pay duties – in the port of Norfolk, Virginia.⁸⁴

To nip this threat in the bud, Martin and Carroll proposed that Congress may not require vessels

to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessels on entering or clearing out or paying duties or imposts in one state in preference to another.⁸⁵

This proposal, along with a similar proposal for uniformity in taxation and commercial regulation, were “considered of such vital importance that they [were] referred to a Special Committee of one from each State, elected by ballot.”⁸⁶ The Special Committee proposed the following provision on August 28:

[A] Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, [B] or oblige vessels bound to or from any State to enter clear or pay duties in another [C] and all tonnage, duties, imposts & excises laid by the Legislature shall be uniform throughout the U.S.⁸⁷

Clause *A* became the Port Preference Clause. Clause *B* became the Enter and Clear Clause. Clause *C* was separated out as a freestanding provision and placed in the section before clauses *A* and *B*, where it became known as the Uniformity Clause.⁸⁸

After some minor phrasing modifications by the Committee of Detail, the Port Preference Clause and the Enter and Clear Clause were finalized as we know them today: “No Preference shall be given by any Regulation of Commerce or

83. *Id.* at 417.

84. *Id.* at 417-18.

85. *Id.*

86. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 587 (1928).

87. 2 FARRAND’S RECORDS, *supra* note 82, at 437 (brackets added and removed).

88. Colby, *supra* note 78, at 281-82; see U.S. CONST. art. I, § 8, cl. 1.

Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”⁸⁹

2. *Founding Era Fears of Large-State Domination*

As explained below, the Port Preference Clause admits of two meanings: one broad, one narrow.⁹⁰ William Blackstone wrote that when a law has multiple possible interpretations, the best way to discover its “true meaning” is to consider the mischief it sought to remedy.⁹¹ Some have criticized the “mischief rule” as an extratextual tool of interpretation, but it can be highly useful even for committed textualists.⁹² Indeed, the Supreme Court has employed the mischief rule often in recent years, albeit without invoking it by name, when called upon to interpret an ambiguous text.⁹³

Here, the mischief that the Framers sought to remedy with the Port Preference Clause is clear even if the text is not. The records of the Philadelphia Convention indicate that small states’ fear of large-state domination permeated the discussions of Congress’s commerce power and motivated the enactment of the Port Preference Clause in particular.

When Maryland delegates initially raised concerns about port discrimination, they were met with a rejoinder from Nathaniel Gorham, a delegate from the relatively high-population state of Massachusetts. As James Madison recorded in his notes on the Convention proceedings, Gorham “thought such a precaution unnecessary; & that the revenue might be defeated, if vessels could run up long rivers, through the jurisdiction of different States without being required to enter, with the opportunity of landing & selling their cargoes by the way.”⁹⁴

Other large-state delegates concurred. Madison himself, representing the populous Commonwealth of Virginia,⁹⁵ thought that prohibiting Congress from centralizing the collection of duties in a single port would be “inconvenient, as

89. 2 FARRAND’S RECORDS, *supra* note 82, at 657; BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 11.04 (Brannon P. Denning ed., 2d ed. 2022).

90. See *infra* Section II.B.

91. 1 WILLIAM BLACKSTONE, COMMENTARIES *61; see also William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1003-05 (2001) (explaining the origins of the mischief rule).

92. See Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1013 (2021).

93. See Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 538, 573-77 (2019).

94. 2 FARRAND’S RECORDS, *supra* note 82, at 418.

95. See AKHIL REED AMAR, THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC 197 (2015) (“We may profitably think of Virginia as the Texas of the Founding—an enormous state by population and landmass . . .”).

in the River Delaware, if a vessel cannot be required to make entry below the jurisdiction of Pennsylvania.”⁹⁶ Gorham agreed, suggesting that “it might be very proper to oblige vessels, for example, to stop at Norfolk on account of the better collection of the revenue.”⁹⁷

But centralizing the collection of duties in a single port, particularly a port in a high-population state like Virginia, is precisely what the small-state delegates feared. One month earlier, Virginia delegate Edmond Randolph had published a “Suggestion for Conciliating the Small States” whose leading proposition was to give each state an equal—not proportional—congressional vote in “granting exclusive rights to Ports.”⁹⁸ Though Randolph’s proposal was never adopted, it shows the extent to which large states recognized legitimate small-state fears that Congress would disfavor their ports. Another example: Connecticut delegate Oliver Ellsworth argued at the Convention that equal representation in the Senate was necessary to avoid “combinations” between the large states.⁹⁹ If Congress were to designate three or four favored ports, Ellsworth warned, the ports chosen by a fully proportionate Congress would be the large-state ports of Boston, Philadelphia, and “some port in Chesapeak[e]” Bay.¹⁰⁰

It should therefore come as no surprise that Carroll was “anxious” that the Convention agree to the Port Preference Clause, and that he informed the other delegates that this was a “tender point” in his home state of Maryland.¹⁰¹ The delegates adopted the Port Preference Clause without objection, and the Enter and Clear Clause by a vote of at least seven to three.¹⁰²

Founding Era state-trade policy provides further evidence that the Port Preference Clause aimed to prevent large states from dominating small ones. In the mid-1780s, large states that controlled major waterways—New York, Massachusetts, and Pennsylvania—enacted duties on shipments from smaller states, such

96. 2 FARRAND’S RECORDS, *supra* note 82, at 480.

97. *Id.* at 420.

98. 3 *id.* at 55.

99. 1 *id.* at 484.

100. *Id.* at 484-85.

101. 2 *id.* at 481. Thomas Jenifer agreed with his fellow Maryland delegate, “urg[ing] the necessity of the clause in the same point of view.” *Id.*

102. The records of the Convention are ambiguous regarding whether the Massachusetts delegate voted yea or nay. Madison recorded the delegate as a “yea” vote, whereas James McHenry recorded him as a “nay.” See *id.* at 480, 481 n.15.

as New Jersey and Connecticut.¹⁰³ The fledgling United States, lacking any powers under the Articles of Confederation to establish uniform trade policy, could not stop them from doing so – surely to the great frustration of the small-state victims.¹⁰⁴ James Madison wrote that “New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms.”¹⁰⁵ Decades later, Justice Joseph Story speculated that “restraints, preferences, and inequalities” enacted by states under the Articles of Confederation generated “very serious irritations and feuds” between states and played a major role in the eventual replacement of the Articles of Confederation with the Constitution.¹⁰⁶

B. *The Port Preference Clause Since the Founding*

Unlike the broad phrasing of other Article I provisions such as the Commerce Clause (empowering Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”)¹⁰⁷ or the Taxing and Spending Clause (empowering Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”),¹⁰⁸ the Port Preference Clause is extremely specific. Given its narrow subject matter, there are few cases interpreting it.¹⁰⁹

Another cause of the Clause’s desuetude is that several courts, parsing ambiguous language from the first Supreme Court case to analyze the Clause in depth, have given an extremely limited construction to the Clause – what this Note calls the *narrow interpretation*. The plain language of the provision prohibits

103. DAVID HUTCHISON, *THE FOUNDATIONS OF THE CONSTITUTION* 145 (1928); AKHIL REED AMAR, *THE WORDS THAT MADE US* 174, 299 (2021). Rhode Island obtained duties from its neighboring states while being discriminated against by New York in turn. See HUTCHINSON, *supra*, at 145; AMAR, *supra*, at 191.

104. HUTCHISON, *supra* note 103; see 5 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS* 119-20 (Jonathan Elliot ed., 1836) [hereinafter *ELLIOT’S DEBATES*]. For a thorough account of trade-uniformity concerns surrounding the adoption of the Constitution, see Colby, *supra* note 78, at 266-84.

105. *ELLIOT’S DEBATES*, *supra* note 104, at 112.

106. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1014 (Boston, Hilliard, Gray & Co. 1833); see Colby, *supra* note 78, at 253. For courts and other commentators noting that the purpose of the Port Preference Clause was to prevent large-state domination, see *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982); *Smith v. Turner*, 48 U.S. (7 How.) 283, 414 (1849) (opinion of Wayne, J.); and Philip Joseph Deutch, Note, *The Uniformity Clause and Puerto Rican Statehood*, 43 *STAN. L. REV.* 685, 717 (1991).

107. U.S. CONST. art. I, § 8, cl. 3.

108. *Id.* art. I, § 8, cl. 1.

109. See *supra* note 79 and accompanying text.

Congress from enacting legislation that advantages the ports of one state over those of another. But some lower courts have held that in the absence of explicit discrimination – for instance, a statute that says “Virginia’s ports shall be favored over those of Maryland” – plaintiffs cannot prevail under the Clause, even if the law intentionally discriminates between ports.¹¹⁰

This Section argues that the narrow interpretation is a mistake. It results from a combination of misinterpretation of early Supreme Court precedent and judicial inertia, and it renders the Port Preference Clause a dead letter. Instead, this Section advances a *broad interpretation* of the Port Preference Clause, which recognizes that facially neutral statutes can violate the Clause if enacted with the *intent* to discriminate in favor of one state’s ports over those of another.

1. Wheeling: *The Port Preference Clause’s Leading Case*

The leading case interpreting the Port Preference Clause arose from an interstate dispute about a bridge over a section of the Ohio River marking the border between Pennsylvania and Virginia.¹¹¹ In 1854, a storm destroyed the old bridge, but the planned replacement was so low that Pennsylvania feared it would keep steamboats from traveling upriver to Pittsburgh. Pennsylvania obtained an injunction against the bridge’s construction, but Congress responded by declaring the bridge a lawful structure.¹¹² In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, Pennsylvania sought to have the congressional enactment declared unconstitutional, relying in part on the claim that the low bridge constituted a forbidden preference for Wheeling, Virginia over Pittsburgh, Pennsylvania.¹¹³

The Supreme Court ruled for the bridge company. The opinion rejected Pennsylvania’s Port Preference Clause challenge, but its language is less than straightforward. In fact, there are two distinct threads running through the Court’s treatment of the Port Preference Clause: one – the narrow interpretation – that all but renders the Port Preference Clause a nullity; another – the broad interpretation – that more closely tracks the Clause’s original purpose.

110. See *infra* Section II.B.2.

111. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); see also *Kansas v. United States*, 797 F. Supp. 1042, 1049–50 (D.D.C. 1992), *aff’d*, 16 F.3d 436 (D.C. Cir. 1994) (describing *Wheeling* as “the leading case on the Port Preference Clause”); *City of Houston*, 679 F.2d at 1196 (“Decisions interpreting the clause are so few and far between that we must h[e]arken back to 1856 [sic] . . . to find the ‘authoritative’ case.”).

