THE COMMERCE CLAUSE AND THE MYTH OF DUAL FEDERALISM

Norman R. Williams*

Despite its substantial theoretical flaws, dual federalism—the model of American federalism according to which the field of federal regulation is separated from the field of state regulation in a mutually exclusive (or close thereto) fashion—continues to attract sophisticated adherents. In this Article, I debunk the myth that the U.S. Supreme Court was ever committed to a dual federalist interpretation of the Commerce Clause from which it subsequently departed. Prior to the Civil War, the Supreme Court expressly embraced overlapping federal and state regulatory authority with respect to interstate commerce. And, even with respect to the Gilded Age between the Civil War and New Deal, the Court's commitment to dual federalism was only nominal. The Court deployed the same terminology in reviewing federal and state commercial regulations and taxes, but its application of the doctrinal rules and its understanding of the underlying theoretical basis for the rules differed substantially depending upon whether it was federal or state action at issue. Understanding the Court's rejection of dual federalism and the underlying reasons for it fatally undermines the historical argument for a return to dual federalism. At the same time, appreciating the full, nuanced history of the Court's Commerce Clause jurisprudence provides a much needed historical context for assessing the current Court's preoccupation with and approach to issues of commercial federalism.

---

* Associate Professor of Law, Willamette University. J.D., New York University; A.B., Harvard University. In addition to the participants at the *UCLA Law Review* Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law*, I thank Brannon Denning and William Nelson for helpful comments on prior drafts. Michael Elliott and Renee Starr provided helpful research assistance.

INTRODUCTION

Various provisions of the U.S. Constitution, most notably the Bill of Rights, limit the powers of both the federal government and the states. With regard to those provisions protecting individual rights, such as the Free Speech or Equal Protection Clauses, the Court nominally applies the same doctrinal framework to both federal and state measures. As Justice O'Connor once wrote, "[t]here is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause."[1] Of course, this declared commitment to doctrinal unitarianism should not be taken canonically. As Adam Winkler has documented,[2] the Court's application of the doctrine may often reflect unstated antipathy toward state or local governmental conduct.[3] Nevertheless, outside the context of the Sixth Amendment,[4] the Court does not formally distinguish

1. Bd. of Educ. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting) (noting that "there is, after all, only one Equal Protection Clause"); McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (noting that "[t]here is, after all, only one Due Process Clause in the Fourteenth Amendment").

2. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

3. *Id.* at 821; *see also* Norman R. Williams, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 966–67 (1994) (offering a normative defense of this disparity).

4. *Compare, e.g.*, Williams v. Florida, 399 U.S. 78, 86 (1970) (holding that the Sixth Amendment does not forbid states from using less than a twelve-person jury in criminal cases), *with* Patton v. United States, 281 U.S. 276, 288–89 (1930) (holding that the Sixth Amendment requires federal courts to impanel a twelve-member jury in criminal trials).

At one time, the Court also applied a different, more lenient standard of scrutiny under the Equal Protection Clause to federal affirmative action programs than to state programs. *Compare* Metro Broad., Inc. v. FCC, 497 U.S. 547, 565 (1990) (holding that a federal affirmative

between federal and state actions in enforcing the Constitution's individual rights provisions. Indeed, Erwin Chemerinsky has declared that it "seems settled" that the Bill of Rights applies "the same content regardless of whether it is a challenge to federal, state, or local actions."[5]

While it may be established that the Constitution's *individual rights* provisions apply in an equal manner and extent to federal and state action, the same cannot be said for the Constitution's *federalism* provisions. To be sure, many of the federalism provisions apply either only to the federal government or only to the states, but that is not always the case. Significantly, the Commerce Clause—the textual provision that lies at the heart of most modern debates over the federal structure of the Union—limits both federal and state authority.[6] Yet, its limitation on state action, particularly regarding interstate commerce,[7] differs substantially from that applicable to federal action. And, perhaps even more intriguingly, unlike with respect to the Bill of Rights, the Court has expressly and repeatedly endorsed a dualist doctrinal framework for the Commerce Clause. For devotees of unitary doctrine, the Commerce Clause is a potent and enduring irritant.

To be sure, there is one significant theory of American federalism that unites both the affirmative and dormant components of the Commerce Clause—the so-called "dual federalism" model.[8] According to this model, the Constitution separates the field of federal regulation from the field of state regulation in a mutually exclusive (or close thereto) fashion. What the U.S. Congress may do, the states may not, and vice versa. In the

---

action program need only "serve important governmental objectives within the power of Congress and [be] substantially related to achievement of those objectives"), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (holding that state affirmative action program must satisfy strict scrutiny). In 1995, the U.S. Supreme Court expressly rejected this approach and held that all affirmative actions programs are subject to the same standard of scrutiny under the Equal Protection Clause. *Adarand*, 515 U.S. at 227 (overruling *Metro Broadcasting*).

5. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.3.3, at 507 (3d ed. 2006).

6. Another prominent example involves the Reconstruction Amendments, which both limit state authority and empower the U.S. Congress (within different limits) to enforce the rights enumerated therein.

7. In a sense, there are six Commerce Clauses. The Commerce Clause identifies three types of commerce—foreign commerce, "Indian" commerce, and interstate commerce—each with an affirmative and a dormant component. This Article is concerned solely with interstate commerce.

8. The term "dual federalism" was first coined by Edward Corwin. *See* Edward S. Corwin, *Congress' Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 481 (1933); *see also* Paul D. Moreno, *"So Long as Our System Shall Exist": Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 711 n.2 (2005) (attributing the invention of the term to Corwin).

words of Chief Justice Taney, "the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."[9]

As applied to the regulation and taxation of commerce, the dual federalist model bifurcates commerce into two realms, intrastate commerce and interstate commerce, entrusting the former exclusively to the states and the latter exclusively to Congress.[10] As Charles Culberson, a strong proponent of dual federalism, put it in the late nineteenth century, "the power of the States ceases and that of Congress takes hold when the subjects are commerce among the States, of whatever character."[11] Under this approach, the judicial review of federal commercial legislation mirrors that of state legislation. Once the Court has determined where the constitutional line lies—for example, what constitutes interstate commerce—the sole remaining question is whether the regulated activity (federal or state) falls on the appropriate side of the line. The constitutionality of the federal or state legislation follows ineluctably and mechanically from this categorization. In this way, the dual federalist conception of the Commerce Clause promises to harmonize and unify the review of both federal and state legislation.

Whether or not dual federalism has ever served as an accurate description of the American constitutional order generally,[12] it most certainly has not described the Court's understanding of the relationship of the federal government and the states with respect to the regulation and taxation of commerce.[13] This is conspicuously true with respect to the modern

9. Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858).

10. *See, e.g.*, Corwin, *supra* note 8, at 482; Samantha K. Graff, *State Taxation of Online Tobacco Sales: Circumventing the Archaic Bright Line Penned by* Quill, 58 FLA. L. REV. 375, 389 (2006); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 104–05 (2004). Corwin diluted the requirement of mutual exclusion modestly, acknowledging that there was some undefined overlap between the two spheres, but he declared that such overlap was minimal and exceptional. *See* Corwin, *supra* note 8, at 482 ("[C]ollision is not contemplated as the rule of life of the system, but the contrary.").

11. Charles A. Culberson, *The Supreme Court and Interstate Commerce*, 24 AM. L. REV. 25, 62 (1890); *see also id.* at 63 (rejecting the idea that there is a "middle ground" of concurrent state and federal authority).

12. For a discussion of the general issue, see Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978).

13. Harry Scheiber argues that, regardless of the Court's formal doctrine, the federal government and states acted consistently with dual federalism prior to the Civil War. *See id.* at 635. Evaluating that claim is beyond the scope of this Article, which focuses on the Court's understanding of the constitutional order.

Commerce Clause, according to which both the federal government and the states possess substantial, overlapping authority over commerce.[14]

Yet, dual federalism, as Robert Schapiro has noted, "haunt[s]" contemporary discussions of federalism among judges and commentators alike.[15] Despite its substantial theoretical flaws, dual federalism attracts sophisticated adherents even today.[16] Part of its appeal is instrumental: Dual federalism entails a much more restrictive view of federal regulatory authority than that currently permitted by the Court.[17] Part of its appeal is historical: Proponents of the model, such as Justice Thomas, believe that the modern Court departed from a dual federalist interpretation of federal authority that prevailed prior to the New Deal and that a proper understanding of and respect for history requires the modern Court to return to this preexisting model of American federalism in reviewing federal legislation.[18] Even several eminent scholars who do not desire to return to the pre–New Deal understanding of federal power presume that the pre–New Deal Court was committed to dual federalism, at least at times.[19]

The mission of this Article is to debunk the myth that there ever was a unitary, dual federalist interpretation of the Commerce Clause from which we departed. Proponents of dual federalism misread the U.S. Supreme

14. Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2133 (2006).

15. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005).

16. David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 80 n.222 (2006) ("Some recent statements from the Court, however, indicate that the vision of dual federalism may not be entirely dead.").

17. United States v. Lopez, 514 U.S. 549, 600–01 (1995) (Thomas, J., concurring); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559–60 (2000); *see also* Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 FORDHAM L. REV. 651, 664 (2006) (noting that "[d]ual federalism and a narrow view of the commerce power imply each other").

18. Gonzales v. Raich, 545 U.S. 1, 58–59 (2006) (Thomas, J., dissenting); *Lopez*, 514 U.S. at 585–600 (Thomas, J., concurring); William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1175, 1177–78 (2002); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 41 (1998); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312–13 (1997); *see also* Franklin, *supra* note 16, at 80 n.222.

19. *See, e.g.*, Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1126 (2000) (arguing that the Court's affirmative Commerce Clause jurisprudence during the Gilded Age "was the flip side of the Court's dormant Commerce Clause jurisprudence"); Edward A. Fitzgerald, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: *Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*, 43 NAT. RESOURCES J. 11, 51 n.330 (2003); Stephen Gardbaum, *Congress' Power to Preempt the States*, 33 PEPP. L. REV. 39, 47 (2005); Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 627 (2006); Kaiya Tollefson, Note, *If Marijuana, Then Marshes: Using the "Comprehensive Scheme" Principle of* Gonzales v. Raich *to Regulate "Isolated" Wetlands*, 28 T. JEFFERSON L. REV. 513, 518 n.25 (2006).

Court's Commerce Clause jurisprudence in two critical respects. First, they ignore the fact that, prior to the Civil War, the Supreme Court expressly embraced overlapping federal and state regulatory authority over commerce—which is inconsistent with the dual federalist model of the Commerce Clause. Second, even with respect to the Gilded Age between the Civil War and the New Deal, the Court's commitment to dual federalism was only nominal. The Court deployed the same terminology in reviewing federal and state commercial regulations and taxes, but its application of the doctrinal rules and its understanding of the underlying theoretical basis for the rules differed substantially depending upon whether federal or state action was at issue. Indeed, contrary to proponents of dual federalism, who look just at what the Court said, a close examination of what the Court actually did—what laws it upheld, what laws it invalidated—reveals a pattern of adjudication markedly different from the dual federalist model supposedly reigning during this time. In short, the constitutional contours of federal and state authority over commerce were never coterminous.

Moreover, the Court's rejection of dual federalism did not result from some judicial oversight or lapse of judgment but rather was and is an inherent component of the Court's Commerce Clause jurisprudence. The divergence between the affirmative Commerce Clause and the Dormant Commerce Clause is the product of the differing theoretical concerns underlying those doctrines. While the Court's affirmative doctrine is rooted in a desire to circumscribe federal authority so as to preserve some sphere of human activity for state regulation, the Court's Dormant Commerce Clause doctrine has been driven by a fear that certain types of state and local measures would imperil national economic union. This theoretical divergence first appeared in the Gilded Age, although its doctrinal significance was not fully appreciated at that time. By the time of the New Deal, though, the Court understood that the affirmative and the Dormant Commerce Clause doctrines were rooted in these differing concerns and that, consequently, any formal linkage between the two doctrines was both artificial and unjustified. The modern divergence between the two doctrines, which has only grown since the New Deal, is thus the inevitable byproduct of jurisprudential forces that first emerged during the Gilded Age.