112. See Act of Aug. 31, 1852, ch. 111, § 6, 10 Stat. 110, 112 (1852); *Wheeling*, 59 U.S. at 426. For a discussion of the legislative history surrounding this congressional enactment, see Louis Fisher, *Correcting Judicial Errors: Lessons from History*, 72 ME. L. REV. 1, 14 (2020).

113. *Wheeling*, 59 U.S. at 433. Wheeling is now part of West Virginia, which was not a state at the time of the Court’s decision.

Both the narrow and broad interpretations share a common baseline: incidental discrimination, standing alone, does not suffice to invalidate a federal law under the Port Preference Clause. Justice Nelson’s majority opinion says so directly, pointing out the existence of many federal statutes that “may incidentally operate to the prejudice of the ports in a neighboring State” but “have never been supposed to conflict with” the Port Preference Clause.¹¹⁴ Congress’s appropriation of funds for a lighthouse may have the incidental effect of favoring the port in which it is constructed,¹¹⁵ but if this were enough to invalidate the statute, the Framers’ “principal object” in establishing the commerce power “would be sacrificed to the subordinate consequences resulting from its exercise.”¹¹⁶

Justice Nelson held that the Port Preference Clause prohibits Congress from granting direct, explicit privileges to the “ports of one State over another’s,” but it does not prohibit any “incidental advantages that might possibly result” from other commerce-related legislation.¹¹⁷ As the following Sections explain, this is where the narrow and broad interpretations begin to diverge.

2. *The Narrow Approach to the Port Preference Clause*

The above language from *Wheeling* has formed the nucleus of the narrow interpretation of the Port Preference Clause. Courts have latched on to the passage to argue that *only* explicit legislative discrimination can give rise to a Port Preference violation.

The Seventh Circuit took such an approach in *City of Milwaukee v. Yeutter*.¹¹⁸ In *Yeutter*, Milwaukee challenged the federal Food for Peace program on Port Preference Clause grounds, contending that the statute’s cost-calculation methods made Great Lakes ports less financially viable for grain shipments.¹¹⁹ Judge Easterbrook made short work of this argument: “Disparate consequences of neutral rules,” he wrote, “do not violate the Port Preference Clause.”¹²⁰ After citing *Wheeling*’s “incidental advantages” language mentioned above, Easterbrook went further, concluding that “*only explicit discrimination* violates the Port Preference Clause, and this dooms Milwaukee’s argument.”¹²¹

114. *Id.*

115. *Id.* at 433-34.

116. *Id.* at 434.

117. *Id.* at 435.

118. 877 F.2d 540 (7th Cir. 1989).

119. *Id.* at 541-43.

120. *Id.* at 545.

121. *Id.* at 546 (emphasis added).

A few other courts have adopted the narrow interpretation to reject Port Preference challenges in the rare circumstances when they arise by seizing on *Yeutter*'s gloss of *Wheeling*.¹²² For example, in rejecting a claim that a harbor-maintenance tax exemption for certain states and regions violated the Port Preference Clause, the Court of International Trade wrote that “[a] violation of the Port Preference Clause requires that an Act explicitly discriminate against the ports of a particular state.”¹²³ But the court, citing *Yeutter*, said nothing about the possibility of intentional discrimination accomplished through facially neutral means.

Given the unlikelihood that Congress would enact an explicit preference for the ports of one state over those of another, this approach effectively renders the Clause, as one narrow-interpretation opinion put it, “almost a historical nullity.”¹²⁴ It would also doom any prospective challenge to the Jones Act, which does not explicitly discriminate against any state’s ports.¹²⁵

3. *The Broad Approach to the Port Preference Clause*

But the Port Preference Clause cannot be so easily cast away. The language in *Wheeling* admits of an alternative interpretation — one that hews closer to the holding in *Wheeling*, the Framers’ intentions, and the plain language of the Port Preference Clause. As this Section explains, the broad approach to the Port Preference Clause recognizes that facially neutral statutes can violate the Port Preference Clause if enacted with the intent to discriminate in favor of one state’s ports over those of another.

Before investigating the broad approach, a brief word on facial neutrality and discriminatory intent is in order. The Fourteenth Amendment prohibits the government from denying “any person within its jurisdiction the equal protection of the laws.”¹²⁶ When addressing claims brought under the Fourteenth Amendment’s Equal Protection Clause, courts generally uphold facially neutral laws — those that do not expressly discriminate against a protected class — under a lenient rational basis standard of review, even if the laws have a disparate impact on

122. *E.g.*, *Amoco Oil Co. v. United States*, 23 Ct. Int’l Trade 613, 620-21 (1999), *aff’d*, 234 F.3d 1374 (Fed. Cir. 2000).

123. *Id.* at 620.

124. *Kansas v. United States*, 797 F. Supp. 1042, 1049 (D.D.C. 1992), *aff’d*, 16 F.3d 436 (D.C. Cir. 1994); see Alan L. Blume, *A Proposal for Funding Port Dredging to Improve the Efficiency of the Nation’s Marine Transportation System*, 33 J. MAR. L. & COM. 37, 51 (2002).

125. At least, not anymore. See *infra* notes 235-236 and accompanying text.

126. U.S. CONST. amend. XIV, § 1; see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (interpreting the Fifth Amendment’s Due Process Clause to require the federal government, not just state governments, to adhere to the Equal Protection Clause).

the protected class.¹²⁷ However, courts subject facially neutral laws enacted with discriminatory intent to greater scrutiny.¹²⁸ Though the Port Preference Clause is a distinct constitutional provision from the Equal Protection Clause, they share a common prohibition against discrimination broadly construed. Indeed, courts analyzing Port Preference Clause challenges often reference or borrow language from equal-protection jurisprudence.¹²⁹ This Note does so as well. However, a full comparison of the parallels between the Port Preference Clause and the Equal Protection Clause – parallels made all the more compelling given that the Jones Act’s biggest victims are those who are, almost by definition, discrete and insular minorities¹³⁰ – is beyond the scope of this Note, as is an investigation of what standard of scrutiny would likely apply under an equal-protection-like framework for analyzing Port Preference Clause challenges.

a. Evidence from the Founding

Recall the circumstances of the Port Preference Clause’s passage. The small states feared domination by the large states; to counter this, they exacted uniformity restraints on Congress’s commerce power.¹³¹ In the same way that the Taxing and Spending Clause requires that “all Duties, Imposts and Excises shall be uniform throughout the United States” – that is, Congress cannot enact a tax where the rates are higher in Maryland than in Virginia – the Port Preference

127. 16B AM. JUR. 2D *Constitutional Law* § 882, Westlaw (database updated Aug. 2022); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3177-78 (2015).

128. 16B AM. JUR. 2D *Constitutional Law*, *supra* note 127, § 882; 16B C.J.S. *Constitutional Law* § 1298, Westlaw (database updated Sept. 2022).

129. *See, e.g., Kansas*, 797 F. Supp. at 1050 (“[F]acially neutral statutes that disparately affect states do not violate the [Port Preference C]lause.”); *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982) (“The Port Preference Clause gave small states protection against deliberate discrimination against them by other, more powerful states. It does not, we believe, cover the situation before us, where the FAA has adopted what another realm of constitutional law would term a facially neutral rule.”); *Thomson Multimedia Inc. v. United States*, 26 Ct. Int’l Trade 958, 966 (2002), *aff’d*, 340 F.3d 1355 (Fed. Cir. 2003) (“[T]he Supreme Court interpreted the [Port Preference C]lause narrowly, holding that direct discrimination, and not disparate effects, violates the Port Preference Clause.” (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855))); *see also* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1898 (2021) (Alito, J., concurring in the judgment) (“Other constitutional provisions contain non-discrimination language. For example, Art. I, § 9, cl. 6, provides that “[n]o preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”).

130. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (upholding a law on rational basis grounds but noting that “prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry”).

131. *See supra* Section II.A.

Clause prohibits Congress from enacting legislation that preferences Virginia's ports over those of Maryland.¹³²

The Framers surely recognized the possibility of intentional discrimination against ports through facially neutral legislation. The mischief that the Port Preference Clause aimed to prevent was the advantaging of large-state ports at the expense of small-state ones. Small states would not have cared whether Congress effectuated the preference through explicit or facially neutral legislation. Professor Samuel L. Bray has noted that the mischief rule is particularly useful when “thwarting clever evasions” of the law.¹³³ If explicit legislation were the only action that could run afoul of the Port Preference Clause, Congress could evade the rule through subterfuge. What would stop the coastal states from ganging up on the inland states by passing a federal law prohibiting ships from entering inland ports? An inland-port prohibition would necessarily operate to the detriment of every inland state. But being facially neutral, the statute would not violate the narrow approach's gloss of the Port Preference Clause. That is why the Clause says nothing about explicit discrimination; it simply bars Congress from giving preferences “to the Ports of one State over those of another.”¹³⁴ Facially neutral discrimination, if enacted with the intent to discriminate against one state's ports, violates the plain language of the Clause and runs contrary to the intentions of the Framers.

b. The Broad Approach and Wheeling

The narrow approach is wrong in holding that explicit legislation is the only way to violate the Port Preference Clause. Narrow-approach courts arrived at this conclusion through two misreadings of *Wheeling*.

First, *Wheeling* held that in addition to prohibiting Congress from granting privileges and immunities to particular states' ports, the Port Preference Clause “may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another.”¹³⁵ *Yeutter* and its progeny interpreted this language to mean that these are the *only* ways to violate the Port Preference Clause.¹³⁶

But nowhere in the *Wheeling* opinion does the Court say so. In fact, there are several ways for Congress to violate the Port Preference Clause apart from those

132. See U.S. CONST. art. I, § 8, cl. 1; see also Colby, *supra* note 78, at 282-83, 313 n.234, 317 n.247 (drawing parallels between the Port Preference Clause and the Taxing and Spending Clause).

133. Bray, *supra* note 92, at 1005 (capitalization altered).

134. U.S. CONST. art. I, § 9, cl. 6.

135. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855).

136. See *supra* notes 118-123 and accompanying text.

given as examples in *Wheeling*. To take an obvious example: suppose Congress prohibits ships from docking at any ports in Rhode Island. This is not a “privilege or immunity,” nor a “direct privilege or preference” for one state’s ports over another’s, which are the violations that the *Wheeling* opinion expressly contemplates.¹³⁷ It is the opposite: a *penalty* on a particular state’s ports. Yet it is as clear a violation of the Port Preference Clause as can be imagined.