Understanding the underlying reasons for the Court's rejection of dual federalism fatally undermines the historical argument for a return to dual federalism. At the same time, appreciating the full, nuanced history

of the Court's Commerce Clause jurisprudence also allows us to better assess the current Court's preoccupation with federalism. The Rehnquist Court is most likely to be remembered for its relatively restrictive approach to Congress's commerce power. As a comparison to prior eras' decisions shows, however, the Rehnquist Court's "New Federalism" neither heralded the advent of dual federalism nor even marked a more limited return to the Gilded Age's restrictive constraints on federal authority. The New Federalism was and is, as David Barron has accurately observed, truly "new."[20] This insight has important ramifications for both supporters and critics of the New Federalism alike: It is neither as historically grounded as supposed nor as counterrevolutionary as feared.

This Article follows a chronological organization in which the Court's affirmative and Dormant Commerce Clause decisions in each given era are analyzed together. In this way, not only can linkages between the two doctrines be more easily perceived, but, more significantly, contemporaneous differences between the doctrines can be more fully assessed and appreciated. Part I covers the antebellum era, beginning with the Supreme Court's first Commerce Clause decision in 1824 and extending to the Civil War. Part II then takes up the Gilded Age from the Civil War to 1937, during which time the Court was busy policing both federal and state efforts to regulate or tax commerce. Part III reviews the post–New Deal era from 1937 to the present, including the Rehnquist Court's New Federalism. Finally, Part IV assesses the modern Commerce Clause and compares the American model of commercial federalism to its principal competitors—the concurrent power model propounded by James Kent and the dual federalist model endorsed by Justice Thomas and others.

For close to two centuries, we have had two Commerce Clauses, one for the federal government and one for the states. To be sure, the two doctrines initially developed in tandem—concepts that emerged in one often appeared in the other—but there were always distinct differences between the two doctrines. More importantly, those differences have only grown larger over time, and, now, the break between the two doctrines is both formal and irremediable. In short, there never has been a unitary Commerce Clause, and, judged by its recent decisions, the Court is entirely uninterested in creating one.

20. David J. Barron, *Fighting Federalism With Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2092 (2006).

I. THE CONCURRENT POWER MODEL AND THE ANTEBELLUM COURT

Prior to the Civil War, Congress did not enact any substantial federal commercial regulatory program, leaving the regulation of commerce largely to the states. As a consequence, the scope and meaning of the Commerce Clause first arose and was flushed out by the Court in cases involving state regulations and taxes.[21] The first such case was *Gibbons v. Ogden*.[22] Because of its centrality to the Court's understanding of the Commerce Clause (even today the Court is divided with regard to exactly what *Gibbons* established[23]), it is worth exploring the case in detail.

At issue was the constitutionality of New York's statutorily conferred monopoly on the provision of steamboat services in the state. James Kent, the chief justice of New York's highest court and renowned early American constitutional theorist, upheld New York's authority to create the monopoly and, in the process, repudiated the dual federalist model.[24] Despite some contradictory language,[25] he made clear that, in his view, there were no mutually exclusive spheres of federal and state authority. Rather, state authority was plenary and extended to all matters except those either

21. Prior to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the federal courts had addressed several federal commercial matters, albeit outside the context of the Commerce Clause. In *McCulloch v. Maryland*, the Court confronted the constitutionality under the Necessary and Proper Clause of the Bank of the United States. 17 U.S. 316 (1819). Interestingly, perhaps the most politically controversial commercial regulation adopted by Congress—Jefferson's embargo (which was adopted to preserve American neutrality prior to the War of 1812)—did not reach the Supreme Court but was upheld by a federal district court. *See* United States v. The William, 28 F. Cas. 614, 620–23 (D. Mass. 1808) (No. 16,700).

22. 22 U.S. (9 Wheat.) 1.

23. *Compare Lopez*, 514 U.S. at 553 (concluding that *Gibbons* held that commerce power did not extend to "completely internal" commerce, thus establishing a limit on federal power (internal quotation marks omitted)), *and id.* at 594 (Thomas, J., concurring) (contending that "the principal dissent is not the first to misconstrue *Gibbons*" and citing *Wickard v. Filburn*, 317 U.S. 111, 120 (1942), as an example), *with id.* at 604 (Souter, J., dissenting) (concluding that *Gibbons* had recognized "broad" federal power over commerce), *and id.* at 615, 631 (Breyer, J., dissenting) (concluding that *Gibbons* recognized federal authority over intrastate commercial activities that "significantly affect interstate commerce" and arguing that, had the Court interpreted commerce power "as this Court has traditionally interpreted it"—citing *Gibbons* as example—it would have upheld the gun control statute).

24. Livingston v. Van Ingen, 9 Johns. 507, 576–81 (N.Y. 1812) (Kent, C.J.); *see also id.* at 566, 568–69 (Thompson, J.).

25. At one point, Chief Justice Kent declared that "[t]he powers of the two governments are each supreme within their respective constitutional spheres." *Id.* at 575 (Kent, C.J.). This language appears to embrace dual federalism, but Kent subsequently made clear that he understood federal and state power to overlap and that, when such overlap occurs, "the power of the state is subordinate, and must yield." *Id.*

expressly or necessarily divested by the Constitution.[26] Moreover—and this was the key point of the case—Chief Justice Kent disagreed that Congress's commerce power was exclusive, thereby divesting the states of authority over interstate commerce in the absence of federal legislation preempting state authority. As Kent pointed out, the commerce power "is not, in express terms, exclusive."[27] And, "[i]t does not follow," Kent declared, "that because a given power is granted to congress, the states cannot exercise a similar power."[28] Indeed, Kent pointed to the myriad state commercial regulations, many of which could be fairly said to regulate interstate commerce.[29] The uncontested validity of these laws indicated, in Kent's view, that the states possess "a concurrent power with congress in the regulation of external commerce."[30]

Kent objected to the exclusivity of the federal commerce power in principle, and he also was dubious that the courts were capable of drawing a principled line between interstate and intrastate commerce as the dual federalist model requires. Distinguishing between interstate and intrastate commerce was "difficult" because, as Kent recognized even then, "every regulation of the one will, directly or indirectly, affect the other."[31] For this reason, the only "safe or practicable rule of conduct" was to hold that the states "are under no other restrictions than those expressly specified in the constitution, and such regulations as the national government may, by treaty, and by laws, from time to time, prescribe."[32] For Kent, there was no Dormant Commerce Clause; the states retained authority to regulate and tax all forms of commerce, including interstate commerce, subject only to congressional preemption or express constitutional prohibition via some other constitutional clause.