Second and relatedly, the narrow approach ignores language from elsewhere in the *Wheeling* opinion clarifying that although “discrimination between individual ports within the same or different States” is permissible, discrimination *between* states is not. The *Wheeling* court concluded that “it is necessary to show, not merely discrimination between Pittsburgh and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.”¹³⁸ This passage reiterates that preferences granted to individual ports—such as a federally funded lighthouse—do not suffice to make out a violation of the Port Preference Clause. At the same time, however, it states that discrimination between states can. Importantly, the passage says nothing about a requirement that the statute *explicitly* discriminate.

c. *Recognition of the Broad Approach*

The broad approach is presently disfavored among the lower courts. However, a number of courts have recognized, albeit in dicta, the possibility that facially nondiscriminatory legislation may violate the Port Preference Clause if enacted with discriminatory intent.

For example, a 1994 case before the District of Alaska concerned federal restrictions on Alaskan oil exportation. Though the court ultimately rejected the plaintiff’s Port Preference challenge on the merits, it did not dispute the plaintiff’s interpretation of *Wheeling* that “the Port Preference Clause can act as a limit on Congressional power when that power is exercised *for the purpose* of favoring some states over others.”¹³⁹ Importantly, the court noted that the plaintiff’s interpretation “is consistent both with the language of the clause and with what plaintiff describes as its historical background, namely the concern of individual states to prevent the exercise of national powers over commerce and taxation to favor politically powerful states over others having less influence in Congress.”¹⁴⁰

An early twentieth-century Supreme Court opinion lends credence to an intention-based approach as well. *Armour Packing Co. v. United States* concerned

137. *Wheeling*, 59 U.S. at 435.

138. *Id.*

139. *Alaska v. Brown*, 850 F. Supp. 821, 826 (D. Alaska 1994) (emphasis added).

140. *Id.*

the constitutionality of the Elkins Act, which prohibits railroads from granting special rebates to shippers.¹⁴¹ The petitioners appealed their convictions under the Act, contending that the statute violated the Port Preference Clause.¹⁴² The Court rejected the claim, reasoning that the regulation imposes nothing more than incidental effects on ports, but went on to note that the Port Preference Clause “was intended to prevent legislation *intended to give and having the effect of giving* preference to the ports of one State over those of another State.”¹⁴³

One more recent D.C. Circuit case, *Kansas v. United States*,¹⁴⁴ reveals the tensions between the two schools of Port Preference Clause interpretation. It also demonstrates the appeal of the broad approach over the narrow one. After Dallas-Fort Worth International Airport (DFW) opened in 1974, Congress feared that competition from Love Field, an airport twelve miles away, would “undermin[e] the economic viability of DFW.”¹⁴⁵ In 1979, Congress enacted the Wright Amendment, which placed operational constraints on Love Field.¹⁴⁶ These constraints included restrictions on flights from Love Field to any states besides the four that border Texas: Louisiana, New Mexico, Oklahoma, and Arkansas.¹⁴⁷

In rejecting a claim that these congressional restrictions on Love Field violated the Port Preference Clause, the D.C. District Court wrote that “it is well established that the goal of the clause was to prevent the national government from *explicitly* privileging the port and related duty collection of certain states,” citing *Yeutter* for support.¹⁴⁸ The district court also cited language from a 1982 Fifth Circuit opinion, which held that government actions resulting more from an “accident of geography than from an intentional government preference” do not violate the Clause.¹⁴⁹

The D.C. Circuit affirmed but cautioned against the lower court’s narrow interpretation of the Port Preference Clause. Though the district-court decision briefly entertained the possibility that intentional discrimination by Congress

141. 209 U.S. 56 (1908); Elkins Act, ch. 708, 32 Stat. 847 (1903).

142. *Armour Packing*, 209 U.S. at 79-80.

143. *Id.* at 80 (emphases added).

144. 16 F.3d 436 (D.C. Cir. 1994).

145. *Id.* at 438; EROS Ctr., *Dallas-Fort Worth International Airport*, U.S. GEOLOGICAL SURV., <https://eros.usgs.gov/media-gallery/earthshot/dallas-fort-worth-international-airport> [<https://perma.cc/75XN-HDQ9>].

146. *Kansas*, 16 F.3d at 438.

147. *Id.*

148. *Kansas v. United States*, 797 F. Supp. 1042, 1049 & n.11 (D.D.C. 1992) (emphasis added), *aff’d*, 16 F.3d 436 (D.C. Cir. 1994).

149. *Id.* at 1050 (quoting *City of Houston v. FAA*, 679 F.2d 1184, 1197 (5th Cir. 1982)).

could violate the Port Preference Clause before summarily dismissing the possibility that it did so there, the D.C. Circuit provided a more detailed evaluation of Congress's purpose in enacting the legislation.¹⁵⁰ And in addition to questioning the lower court's dismissal of the Clause as a "historical nullity," the opinion criticized the district court's use of the Fifth Circuit's "accident of geography" language by noting that "all state boundaries can be termed an 'accident of geography.'"¹⁵¹ That is to say, the Wright Amendment's restrictions refer to particular states, but if restrictions that conform to state boundaries can be dismissed as "accidents of geography," the Port Preference Clause's prohibition on state-based preferences would be rendered ineffectual.

C. Reports of the Port Preference Clause's Death Are Greatly Exaggerated

The Port Preference Clause's obscurity has spawned a vicious cycle. Because the federal judiciary has never relied on it to invalidate an act of Congress,¹⁵² courts are unwilling to seriously consider Port Preference Clause challenges at all. Indeed, when discussing the Clause, many courts have opened with a variation on the same mantra: "The clause has rarely been invoked and has never been used to successfully invalidate a Congressional Act."¹⁵³

This fact about the Port Preference Clause has acquired almost talismanic significance, as if the absence of past Port Preference Clause invalidations guarantees that future challenges will necessarily fail. "Plaintiffs make an ambitious argument because we can find no case in which the Port Preference Clause has been used to strike down an act of Congress," wrote the D.C. District Court in *Kansas v. United States*.¹⁵⁴ The court went on to reject the plaintiffs' claim in what amounted to a judicial shoulder shrug: despite crediting the argument that the Port Preference Clause "was designed to prevent this type of legislation," the court claimed that "it has not so been interpreted by the courts of this land."¹⁵⁵ "In the end," concluded the court, "we are forced to agree with Justice Holmes who said: 'Upon this point a page of history is worth a volume of logic.'"¹⁵⁶

But the idea that the Port Preference Clause has always been a dead letter is simply false. There have been three occasions, largely ignored by the courts and

150. Compare *Kansas*, 16 F.3d at 437-41, with *Kansas*, 797 F. Supp. at 1044-45, 1051.

151. *Kansas*, 16 F.3d at 439, 441 n.4.

152. BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, *supra* note 89, § 11.04.

153. See, e.g., *Amoco Oil Co. v. United States*, 23 Ct. Int'l Trade 613, 620 (1999) (citing *Kansas*, 16 F.3d at 439).

154. 797 F. Supp. 1042, 1049 (D.D.C. 1992).

155. *Id.* at 1051.

156. *Id.* (quoting *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

by legal scholarship, where the Port Preference Clause has been employed to reject or strike down a statute.¹⁵⁷ First, in *Williams v. The Lizzie Henderson*, the district court invalidated a Florida state law that required non-Florida-owned vessels to pay a pilotage fee.¹⁵⁸ Though the court's reasoning on the merits was never challenged or overturned, the decision was subsequently rendered void by *Morgan's Steamship Co. v. Louisiana Board of Health*, where the Supreme Court held that the Port Preference Clause applies only to the federal government and not to the states.¹⁵⁹

Second, President Buchanan invoked the Port Preference Clause in his 1860 veto of a bill appropriating funds to dredge Michigan's St. Clair River. His veto message argued that allocating funds for dredging a particular state's river "would give the ports of the State within which these improvements were made a preference over the ports of other States, and thus be a violation of the Constitution."¹⁶⁰

Third, the Supreme Court held in *Ward v. Maryland* that a state-licensing statute imposing higher taxes on nonresident traders than resident traders violated the Privileges and Immunities Clause of Article IV, which prohibits states from discriminating against nonresidents.¹⁶¹ The Court reasoned that "the want of uniformity in commercial regulations[] was one of the grievances of the citizens under the Confederation," and the Constitution was adopted "to remedy those defects."¹⁶² The Court cited as evidence for its approach none other than the Port Preference Clause and the Enter and Clear Clause.¹⁶³

In any event, the Port Preference Clause's prior impact, or lack thereof, is irrelevant for constitutional purposes. As the following Section shows, constitutional provisions that have been all but forgotten have been rediscovered or revitalized by the Supreme Court in recent years.¹⁶⁴

157. Two reported court cases, *Pacific Refining Co. v. Department of Energy*, 455 F. Supp. 1091, 1093 (D. Del. 1978) and *Goldman v. United States*, 2 Cust. Ct. 446, 449 (1939), have recognized *The Lizzie Henderson* for its Port Preference Clause passage. One work of legal scholarship, Blume, *supra* note 124, at 50 n.94, has recognized Buchanan's veto for its Port Preference Clause passage. One work of legal scholarship, Colby, *supra* note 78, at 320 & n.254, has recognized *Ward* for its Port Preference Clause passage.

158. 29 F. Cas. 1373 (S.D. Fla. 1880) (No. 17,726A).

159. 118 U.S. 455, 467 (1886); see BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, *supra* note 89, § 11.04.

160. James Buchanan, *Veto Message*, AM. PRESIDENCY PROJECT (Feb. 1, 1860), <https://www.presidency.ucsb.edu/documents/veto-message-451> [<https://perma.cc/3REM-SD35>].

161. 79 U.S. (12 Wall.) 418, 430-32 (1870); see U.S. CONST. art. IV, § 2, cl. 1.

162. *Ward*, 79 U.S. at 431.

163. *Id.*

164. See *infra* notes 175-178 and accompanying text.

D. The Port Preference Clause and the Courts

Port Preference Clause cases are few and far between in the federal courts.¹⁶⁵ Indeed, the Roberts Court has yet to consider any case involving the Port Preference Clause. This is unsurprising, given the Clause's specificity. This Section argues that if an opportunity to analyze the Port Preference Clause comes before the federal courts – say, in the form of a challenge to the Jones Act, addressed in Parts III and IV below – the federal courts, looking to the Supreme Court as a guide,¹⁶⁶ should favor the broad interpretation over the narrow interpretation.

First, the broad interpretation comports best with the Supreme Court's originalist methodology of constitutional interpretation. Like the Burger and Rehnquist Courts before it, the Roberts Court consistently looks to the Founding Era when interpreting constitutional provisions.¹⁶⁷ In case after case, the Court has demonstrated its willingness to depart from precedent in order to hew more closely to Founding Era practice and understanding.¹⁶⁸ This is particularly true when it comes to interpreting the Commerce Clause. The scope of the commerce power has expanded significantly since the Founding, but the Court has cut back on this broad construction when the Court thinks it contradicts original public meaning or original intent.¹⁶⁹

True, original public meaning (how the public understood a provision at the time of enactment) and original intent (how the drafters themselves understood the provision at the time of enactment) are two different approaches to constitutional interpretation, and the first is currently the dominant form of originalist jurisprudence.¹⁷⁰ This Note primarily, though not exclusively, looks to the original intent of the Constitution's Framers to evince the Port Preference Clause's

165. See *supra* note 79 and accompanying text.

166. See David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 *LAW & SOC'Y REV.* 579, 579 (2003).

167. See MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 162-79 (2013); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 546-47 (2006).

168. *E.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008); *Citizens United v. FEC*, 558 U.S. 310, 353, 365 (2010); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396-97, 1404 (2020).

169. See, *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 554-55 (2012); Henry Lowenstein & Kathryn Kisska-Schulze, *A Historical Examination of the Constitutionality of the Federal Estate Tax*, 27 *WM. & MARY BILL RTS. J.* 123, 124 (2018) (discussing *Comptroller v. Wynne*, 572 U.S. 1134 (2014)).

170. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751, 758-61 (2009); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 *NOTRE DAME L. REV.* 1753, 1762 (2015).

meaning. But the intent/meaning distinction is not significant here. For one, the Framers' intentions are informative of the text's original meaning and vice versa.¹⁷¹ This is why many scholars have questioned the distinction between original-intent and original-meaning approaches,¹⁷² and why original-meaning scholars and jurists continue to cite records from the Philadelphia Convention.¹⁷³ For another, when it comes to the Constitution's commerce-related provisions specifically, there is no evidence that the Framers' intentions diverged from the text's original public meaning.¹⁷⁴

Second, the Supreme Court is no stranger to resurrecting previously moribund constitutional clauses. In *NLRB v. Noel Canning*, the Court held that appointments to the National Labor Relations Board made during a three-day period between Senate sessions were invalid under the Recess Appointments Clause.¹⁷⁵ Decided in 2014, *Noel Canning* marked the first time in the Court's history that it had interpreted this Clause.¹⁷⁶ The Court relied heavily on Founding Era materials, including the records of the Philadelphia Convention, in arriving at its decision.¹⁷⁷ Like the Recess Appointments Clause, the Port Preference Clause is obscure, but the fact that no Supreme Court decision has used it to strike down a statute yet is no reason to permanently disregard its existence.

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171. See Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118-21, 1183 (2003); Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1738-39 (2012).
172. See, e.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 234-35 (1988); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 557-58 (2003); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019).
173. E.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 124 n.112, 126 nn.123-36; Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1563 n.228 (2005); see also Kesavan & Paulsen, *supra* note 171, at 1119 n.22 (listing cases in which Justice Scalia, an original-meaning advocate, cites or joins opinions citing the Philadelphia Convention records).
174. See Stephen M. Feldman, *Is the Constitution Laissez-Faire? The Framers, Original Meaning, and the Market*, 81 BROOK. L. REV. 1, 4-5 (2015); Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO STATE L.J. 1239, 1243 n.8 (2007).
175. 573 U.S. 513, 536-37 (2014); see U.S. CONST. art. II, § 2, cl. 3.
176. *Noel Canning*, 573 U.S. at 526.
177. See *id.* at 527. Nor is this the only Clause that the Supreme Court has recently reappraised from an originalist standpoint. See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004); Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1580 (2022) ("The Sixth Amendment also contains a right for criminal defendants to confront their accusers. This right has seen a revival over the past fifteen years or so. In 2004, the Supreme Court decided the groundbreaking case of *Crawford v. Washington*, which reinvigorated the Sixth Amendment's Confrontation Clause—a Clause that had previously been rather dormant." (footnotes omitted)).

After all, “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”¹⁷⁸

Third, a broad interpretation of the Port Preference Clause aligns with other features of the Court’s Commerce Clause jurisprudence. Consider the dormant Commerce Clause doctrine, which limits states’ ability to regulate interstate commerce.¹⁷⁹ The dormant Commerce Clause is the state-level analogue to the Port Preference Clause; both aim to prevent commercial discrimination between the states.¹⁸⁰ And when it comes to prohibiting *states* from discriminating against other states, the Court has rejected the notion that disparate impact alone violates the dormant Commerce Clause. In this respect, the Court’s dormant Commerce Clause jurisprudence mirrors its Port Preference Clause jurisprudence—recall *Wheeling’s* holding that disparate impact alone does not suffice to violate the Port Preference Clause.¹⁸¹ But the Court has never denied—and indeed, has repeatedly held—that states may not purposefully discriminate against other states.¹⁸² Clarifying that the Port Preference Clause, which prohibits Congress from discriminating among states when enacting commerce regulations, bars purposeful discrimination would bring it in line with the Court’s dormant Commerce Clause doctrine, which prohibits states from doing the same. Both operate

178. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

179. See 15A AM. JUR. 2D *Commerce* § 95, Westlaw (database updated Aug. 2022); see, e.g., *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007).

180. Compare *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 98 (1994) (“The Framers granted Congress plenary authority over interstate commerce in the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” (internal quotation marks omitted)), and THE FEDERALIST No. 42, at 283 (James Madison) (Jacob E. Cooke ed., 1961) (justifying Congress’s interstate commerce power by pointing out “the desire of the commercial States to collect in any form, an indirect revenue from their uncommercial neighbours”), with *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982) (“The Port Preference Clause gave small states protection against deliberate discrimination against them by other, more powerful states.”), and 2 STORY, *supra* note 106, § 1011 (“The obvious object of [the Export Clause, the Port Preference Clause, and the Enter and Clear Clause] is, to prevent any possibility of applying the power to lay taxes, or regulate commerce, injuriously to the interests of any one state, so as to favour or aid another.”).

181. See *supra* notes 114-116 and accompanying text.

182. See *E. Ky. Res. v. Fiscal Ct. of Magoffin Cnty.*, 127 F.3d 532, 541 (6th Cir. 1997) (“It is axiomatic that a state law that purposefully discriminates against out-of-state interests is unconstitutional.” (citing Supreme Court cases)); Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 859-61, 859 n.128 (2004). This remains so even in recent years when commentators have observed the Court’s shift toward a narrower conception of the dormant Commerce Clause. See Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 286-92 (2017).

with the aim of maintaining an integrated economic union where no state – or set of states – can disfavor another.

Finally, at least one Justice has hinted that he is inclined to look favorably on a Port Preference Clause challenge. In *United States v. Lopez*, the Court invalidated the federal Gun-Free School Zones Act of 1990 on the grounds that it exceeded Congress’s authority under the Commerce Clause.¹⁸³ In a concurring opinion, Justice Thomas lamented that “our case law has drifted far from the original understanding of the Commerce Clause.”¹⁸⁴ At the time of the Founding, Justice Thomas wrote, “‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes . . . in contradistinction to productive activities such as manufacturing and agriculture.”¹⁸⁵ In making this argument, Justice Thomas relied in part on the Port Preference Clause, which, he wrote, “suggests that the term ‘commerce’ denoted sale and/or transport rather than business generally.”¹⁸⁶ “Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another,” Justice Thomas posited that “the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.”¹⁸⁷

One must not make too much of a single remark in a concurring opinion. But this passage is significant when it comes to analyzing a potential Port Preference Clause challenge.

The first thing to note is that Justice Thomas interprets the Clause as “prohibit[ing] Congress from using its commerce power to channel commerce through certain favored ports.”¹⁸⁸ This is a possible endorsement for the broad interpretation: Justice Thomas neither mentions the narrow interpretation’s requirement that Congress explicitly discriminate nor cites any cases that have interpreted the Clause this way. His approach is consistent with his restrictive interpretation of the Commerce Clause and the fact that the Port Preference Clause is one of its few constitutional constraints.¹⁸⁹

183. 514 U.S. 549, 567 (1995).

184. *Id.* at 584 (Thomas, J., concurring).

185. *Id.* at 585-86.

186. *Id.* at 587.

187. *Id.*

188. *Id.*

189. See *supra* note 77 and accompanying text; see, e.g., *Lopez*, 514 U.S. at 584-91 (Thomas, J., concurring); *Gonzales v. Raich*, 545 U.S. 1, 57-59 (2005) (Thomas, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 707 (2012) (Thomas, J., dissenting).

And Justice Thomas is no longer an outlier on the Court. His *Lopez* concurrence may have been a solo opinion, but as many have observed, he has a knack for bringing his views from lone concurrences and dissents into the legal mainstream.¹⁹⁰ As Professor Justin Driver has noted, Justice Thomas has an ability to drag “the constitutional conversation in his direction.”¹⁹¹

In short, the federal courts are likely to favor the broad interpretation of the Port Preference Clause—one that accords with the Clause’s original intent, avoids rendering it a dead letter, and is in keeping with the Supreme Court’s understanding of the commerce power.

III. HOW THE JONES ACT VIOLATES THE PORT PREFERENCE CLAUSE

Under the narrow approach to the Port Preference Clause, which limits its inquiry to whether the statute explicitly favors or disfavors the ports of particular states, the Jones Act is good law. The enacted purpose of the 1920 Merchant Marine Act—the statute in which the Jones Act appears—is to maintain a private

190. See, e.g., Kimberly Strawbridge Robinson, *Clarence Thomas Waited 30 Years for Court that Thinks Like Him*, BLOOMBERG L. (Oct. 22, 2021, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/clarence-thomas-waited-30-years-for-court-that-thinks-like-him> [https://perma.cc/8CJQ-KSVM]; Nina Totenberg, *Clarence Thomas: From ‘Black Panther Type’ to Supreme Court’s Conservative Beacon*, NPR (July 14, 2019, 7:00 AM ET), <https://www.npr.org/2019/07/14/740027295/clarence-thomas-from-black-panther-type-to-supreme-court-s-most-conservative-mem> [https://perma.cc/RBL9-LSWP].