---

26. *Id.* at 576. Indeed, Kent embraced Alexander Hamilton's discussion of residual state authority in *The Federalist* No. 32, in which Hamilton claimed that the U.S. Constitution divested the states of legislative authority only in three limited situations: where the grant of power to Congress was expressly exclusive, where state power is expressly prohibited by the Constitution, and where "an authority in the states would be absolutely and totally contradictory and repugnant to one granted to the union." *Id.*; *see also* THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

27. *Van Ingen*, 9 Johns. at 577.

28. *Id.* at 574.

29. *Id.* at 580–81 (discussing, inter alia, inspection, quarantine, and Sunday laws).

30. *Id.* at 580. Kent subsequently reaffirmed his view of the concurrency of the commerce power in his magisterial Commentaries. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 363, 367 (N.Y., O. Halsted 1826).

31. *Van Ingen*, 9 Johns. at 578.

32. *Id.*

Appealing to the Supreme Court, the great Daniel Webster and then U.S. Attorney General William Wirt challenged Kent's construction of the Commerce Clause. They argued that the power of Congress over commerce was exclusive and that the New York statutes, as regulations of interstate commerce, were therefore unconstitutional.[33] Webster, in fact, attempted to turn Kent's promotion of the concurrent theory of commerce on itself:

> We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general *concurrent power*, in the regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power.[34]

Moreover, Webster believed that the structure of the Constitution necessarily implied an exclusive commerce power. Were that not the case, the states would be free (as Kent had declared) to enact any commercial regulation unless and until Congress preempted it. Such a view would, in Webster's opinion, place Congress in the position of supervising state commercial legislation, a state of affairs that was "as bad as that which existed before the present constitution."[35] Less dramatically, Wirt added that the text of the Commerce Clause—that Congress is empowered to "regulate" commerce—implied uniformity of regulation and therefore exclusivity of regulation.[36]

Both Webster and Wirt acknowledged the force of Kent's observation that all activities may somehow be connected to interstate commerce—a proposition that, if coupled with a fully exclusive commerce power, would severely curtail state authority—but they attempted to rebut this point in two ways. First, Webster disagreed that all state regulations, like inspection and quarantine laws, were regulations of commerce; rather, they were

33. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9 (1824) (argument of Webster); *see also id.* at 11–13 (recounting the weaknesses of the Articles of Confederation and arguing that the framers expected Congress's commerce power to be exclusive).

34. *Id.* at 13.

35. *Id.* at 16. Indeed, Webster hyperbolically declared that, had the Constitution not made Congress's commerce power exclusive, "the constitution would not have been worth accepting." *Id.* at 13.

36. *Id.* at 178 (argument of Wirt). Webster also rejected the notion that Article I, Section 10, by expressly prohibiting certain state commercial regulations and taxes, implied that the states retained a concurrent commerce power. Webster thought it inconceivable that the Constitution would prohibit states from imposing onerous inspection laws but allow them to establish monopolies of trade and navigation. *Id.* at 14–15 (argument of Webster).

"regulations of police."[37] The implication was that, even if the commerce power was fully exclusive, the states retained the authority to enact police regulations for the health, safety, and welfare of their people. Moreover, such police regulations were valid even if they affected interstate commerce; as Webster claimed, "[q]uarantine laws, for example may be considered as affecting commerce; yet they are, in their nature, health laws."[38]

Second, and more interestingly, Webster argued that Congress's commerce power was only selectively exclusive.[39] According to Webster, only those "higher branches" of commerce were exclusively committed to Congress's care.[40] Wirt elaborated on this point:

> One branch alone, of such a subject, might be given exclusively to Congress, (and the power is exclusive only so far as it is granted,) yet, on other branches of the same subject, the States might act, without interfering with the power exclusively granted to Congress. Commerce is such a subject. . . . One or more branches of this subject might be given exclusively to Congress; the others may be left open to the States. They may, therefore, legislate on commerce, though they cannot touch that branch which is given exclusively to Congress.[41]

The Webster-Wirt theory of selective exclusivity, of course, begged the question what activities were part of the "higher branches" of commerce exclusively entrusted to Congress and what activities were subject to concurrent regulation by Congress or the states. They gave no definitive answer, suggesting in a minimal fashion geared to the case at hand that interstate navigation—with which New York's monopoly interfered—was clearly part of the "great branch."[42]

Significantly, neither the police regulation nor the selective exclusivity theory entailed a dual federalist conception of the Commerce Clause, which rigidly segregates federal and state authority over commerce. Both the police regulation and selective exclusivity theories, though nominally different, presupposed a tripartite constitutional division of commercial

37. *Id.* at 19; *see also id.* at 179 (argument of Wirt) (contending that Hamilton viewed police regulations as distinct from commercial regulations).

38. *Id.* at 20 (argument of Webster); *see also id.* at 178 (argument of Wirt) (contending that quarantine laws "do not partake of the character of regulations of the commerce of the United States").

39. *Id.* at 9–10 (argument of Webster).

40. *Id.* at 14; *see also id.* at 16 (arguing that only "those high exercises of [commerce] power" were necessarily exclusive).

41. *Id.* at 165 (argument of Wirt).

42. *Id.* at 26 (argument of Webster); *id.* at 181 (argument of Wirt).

regulatory authority into exclusively federal, exclusively state, and concurrent areas. Under the police regulation view, only Congress could regulate interstate commerce, but the states were free to regulate intrastate commerce and to adopt police regulations, which regulations might overlap with or affect interstate commerce. Under the selective exclusivity view, only Congress could regulate the higher branches of interstate commerce, but both Congress and the state could regulate the lower branches of interstate commerce, while only the states could regulate purely intrastate commerce. Common to both approaches was the belief that there was a middle area of commercial activities neither exclusively federal nor exclusively state in nature that was subject to both federal and state regulation.