Consider his views on *Chevron* deference—the judicial practice of deferring to an agency’s reasonable interpretation of a statute that the agency administers unless Congress has directly addressed the issue. Justice Thomas’s concurring opinion in *Michigan v. Env’t Prot. Agency* assailed *Chevron* deference as unconstitutional. 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring). No other Justice joined him. Seven years later, *Chevron* is hanging on by a thread: Justice Gorsuch and Justice Kavanaugh have repeatedly criticized the doctrine, and *American Hospital Ass’n v. Becerra*—an agency deference case before the Court last Term—saw Justices Barrett and Gorsuch indicating their distaste for *Chevron* during oral argument, and Justice Alito asking whether the Court should overrule it. See Oral Argument at 27:00; 59:44; 1:01:51; 1:04:18, *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114), <https://www.oyez.org/cases/2021/20-1114> [https://perma.cc/MV46-EA35]; Richard A. Epstein & Mario Loyola, Opinion, *The Supreme Court’s Chance to Rein in the Regulatory State*, WALL ST. J. (Dec. 7, 2021, 3:11 PM ET), <https://www.wsj.com/articles/the-supreme-court-chance-to-rein-in-federal-agency-power-chevron-deference-gorsuch-barrett-11638888240> [https://perma.cc/SGP8-ENMS]; Kent Barnett, Christina L. Boyd & Christopher J. Walker, Opinion, *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, REGUL. REV. (Sept. 3, 2018), <https://www.theregview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court> [https://perma.cc/F3UN-VE9Y].

191. Robinson, *supra* note 190; see Lillian R. BeVier, Letter to the Editor, *Thomas Has Led the Fight Against Chevron Deference*, WALL ST. J. (Dec. 30, 2020, 3:30 PM ET), <https://www.wsj.com/articles/thomas-has-led-the-fight-against-chevron-deference-11609360210> [https://perma.cc/2SQS-75RB].

merchant marine fleet “sufficient to carry the greater portion of [U.S.] commerce and serve as a naval or military auxiliary in time of war or national emergency.”¹⁹² The reason the provision is phrased in such broad terms is that the Merchant Marine Act is an omnibus bill. It covers everything from procedures for selling off World War I-era government-requisitioned ships to suits for injuries suffered by seamen to marine-insurance antitrust regulations.¹⁹³

It should come as no surprise that the statute’s purpose provision does not facially discriminate against Hawaii and Alaska.¹⁹⁴ If it did, the Jones Act would violate even the narrow conception of the Port Preference Clause. But facially neutral enacted purposes do not foreclose a finding of discriminatory intent. When it comes to determining discriminatory animus, courts look beyond the statutory text to divine the law’s purpose.¹⁹⁵ And as explained below, the context and history of the Jones Act reveal the statute’s intent to discriminate in favor of the ports of certain states, particularly Washington, against the ports of other states, particularly Alaska and Hawaii.¹⁹⁶

A. *State Versus Port Discrimination*

As a threshold matter, it is necessary to revisit the last phrase of the Port Preference Clause. The Clause prohibits preferences given to “the Ports of *one State* over those of *another*.”¹⁹⁷ That is, Congress may discriminate between particular ports as long as it does not engage in statewide discrimination. The *Wheeling* Court recognized this when it held that “what is forbidden is, not discrimination between individual ports within the same or different States, but

192. See Merchant Marine Act of 1920, ch. 250, § 1, 41 Stat. 988, 988 (codified as amended at 46 U.S.C. § 50101).

193. *Id.* §§ 5, 29, 33.

194. *But see infra* notes 235-236 and accompanying text (discussing a since-amended provision of the Jones Act that had explicitly discriminated against Alaska).

195. *Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018) (applying this approach to an executive order); *see also* *Mech. Contractors Ass’n of N.J., Inc. v. New Jersey*, 541 F. Supp. 3d 477, 487-88 (D.N.J. 2021) (applying this approach to a statute).

196. Though Alaska and Hawaii were territories and not states when Congress enacted the Jones Act in 1920, their former territorial status presents no barrier to a Port Preference Clause challenge to the Jones Act. *See infra* Section V.A.

197. U.S. CONST. art. I, § 9, cl. 6 (emphases added).

discrimination between States; . . . it is necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.”¹⁹⁸

This principle is uncontroversial and has been used to reject Port Preference Clause challenges that otherwise appear to discriminate explicitly. Recall, for instance, the Wright Amendment’s explicit restrictions on Texas’s Love Field.¹⁹⁹ In its opinion rejecting the Clause’s applicability, the D.C. Circuit noted that the Amendment only applied to a single port in Texas.²⁰⁰ It was therefore “clearly not designed to provide a preference to ports of one *state* over another; it was drafted to protect DFW, one Texas airport, from competition from Love Field, another Texas airport.”²⁰¹ “Such a preference,” the court concluded, “is of no concern to the Port Preference Clause[,] which is designed to protect states, not individual ports.”²⁰²

Unlike Texas’s airports, every port in the states of Alaska and Hawaii share the same quality—extreme remoteness—that every contiguous state’s ports lack. It follows that all the ports of Alaska and Hawaii are comparably disadvantaged by the Jones Act in a way that no other states’ ports are. That is, the Jones Act discriminates in a way that fulfills *Wheeling*’s requirement of state-by-state, rather than port-by-port, discrimination.²⁰³ The Sections below explain that this discrimination is intentional, not merely incidental.

B. Crafting a Cabotage Policy at the Expense of Alaska and Hawaii

When evaluating a statute for evidence of discriminatory intent in violation of the Port Preference Clause, courts have looked—among other places—at the context of the statute’s adoption.²⁰⁴ And the years leading up to the passage of the Jones Act show that Congress specifically targeted states like Alaska and Hawaii when developing the nation’s cabotage policy.

198. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855); *accord* *La. Pub. Serv. Comm’n v. Tex. & New Orleans R.R. Co.*, 284 U.S. 125, 131 (1931) (“The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports.”).

199. *See supra* text accompanying notes 145-151.

200. *Kansas v. United States*, 16 F.3d 436, 440 (D.C. Cir. 1994).

201. *Id.*

202. *Id.*

203. *See Wheeling*, 59 U.S. at 435.

204. *See, e.g., Kansas*, 16 F.3d at 438.

Given the prohibitively high cost of using U.S. vessels, carriers have long sought to evade U.S. cabotage laws by any means possible. The pre-Jones Act cabotage laws—namely, the Navigation Act of 1817—prohibited foreign-vessel trade between U.S. ports, so merchants began routing their shipments from Seattle to Alaska through Vancouver, Canada.²⁰⁵ This enabled them to use far cheaper foreign ships for both legs of the journey. Congress responded by amending the law to prohibit carriers from routing cargo through a foreign port.²⁰⁶ But carriers did not give up. The 1817 Act applied to *maritime* trade between U.S. *ports*, so carriers began transporting their Alaska goods through Vancouver *by rail*.²⁰⁷

This did not sit well with Senator Wesley L. Jones, then-Chair of the Commerce Committee and the chief architect of the law that bears his name.²⁰⁸ As the bill that would become the Jones Act made its way through Congress after World War I, Jones amended the bill's language to cover shipments "by land and water" and replaced the references to shipments between U.S. "ports" with shipments between U.S. "points."²⁰⁹ These changes, bitterly resented by Alaskans as they had the costly effect of requiring Alaska-bound cargo to move through the Port of Seattle, were enacted in the Jones Act and remain law.²¹⁰

But even before the Jones Act, Senator Jones's efforts to strengthen cabotage restrictions were extraordinary. As early as 1900, when Jones was a first-term congressman in the House of Representatives, he introduced a bill to extend cabotage restrictions to Hawaii. In proposing the bill, he stated that "[t]he most important effect of this measure will be the *restriction of trade between Hawaii and the United States to American vessels*."²¹¹ The bill failed, as did other cabotage restrictions Jones proposed in that term.²¹² But these failures did not deter him.

205. FRITTELLI, *supra* note 9, at 2-3.

206. *Id.* at 3.

207. *Id.*

208. See Constantine G. Papavizas, *The Story of the Jones Act (Merchant Marine Act, 1920): Part II*, 45 TUL. MAR. L.J. 239, 241 (2021) ("Sen. Jones, as the Chairman of the Commerce Committee, took the leading role in the hearings and Senate floor deliberations that led to the 1920 Act and is most often credited as being primarily responsible for its enactment.").

209. FRITTELLI, *supra* note 9, at 3.

210. William Stuart Forth, *Wesley L. Jones: A Political Biography 500-01* (Nov. 2, 1962) (Ph.D. dissertation, University of Washington) (ProQuest); FRITTELLI, *supra* note 9, at 3; see 46 U.S.C. § 55102(b) (2018).

211. Forth, *supra* note 210, at 61-62 (emphasis added).

212. See *id.* at 62, 86.

In the term leading up to the Jones Act, for instance, he proposed extending cabotage restrictions to the Virgin Islands, Guam, and the Philippines.²¹³ Indeed, Jones went so far as to compare the Philippines with the British colonies during a Senate debate. Great Britain “buil[t] up her merchant marine,” Jones argued, “by saying that goods from her colonies should not be brought into Great Britain except under the British flag and in British ships.” And like Britain, he continued, the United States “want[s] to build up [its] merchant marine in the foreign trade [T]he trade of the Philippines, between those islands and this country, is ours if we see fit to take it, and why should we not take it?”²¹⁴ Jones even voted against the temporary elimination of cabotage restrictions in 1916 even though World War I had created a massive shortage of commercial vessels that domestic vessels were unable to fill.²¹⁵

One may question why the primary architect of the Jones Act wanted to enact legislation that benefitted Washington at the expense of Alaska and Hawaii. The answer is twofold.

First, Jones was the senior senator from Washington, home to a powerful shipping industry.²¹⁶ Jones sought these cabotage restrictions, and the restrictions imposed by the Jones Act in particular, to advance the interests of the state shipping companies who stood to gain the most from restricting foreign commerce with Alaska and Hawaii.²¹⁷ To take one example: before the Jones Act was passed, both U.S. and Canadian steamship lines served the Alaskan market. After the Jones Act forced out the Canadian lines, only two U.S. carriers remained. Both companies were based in the state of Washington.²¹⁸ Indeed, what is likely the most detailed monograph of U.S. shipping policy notes that the do-

213. Papavizas, *supra* note 208, at 255. These provisions were enacted in section 21 of the Merchant Marine Act but never implemented. *Id.* at 268-70.

214. 59 CONG. REC. 6811 (1920) (statement of Rep. Jones).

215. See Constantine G. Papavizas, *The Story of the Jones Act (Merchant Marine Act, 1920): Part I*, 44 TUL. MAR. L.J. 459, 479 (2020); H.R. REP. NO. 66-135, at 1 (1919) (“[The temporary repeal’s] purpose was to allow foreign ships by permit to participate in our coastwise trade that the larger American ships so engaged, prior to our entrance into the war, might be utilized for the very important transoceanic trade.”).

216. See Papavizas, *supra* note 208, at 243; see also *Establishment of an American Merchant Marine: Hearings Before the S. Comm. on Com.*, 66th Cong. 48-52, 57, 102 (1920) [hereinafter *Merchant Marine Hearings*] (listing several shipyards in Washington).

217. See Papavizas, *supra* note 215, at 463; Grabow et al., *supra* note 8, at 3-4.

218. See Bryan Riley, *The Jones Act: Protecting Special Interests, Not America*, HERITAGE FOUND. (June 15, 2016), <https://www.heritage.org/defense/commentary/the-jones-act-protecting-special-interests-not-america> [<https://perma.cc/2BBE-KM7C>].

mestic-vessel requirements for coastwise trade were adopted “[a]t the instigation of private shipping interests.”²¹⁹ Many of these Washington shipping companies lobbied openly and aggressively for these protectionist policies.²²⁰ Taking a wider view of Jones’s record in Congress corroborates this finding: in addition to Jones’s repeated attempts to broaden cabotage restrictions, Jones constantly sought to pass bills that would specifically help the Washington shipping industry, from military appropriations to favorable tonnage-duty policies.²²¹

Second, Senator Jones harbored bigoted views toward Asians and Native Americans, and he had no compunction about letting his views bleed into his politics. Jones repeatedly spoke of Asian people in vile terms, including on the Senate floor, and his rabid opposition to immigration from Asian countries was well known.²²² His treatment of Native Americans was just as rotten. Virtually every Native American-related statute proposed by Jones had the same object: forcing Native Americans off their land to make way for white settlers.²²³ It is therefore no surprise that Hawaii and Alaska were the two areas hardest hit by the statute: at the time of the Jones Act’s enactment, these territories had the greatest number of Asian and Native American people, respectively, as a proportion of their total populations.²²⁴

C. Evidence from Legislative History

On the few occasions where courts have followed the broad approach to the Port Preference Clause and examined federal statutes for evidence of discriminatory intent, they usually start with legislative history—the conference reports, hearings, and debates leading up to the statute’s passage.²²⁵ In the case of the

219. See PAUL MAXWELL ZEIS, *AMERICAN SHIPPING POLICY* 115 (1938).

220. *E.g.*, *Merchant Marine Hearings*, *supra* note 216, at 1429-30 (statement of William L. Clark, Pacific Steamship Co.); *id.* at 1132-33 (statement of David Edward Skinner, Skinner & Eddy Corp.); *Providing for the Disposition, Regulation, or Use of the Property Built or Acquired by the United States: Hearings Before the H. Comm. on the Merch. Marine & Fisheries on H.R. 10378*, 66th Cong. 273-74 (1920) (statement of Benjamin S. Grosscup, Pacific Steamship Co.).

221. See Forth, *supra* note 210, at 62-65.

222. *Id.* at 246-47, 347.

223. See, *e.g.*, *id.* at 60-61, 79-82, 147, 217.

224. Compare U.S. CENSUS BUREAU, *Outlying Possessions*, in 3 FOURTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1920, at 1158 tbl.1, 1172 tbl.1 (1922) (listing Alaskan and Hawaiian demographic population data for 1920), with U.S. CENSUS BUREAU, *Continental United States*, in 3 FOURTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1920, *supra*, at 19 tbl.7 (listing continental United States demographic population data for 1920).

225. See, *e.g.*, *Cramer v. Skinner*, 931 F.2d 1020, 1031-32 & n.13 (5th Cir. 1991); *Kansas v. United States*, 16 F.3d 436, 438 (D.C. Cir. 1994); *Alaska v. Brown*, 850 F. Supp. 821, 827 & n.20 (D. Alaska 1994).

Jones Act, its legislative history reveals Congress's intent to discriminate against Alaska and Hawaii.

The congressional hearings are replete with acknowledgements, by supporters and opponents alike, that the Merchant Marine Act—of which the Jones Act constitutes a part—would hurt Alaska and Hawaii. Representative Julius Kahn boasted how he “appeared before the Chamber of Commerce of Honolulu and told them to their faces that they ought to be willing to build up the American steamship lines . . . that they ought to be willing to pay something for being under the American flag.”²²⁶ Senator Knute Nelson of Minnesota directly asked the Governor of Hawaii, Charles J. McCarthy, whether Hawaii was “penalized by the application of the coastwise laws to Hawaii,” to which McCarthy replied in the affirmative.²²⁷ Nelson continued: “They want the exclusive right for American ships, and then they will not supply you with the necessary facilities.”²²⁸

Nelson was referring to an absurd situation created by Hawaii's remoteness and small size. After World War I, there were not enough American vessels to transport passengers to and from Hawaii. Reimposing cabotage restrictions would leave Hawaii with only four American steamships to conduct passenger transport: a total capacity of 231 for a population of 255,000.²²⁹ During hearings before the House of Representatives, the deposed Prince of Hawaii Jonah Kūhiō Kalaniana'ole begged Congress for relief:

These Members know that what I now ask is not unreasonable, but just and equitable. They know the value of Hawaii to the United States, and they know that Hawaii never asks for favors from the Federal Government through the National Congress unless the request is based on right and justice . . . Hawaii is not asking this privilege of travel in order to secure lower rates . . . We ask it only as a matter of necessity, in order to secure the physical possibility of travel and reasonable freedom and facility for going to and coming from the mainland of, the United States.²³⁰

Prince Kalaniana'ole himself was nearly unable to attend the hearing because, despite searching for available spots months in advance, there was no space on any U.S. vessel. One captain eventually took pity on him: “Eventually . . . the captain of the *Lurline* brought me across. My bunk was the lounge of the chart

226. 58 CONG. REC. 3519 (1919) (statement of Rep. Kahn).

227. *Merchant Marine Hearings*, *supra* note 216, at 1331.

228. *Id.*

229. 58 CONG. REC. 3520 (1919) (statement of Jonah Kūhiō Kalaniana'ole, Haw. Cong. Del.); U.S. CENSUS BUREAU, *Detailed Tables*, in 1 FOURTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1920, *supra* note 224, at 682 tbl.54.

230. 58 CONG. REC. 3521 (1919) (statement of Jonah Kūhiō Kalaniana'ole, Haw. Cong. Del.).

room. A concession for which I was truly grateful.” “We are virtually marooned,” concluded Prince Kalanianaʻole.²³¹

Recognizing the shameful situation, Congress carved out a semi-exception to the Merchant Marine Act for Hawaii. The government could issue permits to foreign vessels allowing them to transport Hawaiian passengers to the West Coast, but only “if it deems it necessary so to do.”²³² Even this meager exception lasted less than two years before expiring.²³³

As for Alaska: recall the reason for the 100-foot-long railroad in New Brunswick.²³⁴ The Jones Act exempts goods that travel in part over Canadian rail. But to prevent Alaskan shippers from favoring Canadian over domestic carriers, the original version of the Jones Act expressly carved out Alaska as an exception to the exception: “[T]his section shall not apply to merchandise transported between points within the continental United States, *excluding Alaska*, over [certain rail lines].”²³⁵ Of course, this was when Alaska was still a territory, and the relevant language has since been changed.²³⁶

But even apart from the since-amended carveout, evidence of discrimination against Alaska is still striking. Forcing Alaska to use expensive U.S. vessels in its domestic commerce made Alaskans understandably furious.²³⁷ Alaska’s nonvoting congressional delegate, George B. Grigsby, confessed to his constituents that he “could not get Alaska excepted from the provisions of the bill because it was Senator Jones’ bill, and . . . Senator Jones was more powerful tha[n] I was.”²³⁸ Grigsby pointed out that “Senator Jones’ interests [were] in Washington,” and his constituents did not want “Canadian competition” in the Alaskan shipping trade.²³⁹ “It is fortunate,” one biographer of Senator Jones wrote, “that Jones did not need Alaskan votes to retain his Senate seat.”²⁴⁰

231. *Id.* at 3520.

232. Merchant Marine Act of 1920, ch. 250, § 22, 41 Stat. 988, 997; Papavizas, *supra* note 208, at 262–63.

233. *See* Merchant Marine Act § 22.

234. *See supra* text accompanying notes 66–70.

235. Merchant Marine Act § 27 (emphasis added).

236. *See* 46 U.S.C. § 55116 (2018). The Jones Act also contains an exemption for Alaska’s Yukon River. *Id.* § 55119.

237. *See, e.g.*, Papavizas, *supra* note 208, at 281; Forth, *supra* note 210, at 500–01; Riley, *supra* note 218.

238. George B. Grigsby, Alaska Cong. Del., Opening Talk of Campaign (Aug. 17, 1920), in DOUGLAS ISLAND NEWS, Sept. 3, 1920, at 3.

239. *Id.*

240. Forth, *supra* note 210, at 502.

The relationship between the Jones Act's enacted purpose—to foster a domestic marine fleet—and the Act's state-discriminatory purpose is clear. It is not just that the enacted purpose exists alongside the discriminatory one.²⁴¹ In fact, the two purposes are inextricable from each other. Requiring goods shipped from the contiguous United States to Alaska and Hawaii to be carried by U.S. vessels creates demand for U.S. vessels—vessels supplied by shipbuilders from Senator Jones's home state of Washington.²⁴² Representative Kahn told the House that even before the Jones Act, he had “always opposed” efforts “to break down the coastwise-trade laws between Hawaii and the mainland.” “And what happened?” he asked the House. “As a result of the defeat of the proposed changes, there were no less than 8 or 10 American ships built, flying the American flag, giving employment to American shipbuilders, American seamen, and American officers, instead of building up the Japanese line.”²⁴³ Thus, the protectionist purpose of the cabotage restrictions was effectuated through the discriminatory one.

Senator Jones recognized this. It is why as early as 1900, he proposed bills that would effectively force foreign vessels out of the domestic Pacific-territory market.²⁴⁴ And this elementary causal relationship has been borne out in practice: the Congressional Research Service recently found that the domestic Jones Act fleet is “almost entirely engaged in” serving Alaska, Hawaii, and Puerto Rico, “where shippers have little alternative.”²⁴⁵ In purpose and effect, the Jones Act has carved out a market for domestic carriers at the expense of the citizens of the noncontiguous United States.

IV. WHY A JONES ACT CHALLENGE CAN PREVAIL

This Note has set forth a roadmap for invalidating the Jones Act as unconstitutional—at least, unconstitutional as applied to Alaska and Hawaii—on Port Preference Clause grounds. This Part explains why the federal courts are likely

241. This alone would arguably render the Jones Act unconstitutional. For example, laws enacted with a discriminatory purpose violate the Equal Protection Clause even if that purpose exists alongside a valid nondiscriminatory purpose. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). The same is true in the dormant Commerce Clause context. *E.g.*, *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375 (1976); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977); *cf. Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) (plurality opinion) (“[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack.”).