Ultimately, the Supreme Court invalidated New York's steamboat monopoly. Chief Justice Marshall's opinion for the Court is remembered primarily for his articulation of an expansive and plenary commerce power held by Congress. Commerce, Marshall declared, "is traffic [in goods], but it is something more: it is intercourse," which included navigation and other acts related to the exchange of goods.[43] Moreover, Congress could regulate intrastate commercial activities, except for the "completely internal commerce" of a state, which Marshall defined as those matters "completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[44]

Marshall then turned to the limits on state authority imposed by the Commerce Clause. Marshall pointedly criticized Kent's concurrency theory.[45] Indeed, Marshall declared that there was "great force" in Wirt's argument that the power "to regulate" necessarily excludes state authority.[46] Marshall, though, refrained from resting the case on that ground, preferring instead to hold that the federal Navigation Act preempted the New York statutes by conferring a right for all federally licensed vessels to engage in

43. *Id.* at 189 (majority opinion). Even Justice Johnson, a Republican appointed to the Court by President Thomas Jefferson, agreed that commerce included more than the exchange of goods and that, therefore, Congress had the authority to regulate many commercial activities that were connected to the traffic in goods, such as shipbuilding. *Id.* at 229–30 (Johnson, J., concurring).

44. *Id.* at 195 (majority opinion).

45. *Id.* at 199–208.

46. *Id.* at 209. So, too, Justice Johnson, concurring in the judgment, agreed that Congress's power "to regulate" commerce "must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon." *Id.* at 227 (Johnson, J., concurring).

the coasting trade and to enter New York waters.[47] Nevertheless, *Gibbons*'s tentative embrace of the Webster-Wirt exclusivity theory, albeit dicta, is the jurisprudential origin of the Dormant Commerce Clause.

More significantly for present purposes, Marshall unequivocally rejected a dual federalist conception of the Commerce Clause. While he repudiated Kent's concurrency theory and was prepared to accept that state authority over commerce was constitutionally constrained by the Commerce Clause of its own force, Marshall also rejected the notion that states were limited only to regulating those commercial matters that were beyond Congress's authority to control—namely the "completely internal commerce" of the states. Rather, Marshall embraced Webster's first proposal—that the states retained their so-called police powers to enact regulations for the health, safety, morals, or welfare of their citizenry.[48] Moreover, and contrary to some recent commentary,[49] Marshall understood that the sphere of federal commercial regulation overlapped with the sphere of state police regulations—that there was an intermediate area of commercial conduct subject to both federal and state regulation (by Congress via its commerce power and by the states via their police powers).[50] As a result of this regulatory overlap, conflicts between the federal and state governments were inevitable, although Marshall was clear that federal law superseded any conflicting state law.[51]

Gibbons formed the touchstone for Dormant Commerce Clause cases for the next two decades.[52] Even when the Court revisited the issue of a

47. Marshall hedged on the notion of a Dormant Commerce Clause restricting state authority of its own force, stating that the Court need not definitely resolve the matter because the preemptive effect of the federal Navigation Act provided a sufficient ground for the decision. *Id.* at 210–12. For a thorough discussion of the reason for Marshall's hedge, see Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398 (2004).

48. *Gibbons*, 22 U.S. (9 Wheat.) at 203.

49. *See, e.g.*, Graff, *supra* note 10, at 389.

50. As Marshall expressly conceded, many of the states' police laws were indistinguishable in form from permissible federal legislation. *Gibbons*, 22 U.S. (9 Wheat.) at 204. Marshall agreed, for example, that state inspection laws affected commerce and were nevertheless valid, but he categorized them as part "of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." *Id.* at 203. For Marshall, what distinguished a police regulation from a commercial regulation was not its form, but its purpose or aim. *See* Louis M. Greeley, *What Is the Test of a Regulation of Foreign or Interstate Commerce?*, 1 HARV. L. REV. 159, 163 (1887) (endorsing the purpose test).

51. *Gibbons*, 22 U.S. (9 Wheat.) at 204–05.

52. *See* Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283 (1849) (invalidating state laws imposing taxes on aliens arriving at port); Thurlow v. Massachusetts (The License Cases), 46 U.S. (5 How.) 504 (1847) (upholding state liquor licensing requirements); City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding New York passenger reporting requirement as within city police power); Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (upholding the power of the state to place a dam across a stream as not "repugnant to the power to regulate commerce in its dormant state").

Dormant Commerce Clause in *Cooley v. Board of Wardens of Philadelphia*,[53] the Court again repudiated a dual federalist interpretation of the clause. At issue in *Cooley* was the constitutionality of Pennsylvania's pilotage statute, which required most vessels to either hire a pilot or pay an amount equal to half the pilotage fee for the benefits of pilots and their families. As the Court quickly realized, the *Gibbons*-based distinction between police and commercial regulations did not provide a clean solution to the case. States had historically imposed pilotage requirements.[54] At the same time, Congress had enacted several statutes, including the first federal Navigation Act, which regulated pilotage.[55] Indeed, in the first federal Navigation Act, Congress had adopted state pilotage statutes as federal law. Although *Gibbons* acknowledged the possibility that identical measures could be adopted by Congress and the states, the Court was not prepared to declare that a law regulating the licensing of pilots was police in nature when passed by a state but commercial in nature when adopted as federal law by Congress. Even if it was not philosophically incoherent to suggest that regulations might possess such a bipolar nature, such an approach was unappealing to the Court.

Neither was the Court attracted to the clarity offered by a dual federalist interpretation of the Commerce Clause. Dual federalism, with its emphasis on a strict delineation between federal and state authority, would have required the Court to invalidate either the federal navigation acts (on the ground that pilotage involves only intrastate commerce) or the myriad state pilotage statutes (on the ground that it involves interstate commerce). The first option was a nonstarter. Justice Curtis cursorily declared that it was "settled" that Congress's power to regulate interstate and foreign commerce included the power to regulate navigation (as *Gibbons* had held) and that the regulations of pilots "do constitute regulations of navigation, and consequently of commerce."[56] At the same time, the second option—the invalidation of the state pilotage statutes—was also beyond serious thought. States and localities had long adopted

53. 53 U.S. (12 How.) 299 (1851).

54. *Id.* at 312.

55. *Id.* at 315 (noting Act of Aug. 7, 1789, 1 Stat. 54); *id.* at 317 (noting Act of Mar. 2, 1837, 5 Stat. 153).

56. *Id.* at 315–16; *see also id.* at 317 (noting that "a regulation of pilots is a regulation of commerce, within the grant to Congress of the commercial power"). Only Justice Daniel disagreed, declaring that pilotage requirements were not commercial regulations within Congress's commerce power, and, therefore, they remained within the states' power to enact. *Id.* at 325–26 (Daniel, J., concurring). Though he did not say so expressly, his view seemed to condemn as unconstitutional the various provisions of the federal navigation acts concerning pilotage.

pilotage regulations, and it seemed inconceivable to the Court that the Constitution had divested the states of authority to adopt such important measures. The challenge for the Court was to identify some other formulation that would preserve both state and federal authority over pilotage.

One possible solution available to the Court would have been to adopt the dual federalist conception of the Commerce Clause but then hold that Congress could delegate some of its authority over commerce back to the states. On this view, the state pilotage requirements would be valid, but only because Congress in the first navigation act had made them so. In the absence of such act, they would be unconstitutional as falling within Congress's exclusive power to regulate commerce. The Court, however, rejected this approach, declaring that Congress could not delegate its power over commerce to the states. "If the Constitution excluded the States from making any law regulating commerce," Justice Curtis wrote for the Court, "certainly Congress cannot regrant, or in any manner reconvey to the States that power."[57] Justice McLean was even more emphatic: "State sovereignty can neither be enlarged nor diminished by an act of Congress."[58]

Alternatively, the Court could have embraced Kent's concurrency theory and held that both Congress and the states had the authority to regulate interstate commerce. Several members of the Taney Court, including the Chief Justice himself, had expressly embraced Kent's approach in earlier cases and repudiated the notion of a Dormant Commerce Clause resting on an exclusive federal commerce power.[59] Moreover, despite Marshall's lengthy discussion in *Gibbons* and the holding of *The Passenger Cases*,[60] Curtis announced that the question of the exclusivity of the commerce power was an open one.[61] And, on the merits of the question,

57. *Id.* at 318. As Curtis recognized, this view meant that federal statutes that adopted state laws only adopted those state laws in effect at the time of the enactment of the federal statute. Subsequent changes to the state law were not—and could not be—made part of the federal statute. *Id.* at 317–18. The Court subsequently relaxed this requirement in the twentieth century, at least with respect to federal enclaves, upholding the Assimilative Crimes Act. *See* United States v. Sharpnack, 355 U.S. 286 (1958); *see also* Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 219–28 (2005) (discussing the nondelegability of Congress's commerce power).

58. *Cooley*, 53 U.S. at 323 (McLean, J., dissenting).

59. *See, e.g.*, The License Cases, 46 U.S. (5 How.) 504, 578–86, 618 (1847) (Taney, C.J., joined by Nelson, J.); *see also* Greeley, *supra* note 50, at 168–69 (declaring that Chief Justice Taney, and Justices Catron and Woodbury endorsed the concurrency theory and that Justice Daniel was sympathetic to that view).

60. 48 U.S. (7 How.) 283 (1849).

61. *Cooley*, 53 U.S. at 318 ("This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court.").

Curtis initially seemed skeptical. Echoing Kent, Curtis pointed out that the text of the Commerce Clause said nothing about the exclusivity of the federal commerce power.[62]

Somewhat surprisingly (and all the more so given that Chief Justice Taney joined his opinion), Curtis rejected Kent's concurrency theory. Tracking Hamilton's *The Federalist* No. 32, Curtis noted that the central issue was whether the nature of the commerce power required that it be treated as exclusive (like Congress's power over the District of Columbia) or concurrent (like Congress's taxation authority).[63] And, here, Curtis announced that it was folly to provide a categorical answer to that question. Curtis observed that:

> [T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.[64]

As a description of the public policy issues confronting the nation, this was an entirely uncontroversial assertion. After all, even today, no one disputes that some matters should be regulated by the federal government in the interest of uniformity, while others should be left to the states in the interest of local accountability and experimentation. Curtis, though, believed that this distinction had constitutional foundations—specifically, that Congress's commerce power was exclusive with regard to "national" measures but concurrent with regard to "local" measures.[65] Curtis's embrace of a partially exclusive commerce power was a belated vindication for Webster and Wirt, who had argued in *Gibbons* that the commerce power was selectively exclusive. Applying his rule, Curtis concluded that pilotage regulations were a species of local commercial regulation within the power of both the federal government and states to adopt.

---

62. *Id.* at 318.
63. *Id.* at 318–19.
64. *Id.* at 319.
65. *Id.* ("Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."). Curtis went on to hold that pilotage regulations fall into the local category for which federal and state authority is concurrent. *Id.* Curtis bolstered this conclusion by reference to the fact that Congress had adopted state pilotage regulations, which, in his view, reflected Congress's understanding that diversity of pilotage requirements from state to state was acceptable. *Id.* at 320.

The Court's decision in *Cooley* was subject to substantial criticism even at the time. Curtis had offered no textual or historical foundation for his rule, nor did he attribute it to any prior decision of the Court (as he could not)—a feature that Justice McLean pounced upon in his dissent.[66] Moreover, as many constitutional commentators subsequently observed, the line between matters national in nature and those local in nature was vague at best.[67]

At the same time, though, *Cooley* did not work a substantial revision in the Court's nascent Dormant Commerce Clause jurisprudence. In practice, the Court's new national-local distinction would likely track the commerce-police distinction—that is, measures falling within the local category of *Cooley* would likely also qualify as police measures under *Gibbons*.[68] More fundamentally, the Court once again had rejected the dual federalist conception of the Commerce Clause. Under the *Cooley* rule, Congress had the power to regulate interstate and foreign commerce (presumably as understood by *Gibbons*), but the states also had the authority to regulate such commerce, at least in those areas in which there was no urgent need for a uniform, national rule. Though defined in different doctrinal terms, *Cooley* reaffirmed *Gibbons*'s tripartite categorization of exclusively federal, exclusively state, and concurrent authority.