242. FRITTELLI, *supra* note 9, at 5-7; *see supra* notes 216-218.

243. 58 CONG. REC. 3519 (1919) (statement of Rep. Kahn).

244. *See supra* notes 211-215 and accompanying text.

245. FRITTELLI, *supra* note 9, at 15.

to grant relief on the merits to such a challenge. Section IV.A argues that solicitude for the Framers' original intent and considerations of federalism make courts likely to view the Jones Act's privileging of states with large ports as a major cause for concern. Section IV.B notes the Supreme Court's recent willingness to consider racial context when evaluating a statute's constitutionality.

A. *An Originalist Approach*

The Founding Era circumstances of the Port Preference Clause's passage make its intended purpose clear: to serve as a bulwark against oppression of small states (e.g., Alaska and Hawaii) by the large ones.²⁴⁶ California and Washington are two of the most populous states in the Union, and Alaska and Hawaii two of the least.²⁴⁷ Ports in California and Washington benefit the most from the Jones Act's restrictions, while those of Alaska and Hawaii suffer.²⁴⁸

In addition to this general point about the original aim of the Port Preference Clause, a few Jones Act-specific arguments are worth mentioning. For one, it is necessary to dispel the misconception that the United States first restricted coastwise trade to domestic vessels in 1789, during the First Congress.²⁴⁹ A defender of the Jones Act might seek to rely on this argument. After all, it is unlikely that the First Congress, which included many of the Framers, would have immediately enacted an unconstitutional statute.²⁵⁰ The mistake is likely attributable to a misreading of the terms of the nation's early maritime laws. The 1789 Acts imposed differential duties on foreign versus domestic vessels conducting coastwise trade but implemented no per se ban on foreign vessels conducting coastwise

246. See *supra* Section II.A.

247. See *Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia, and Puerto Rico: April 1, 2020 to July 1, 2021*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=NST_EST2021_POP%3A%20Annual%20Estimates%20of%20the%20Resident%20Population%20for%20the%20United%20States,%20Regions,%20States,%20District%20of%20Columbia,%20and%20Puerto%20Rico%3A%20April%201,%202020%20to%20July%201,%202021&tid=PEPPOP2021.NST_EST2021_POP [https://perma.cc/W47V-BHZK].

248. See *supra* Section I.B.

249. See, e.g., Sarah Beason, Darrell Conner, Nickolas Milonas & Mark Ruge, *Myth and Conjecture? The "Cost" of the Jones Act*, 46 J. MAR. L. & COM. 23, 27 n.20 (2015) (committing this error).

250. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 787-88 (1983) (upholding the constitutionality of a state legislature's chaplain-led prayer, relying in part on the fact that "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer").

trade.²⁵¹ In fact, Congress first prohibited coastwise trade by foreign vessels in 1817, and in terms that are far less restrictive than those of the Jones Act.²⁵² For example, the 1817 Act carved out an exception for foreign vessels to unload foreign goods at domestic ports and load U.S. goods bound for foreign ports.²⁵³ The Jones Act, in contrast, contains no such exemption.²⁵⁴ This is why, as Part I explains, foreign vessels cannot unload part of their cargo in Hawaii or Alaska en route to the contiguous United States.

There is another reason that the Framers would have disfavored a statute like the Jones Act. The ostensible purpose of the Act—the supposed necessity of a merchant marine fleet²⁵⁵—is a *national* justification. But the tensions between national justifications for port preferences and state-specific justifications against them were explored during the Philadelphia Convention and resolved in favor of the latter. Recall that after the Maryland delegation proposed what eventually became the Port Preference Clause, Massachusetts delegate Nathaniel Gorham expressed concern “that the revenue might be defeated, if vessels could run up long rivers, through the jurisdiction of different States without being required to enter.”²⁵⁶ The delegates weighed the national justification of centralized and efficient duty collection but nonetheless decided that the states’ interests in being free from port discrimination should take priority.

B. *Looking Below the Load Line*²⁵⁷

A recent landmark case indicates the Supreme Court’s willingness to let the context of a statute’s passage inform its constitutional analysis, particularly if the statute’s passage was inflected by racism. In *Ramos v. Louisiana*, the Court deter-

251. See Act of July 4, 1789, ch. 2, § 5, 1 Stat. 24, 27 (providing a duty discount for domestic vessels conducting domestic trade); Act of July 20, 1789, ch. III, § 1, 1 Stat. 27, 27 (imposing a tax on foreign vessels conducting domestic trade).

252. Act of Mar. 1, 1817, ch. 31, 3 Stat. 351; see Papavizas, *supra* note 208, at 270; GERALD R. JANTSCHER, BREAD UPON THE WATERS: FEDERAL AIDS TO THE MARITIME INDUSTRIES 46 (1975).

253. Act of Mar. 1, 1817, ch. 31, § 4, 3 Stat. 351, 351; see JANTSCHER, *supra* note 252, at 46.

254. See Merchant Marine Act of 1920, ch. 250, § 27, 41 Stat. 988, 999 (codified as amended at 46 U.S.C. §§ 55102, 55116, 55119).

255. See FRITTELLI, *supra* note 9, at 1.

256. 2 FARRAND’S RECORDS, *supra* note 82, at 418.

257. That is, looking under the surface. Load lines are markings on a ship’s hull indicating the maximum depth to which they may be submerged. See Mar. Admin., *Glossary of Shipping Terms*, U.S. DEP’T OF TRANSP. 64 (May 2008), <https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/resources/3686/glossaryfinal.pdf> [<https://perma.cc/3WLT-YHEH>]. I am indebted to Kathleen Charvet for this maritime metaphor.

mined that Louisiana and Oregon statutes permitting nonunanimous jury verdicts violated the Sixth Amendment.²⁵⁸ Justice Gorsuch's majority opinion emphasized that the statutes were facially neutral but had the aim of discriminating against Black jurors.²⁵⁹ And *Ramos* is no mere aberration. For example, Justice Alito, who had criticized Justice Gorsuch's *Ramos* opinion for considering the laws' discriminatory context, adopted this very approach later in the same Term.²⁶⁰

Part III demonstrated that just like the Louisiana and Oregon jury laws, the Jones Act was drafted with discriminatory intent. Moreover, the discriminatory intent was not merely against states; it had a significant racial component as well. The *Ramos* dissent chided the majority for undermining "rational and civil discourse" by wading into the racist past of the challenged jury laws.²⁶¹ The majority replied that "our respect for rational and civil discourse [cannot] supply an excuse for leaving an uncomfortable past unexamined."²⁶² So too here.

V. ADDRESSING OBJECTIONS

This Note began with an overview of the Jones Act and its ruinous consequences for the people of Alaska and Hawaii. Part II introduced the Port Preference Clause and explored how the federal courts are likely to interpret it. Part III argued that the Jones Act violates the Port Preference Clause, and Part IV explained how this challenge can prevail before the federal courts. This Part responds to possible objections to these arguments.

A. *Alaska and Hawaii's Territorial Status in 1920*

The Port Preference Clause prohibits Congress from favoring the ports of one state over those of another. One might object that Alaska and Hawaii were not admitted as states until 1959. When the Jones Act was first enacted in 1920, both were territories.

258. 140 S. Ct. 1390 (2020).

259. *Id.* at 1394.

260. See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring) ("I argued in [my *Ramos*] dissent that this original motivation, though deplorable, had no bearing on the laws' constitutionality because such laws can be adopted for non-discriminatory reasons, and both States readopted their rules under different circumstances in later years. But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here." (internal quotation marks and citation omitted)).

261. *Ramos*, 140 S. Ct. at 1427 (Alito, J., dissenting).

262. *Id.* at 1401 n.44 (majority opinion) (internal quotation marks and citation omitted).

But when it comes to a present-day challenge to the Jones Act, Alaska and Hawaii's former territorial status presents no barrier. The Jones Act remained (and remains) in full force once Alaska and Hawaii became states. And an unconstitutional statute is unconstitutional even if it had been constitutional at the time of enactment.

Other cases of congressional treatment of the former territories illustrate this principle. Congress has plenary power over the territories, but its power to regulate states is far more limited.²⁶³ For instance, Congress can force a territory—but not a state—to adopt a particular city as its capital.²⁶⁴ Once a territory is admitted as a state, a federal law imposing that requirement becomes unconstitutional.²⁶⁵ The same reasoning applies to the Jones Act. That the Act originally discriminated against territories posed little threat to its constitutionality given that differential treatment of territories is subject to lenient rational basis review.²⁶⁶ But once Alaska and Hawaii became states, the Act violated the Port Preference Clause's prohibition on state discrimination.

Indeed, Alaska and Hawaii are the two newest states in the Union, and also the two states most heavily penalized by the Jones Act.²⁶⁷ In addition to the above-mentioned Port Preference Clause concerns, their entry to the Union violates the spirit of the equal footing principle that new states enter the Union with the same “power, dignity and authority” as the older ones.²⁶⁸ I leave to a future piece a more searching analysis of the equal footing doctrine with respect to these states, or with respect to Puerto Rico if it were to become a state.²⁶⁹

The two cases that have come the closest to striking down a federal statute on Port Preference Clause grounds support the view that what separates a successful Jones Act challenge from an unsuccessful one is the status of the state or territory. In *Downes v. Bidwell*, the Supreme Court rejected a Port Preference

263. See *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 93-94 (1909); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937); see also U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

264. *Coyle v. Smith*, 221 U.S. 559, 577 (1911).

265. *Id.*

266. 86 C.J.S. *Territories* § 15 (Oct. 2022 update); e.g., *United States v. Vaello Madero*, 142 S. Ct. 1539, 1542-43 (2022).

267. Grennes, *supra* note 3, at 6-7.

268. *Coyle*, 221 U.S. at 567. For a brief overview of the equal footing doctrine, see Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 YALE L.J. 825, 835-37 (1979).

269. Cf. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 259-60 (2012) (arguing that if Puerto Rico were to seek statehood, congressional refusal to act would contravene the ethos of the equal footing doctrine).