II. DUAL FEDERALISM AND THE GILDED AGE

After the Civil War, the Court continued to be confronted with constitutional challenges to state and local measures under the Dormant Commerce Clause. As the federal government began to take an increasingly active role in commercial affairs, particularly in response to the Grange and Progressive movements, the Court also found itself addressing constitutional challenges to Congress's affirmative authority over interstate commerce. Although there are clear linkages between the Court's

66. *Id.* at 324 (McLean, J., dissenting). Charles Culberson contended that the *Cooley v. Board of Wardens* rule had its origin in Justice Woodbury's opinion *The Passenger Cases*. Culberson, *supra* note 11, at 42–43; *see also* The Passenger Cases, 48 U.S. (7 How.) 283, 561 (1849) (Woodbury, J., dissenting) (arguing that commerce power "may thus be exclusive as to some matters and not as to others").

67. *See* Greeley, *supra* note 50, at 174. For additional criticism of the *Cooley* rule, see *United States v. Lopez*, 514 U.S. 549, 569–70 (1995) (Kennedy, J., concurring); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-4, at 1049 (3d ed. 2000); Cushman, *supra* note 19, at 1114.

68. Justice McLean, who dissented and who would have applied *Gibbons* to invalidate the measure, believed that the *Cooley* rule necessarily meant that *The Passenger Cases* were wrongly decided. *Cooley*, 53 U.S. at 325 (McLean, J., dissenting).

decisions in the affirmative and Dormant Commerce Clause doctrines, this Part separately addresses the two areas so that the differences between the doctrines can be more easily perceived. Moreover, to understand the Gilded Age Court, it is necessary not just to assess what the Court said, but also to appreciate what it actually was doing. What emerges from that inquiry is a more nuanced and decidedly non–dual federalist portrait of the Commerce Clause during this period.

A. The Dormant Commerce Clause

In the wake of the Civil War, the Court was confronted with a number of challenges to state and local commercial regulations and taxes. For a time, the Court resolved these cases according to the *Cooley* national-local rule. Thus, for example, in *County of Mobile v. Kimball*,[69] the Court upheld an Alabama statute providing for the maintenance and improvements of harbors because, though interstate navigation was of national importance, the improvement of harbors was a local matter suitable for state regulation.[70] Meanwhile, in *Henderson v. New York*,[71] the Court held that New York's imposition of a $1.50 fee for each passenger arriving from a foreign port was an intrusion into an area of national concern and therefore unconstitutional.[72] Although the Court did not repudiate the *Cooley* rule, its approach to the Dormant Commerce Clause evolved in three significant respects during this period.

1. Rooting Out Discrimination

First, the Court's previously unitary Dormant Commerce Clause doctrine itself split into separate branches, with the Court identifying different features of state legislation as worthy of constitutional scrutiny. One such

69. 102 U.S. 691 (1880).

70. *Id.* at 699; *see also* Escanaba Co. v. Chicago, 107 U.S. 678, 687–88 (1883) (upholding Chicago's authority to build bridges across the Chicago River, even though the bridges, when closed, obstructed interstate ships ferrying goods to and from warehouses on the river, because the building of bridges, like the maintenance and improvements of harbors, was a distinctly local matter entrusted to state authority until such time as Congress preempted state control); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 432–33 (1870) (Bradley, J., concurring) (arguing that the state requirement that all vendors of imported items be licensed by the state violates the Dormant Commerce Clause, even if the state imposed the same license requirement on in-state and out-of-state vendors); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 729 (1865) (upholding the power of a city to build a bridge over a river despite its impact on interstate commerce).

71. 92 U.S. 259 (1875).

72. *Id.* at 273.

branch involved state or local measures that treated out-of-state goods worse than in-state goods—that, in modern parlance, "discriminated against interstate commerce." For example, in *Welton v. Missouri*,[73] the Court invalidated a Missouri statute that required traveling salesmen who sold out-of-state goods (but not salesmen who sold in-state goods) to procure a license. The Court characterized the Missouri statute as "discriminatory" and held that the Commerce Clause "protects [a good], even after it has entered the State, from any burdens imposed by reason of its foreign origin."[74] Moreover, as time went on and states attempted to conceal the discriminatory aspect of some measures, the Court became more adept at rooting out such discrimination in otherwise facially neutral laws. Thus, for example, when Minnesota enacted a law requiring all meat regardless of origin to be inspected within twenty-four hours of slaughter, the Court invalidated the facially neutral measure, concluding that it was a thinly veiled effort to ban meat slaughtered out of state and to require that all meat be slaughtered within the state.[75]

At first, the Court threaded the need to police against discriminatory measures through the *Cooley* rule, suggesting that discriminatory measures threatened the uniformity of regulation in areas of national concern subject to Congress's exclusive commerce power.[76] The unstated, negative

73. 91 U.S. 275 (1876).

74. *Id.* at 280, 282; *see also* Voight v. Wright, 141 U.S. 62, 66 (1891) (invalidating a Virginia law requiring inspection of only out-of-state flour); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497–98 (1887) (invalidating a Tennessee privilege tax that only applied to salesmen of out-of-state goods); Walling v. Michigan, 116 U.S. 446, 458 (1886) (invaliding a Michigan tax on out-of-state salesmen selling liquor manufactured out of state); Webber v. Virginia, 103 U.S. 344, 350 (1880) (invalidating a similar Virginia license tax on vendors of out-of-state goods); Tiernan v. Rinker, 102 U.S. 123, 127 (1880) (suggesting that a Texas occupation tax on liquor vendors that exempts vendors of in-state wine and beer is discriminatory and therefore violates the Dormant Commerce Clause); Guy v. Baltimore, 100 U.S. 434, 443 (1879) (invalidating a discriminatory wharfage fee on ships unloading out-of-state goods); Cook v. Pennsylvania, 97 U.S. 566, 573 (1878) (invalidating an auctioneer tax levied on the sale of foreign goods); Morrill v. Wisconsin, 154 U.S. 626, 626 (1877) (invalidating a similar Wisconsin license tax on peddlers of out-of-state goods).