Clause challenge to federal import duties on goods shipped from Puerto Rico but heavily implied that the claim would be meritorious if the territory of Puerto Rico were a state.²⁷⁰ Similarly, *Alaska v. Troy* involved a Port Preference Clause challenge to a former provision of the Jones Act that explicitly discriminated against Alaska.²⁷¹ As in *Downes*, the Court denied relief by relying on the fact that Alaska was a territory but suggested that the challenge would have been successful otherwise.²⁷²

Of course, the very reason that a Port Preference Clause challenge to the Jones Act would succeed as applied to former territories that are now states precludes relief under the Port Preference Clause for current territories. But fortunately for the territories, the Jones Act largely exempts them from its cabotage requirements. The Jones Act does not apply to American Samoa, the Northern Mariana Islands, or the U.S. Virgin Islands.²⁷³ It is only partially applicable to Guam, for which coastwise trade must be conducted on U.S.-owned and U.S.-crewed vessels, but they need not be U.S.-built.²⁷⁴

That still leaves Puerto Rico. But recall that the Jones Act fleet serves few ports other than Alaska, Hawaii, and Puerto Rico, given its lack of international competitiveness.²⁷⁵ Though the Port Preference Clause is presently inapplicable to Puerto Rico, an as-applied invalidation of the Jones Act with respect to Alaska and Hawaii would effectively gut the statute. This could lead to a radical rework of the Act, one in which the coastwise restrictions on Puerto Rico are weaker or nonexistent.

Alternatively, it is possible that a challenge to the Jones Act based on the Enter and Clear Clause could lead to its complete invalidation. The following Section explores a potential challenge to the Jones Act on this basis but concludes that it is less likely to succeed than one based on the Port Preference Clause.

B. *The Enter and Clear Clause as an Alternative*

The Enter and Clear Clause immediately follows the Port Preference Clause: “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: *nor shall Vessels bound to, or from, one*

270. 182 U.S. 244, 249, 255 (1901) (plurality opinion).

271. *Territory of Alaska v. Troy*, 258 U.S. 101 (1922); *see also supra* notes 235-236 (describing the relevant Jones Act provision).

272. *Troy*, 258 U.S. at 110-11.

273. 46 U.S.C. § 55101(b) (2018); *see* FRITTELLI, *supra* note 9, at 5.

274. FRITTELLI, *supra* note 9, at 5; 46 U.S.C. § 12111(b) (2018).

275. FRITTELLI, *supra* note 9, at 15.

*State, be obliged to enter, clear, or pay Duties in another.*²⁷⁶ Like the Port Preference Clause, the Enter and Clear Clause is rarely litigated—indeed, as discussed in Part II, the two are often mistakenly grouped together.²⁷⁷

Perhaps the Enter and Clear Clause’s reference to “duties” is another way to challenge the Jones Act. The Jones Act imposes substantial penalties on foreign ships that engage in coastwise trade: up to the value of the transported merchandise or the cost of transportation, whichever is greater.²⁷⁸ It can be argued that the Jones Act violates the Enter and Clear Clause by imposing a penalty fee—in effect, a duty—on vessels traveling to or from U.S. states. At the least, it certainly falls within the original intent of the Clause: Justice Joseph Story noted that its aim was to “cut[] off the power to require, that circuitry of voyage, which, under the British colonial system, was employed to interrupt the American commerce before the revolution. No American vessel could then trade with Europe, unless through a circuitous voyage to and from a British port.”²⁷⁹ The Taiwan-Washington-Hawaii trip described in the Introduction, for instance, certainly appears to qualify as a “circuitous voyage.”²⁸⁰

At first glance, an Enter and Clear Clause challenge to the Jones Act has much to recommend it. Most importantly, the “to, or from” language in the Enter and Clear Clause means that Puerto Rico could obtain relief from the Jones Act, whereas it could not under the Port Preference Clause, which refers to the ports “of one State over those of another.”

Although facially attractive, an Enter and Clear Clause challenge contains a fatal flaw. The term “duty” generally refers to a tax on imported or exported goods.²⁸¹ It is hard to construe the Enter and Clear Clause’s reference to “duties” as referring to the penalty imposed, not on transported goods, but on the vessel itself for violating the Jones Act. Even broad definitions of “duty” in the context of constitutional interpretation assume it refers to some form of tax rather than a penalty.²⁸²

276. U.S. CONST. art. I, § 9, cl. 6 (emphasis added).

277. See *supra* text accompanying notes 79–81.

278. 46 U.S.C. § 55102(c) (2018).

279. 2 STORY, *supra* note 106, § 1011.

280. See *supra* text accompanying note 8.

281. See Evgeny Magidenko, *Classifying Federal Taxes for Constitutional Purposes*, 45 U. BALT. L. REV. 57, 78–79 (2015); cf. *Duty*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “customs duty” as “[a] tax levied on an imported or exported commodity; esp., the federal tax levied on goods shipped into the United States”).

282. See, e.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796); 3 STORY, *supra* note 106, § 949.

One might counter that the line between penalties and taxes is no longer so sharp after *NFIB v. Sebelius*.²⁸³ The *NFIB* decision upholding the Affordable Care Act's individual mandate as a tax demonstrated the Court's willingness to elevate substance over form when evaluating federally imposed penalties.²⁸⁴ Unfortunately, it is this very case that dooms an Enter and Clear Clause challenge. The *NFIB* Court considered three factors to determine whether the individual mandate payment was a tax or a penalty. First, an "exceedingly heavy burden," such as ten percent of a company's net income, indicates the payment is a penalty.²⁸⁵ Second, punitive statutes typically have scienter requirements.²⁸⁶ Third, taxes tend to be enforced by revenue-collection agencies.²⁸⁷

These factors point against recognizing the Jones Act's penalty as a tax. First and most importantly, violators of the Jones Act are liable for the full value of their merchandise – in effect, a 100% *ad valorem* tax.²⁸⁸ Penalty amounts are often mitigated but typically not below 10% of the total value.²⁸⁹ And a 10% forfeiture is precisely what the *NFIB* Court described as an "exceedingly heavy burden" indicating a payment was actually a penalty.²⁹⁰ Second, though the Jones Act has no express scienter requirement in its statutory text, deliberate violations are subject to stiffer penalties in practice.²⁹¹ And third, the payment is collected by CBP rather than a revenue-collection agency like the Internal Revenue Service.²⁹²

The Enter and Clear Clause appears at first glance to be an appealing way to take down the Jones Act. But unless the Supreme Court radically revises its tax-law jurisprudence, it appears that the most plausible path to relief is the Port Preference Clause.

283. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

284. *Id.* at 563-71.

285. *Id.* at 565.

286. *Id.* at 565-66.

287. *Id.* at 566.

288. See 46 U.S.C. § 55102(c) (2018).

289. CBP, *What Every Member of the Trade Community Should Know About: Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages*, U.S. DEP'T OF HOMELAND SEC. 183-85 (Feb. 2004) [hereinafter CBP, *Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages*], https://www.cbp.gov/sites/default/files/documents/icpo69_3.pdf [<https://perma.cc/Q3GH-DZFD>].

290. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 565.

291. CBP, *Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages*, *supra* note 289, at 186.

292. See Grabow et al., *supra* note 8, at 14; CBP, *Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages*, *supra* note 289.

C. Issuing Blanket Jones Act Waivers

Due to the increased need for vessels during wartime, Congress temporarily eliminated cabotage restrictions during World War I and World War II.²⁹³ After the Korean War began in 1950, Congress enacted a law permitting the executive branch to waive cabotage restrictions “in the interest of national defense.”²⁹⁴ This provision has most recently been employed following natural disasters – often over the strenuous objections of the domestic shipping lobby – where U.S. vessels lacked the capacity to transport needed goods to the affected areas.²⁹⁵ In 2017, for example, the Department of Homeland Security (DHS) granted a Jones Act waiver to Puerto Rico in the aftermath of Hurricane Maria.²⁹⁶ To this end, one might attempt to achieve a de facto abrogation of the Jones Act by issuing permanent, blanket waivers under the national-defense provision.

However, there are at least two serious problems with this approach. First, CBP, which is the DHS agency charged with administering cabotage rules, has stated that the “national defense” justification is very difficult to meet, requiring an “immediate and adverse impact” on national defense.²⁹⁷ Economic reasons do not suffice.²⁹⁸ CBP has denied waivers that would strengthen domestic oil-supply lines, for example, even though energy security closely relates to national defense.²⁹⁹ Second, these waivers are temporary. The relevant provision sets a maximum waiver duration of ten days.³⁰⁰ Waivers can be extended, but the maximum duration for “any one set of events” may not exceed forty-five days.³⁰¹

293. See FRITTELLI, *supra* note 9, at 2, 12.

294. *Id.* at 12; see 46 U.S.C. § 501 (2018); CBP, *Coastwise Trade: Merchandise*, *supra* note 10, at 8 (“The Jones Act can only be waived in the interest of national defense, pursuant to 46 U.S.C. § 501.”).

295. Constantine G. Papavizas & Brooke F. Shapiro, *Jones Act Administrative Waivers*, 42 TUL. MAR. L.J. 317, 340-44 (2018); Yglesias, *supra* note 6; FRITTELLI, *supra* note 9, at 12-13.

296. See Niraj Chokshi, *Trump Waives Jones Act for Puerto Rico, Easing Hurricane Aid Shipments*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/us/jones-act-waived.html> [<https://perma.cc/Y5S6-H65P>].

297. Papavizas & Shapiro, *supra* note 295, at 334, 352-53; FRITTELLI, *supra* note 9, at 13.

298. See WAIVER OF THE COASTWISE LAWS CONCERNING THE TRANSPORTATION OF MERCHANDISE FROM THE PORTS OF NEWPORT NEWS, VIRGINIA TO THE PORT OF HOUSTON, TEXAS, HQ 111930, U.S. CUSTOMS SERV., Oct. 8, 1991, https://www.customsmobile.com/rulings/docview?doc_id=111930 [<https://perma.cc/PEW8-K52A>]; FRITTELLI, *supra* note 9, at 13; Papavizas & Shapiro, *supra* note 295, at 352-53.

299. See Papavizas & Shapiro, *supra* note 295, at 331-32, 351-53.

300. 46 U.S.C. § 501(b)(2)(A) (2018).

301. *Id.* § 501(b)(2)(C).

Even setting aside the current Administration's enthusiastic endorsement of the Jones Act, the above factors preclude a broad executive-waiver policy as a solution.³⁰² Executive action alone cannot remedy the injurious effects of the Jones Act.

CONCLUSION

The Jones Act has been a disaster for Americans who live outside the contiguous United States: the cost of goods soars while local businesses struggle. As the one-hundredth anniversary of its enactment comes and goes, efforts to repeal it appear more remote than ever.

But the Jones Act is not as invulnerable as it appears. The Constitution's Port Preference Clause has been largely ignored since the mid-nineteenth century; a critical reexamination of its scope and meaning is long overdue. The broad interpretation of the Clause recognizes that even facially neutral legislation may not be enacted with discriminatory intent. And the context of the Jones Act's enactment evinces an undeniable intent to discriminate. A Port Preference Clause challenge to the Jones Act is the best way to finally nullify it.

302. See *supra* note 75 and accompanying text.