75. Minnesota v. Barber, 136 U.S. 313, 322, 326 (1890). Interestingly, the Court in *Barber* also invoked the *Gibbons*-based commerce-police distinction, concluding that the Minnesota law, because it was discriminatory, was not properly part of the police powers of the state. *See id.* at 328 (concluding that "a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the state, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the state of sound meats, the product of animals slaughtered in other states").

76. *See, e.g.*, *Walling*, 116 U.S. at 455 ("A discriminating tax imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the constitution upon the congress of the United States."); *Welton*, 91 U.S. at 280 ("The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation.").

implication of this doctrinal formulation was that discrimination was acceptable in areas of local concern. Yet, the Court's decisions belied such a limitation. If any commercial matter seemed appropriate for diverse, local regulation, the licensing of traveling salesmen was it, but the Court nevertheless invalidated discriminatory licensing requirements.[77] Indeed, if Pennsylvania's pilotage statute had applied only to foreign ships, surely *Cooley* would not—and should not—have been decided the same way. More importantly, though, the linkage between the need for national regulatory uniformity and the dangers of discrimination was opaque at best. The dangers of discrimination were hardly confined to national issues.

Consequently, as time went on, the Court decoupled the mission of rooting out discriminatory measures from the need for regulatory uniformity. Rather, the danger to national economic union posed by discriminatory measures was itself justification for invalidating such measures. As the Court declared, "[i]t was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."[78] Even as early as 1879, the Court, making no mention of the *Cooley* rule, declared that it was "settled" that "no State can, consistently with the Federal Constitution, impose upon the products of other States . . . more onerous public burdens or taxes than it imposes upon the like products of its own territory."[79] Thereafter, the Court routinely invalidated discriminatory measures without any assessment of whether the affected subject matter was national or local in nature.[80]

77. *See supra* text accompanying notes 73–74.

78. *Webber*, 103 U.S. at 350.

79. *Guy*, 100 U.S. at 439; *see also* Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 426–27 (1921) (invaliding a state license imposed on out-of-state manufactures alone, without mentioning *Cooley*).

80. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521–22 (1935) (invalidating a New York statute banning the importation of milk unless the price paid to out-of-state producers was the same as the price paid to in-state producers); Pennsylvania v. West Virginia, 262 U.S. 553, 597 (1923) (invalidating a West Virginia statute requiring natural gas produced in the state to be reserved for in-state consumers); West v. Kan. Natural Gas Co., 221 U.S. 229, 254–55 (1911) (invalidating a state law banning construction of natural gas pipelines out of the state so as to ban the export of natural gas). At the same time, nondiscriminatory taxes were routinely upheld. *See, e.g.*, Hinson v. Lott, 75 U.S. (8 Wall.) 148, 153 (1868) (upholding an Alabama tax on imported liquor because in-state liquor is subject to a tax of an identical amount via another provision of the act).

2. Defining "Commerce Among the States"

a. Commerce Versus Production

At the same time, the Court began to take a narrower view of "commerce," even in cases involving patent discrimination. For example, in *Paul v. Virginia*,[81] the Court held that the issuance of insurance contracts did not constitute commerce because there was no exchange of goods or commodities.[82] Similarly, the Court upheld Virginia's authority to reserve its oyster beds exclusively for state citizens, because oyster farming did not involve the "transportation or exchange of commodities, but only . . . cultivation and production," which were not part of "commerce."[83] And, in *Coe v. Errol*,[84] the Court upheld the power of a town to tax lumber destined for export to another state so long as the lumber was not in actual transit.[85] Implicit in these decisions was the idea that commerce was distinct from and succeeded to productive activities.

The watershed case came in 1888 in *Kidd v. Pearson*,[86] in which the Court upheld the power of states to prohibit the manufacture of liquor. "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature," the Court declared, "than that between manufactures and commerce."[87] Elaborating, the Court wrote that "[m]anufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce . . . ."[88] Although the immediate effect of the Court's decision was to preserve state power against a Dormant Commerce

81. 75 U.S. (8 Wall.) 168 (1869).

82. *Id.* at 183; *see also* Hooper v. California, 155 U.S. 648, 655 (1895) (upholding a California punitive bond requirement for foreign insurance companies because insurance is not commerce). The Court's holding invited states to adopt myriad discriminatory measures involving the business of insurance, which discrimination Congress subsequently approved. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 435–36 (1946) (holding that the McCarran-Ferguson Act licenses states to adopt discriminatory insurance regulations and taxes).

83. McCready v. Virginia, 94 U.S. 391, 396 (1876).

84. 116 U.S. 517 (1886).

85. *Id.* at 527 (holding that a property tax may be laid on lumber "until [it has] been shipped, or entered with a common carrier for transportation, to another state, or [has] been started upon such transportation in a continuous route or journey").

86. 128 U.S. 1 (1888).

87. *Id.* at 20.

88. *Id.*

Clause challenge,[89] it was clear that it was the fear of federal authority over production that drove the Court's decision:

> If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat-grower of the northwest, and the cotton-planter of the south, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in congress and denied to the states, it would follow as an inevitable result that the duty would devolve on congress to regulate all of these delicate, multiform, and vital interests,—interests which in their nature are, and must be, local in all the details of their successful management.[90]

The Court added that such an expansive view of Congress's commerce power would entail a "swarm" of federal statutes that either would be general in form, thereby ignoring local differences, or would be tailored to individual markets, thereby leading to myriad inconsistent federal rules.[91] In the Court's view, it was difficult to imagine "[a] situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the constitution intended . . . ."[92] The Court recognized that production led to commerce and that by curtailing the former, a state would inevitably affect the latter, but that was constitutionally immaterial.[93] Indeed, the fact that the manufacturer in *Kidd* intended to export all of its liquor to other states made no difference; manufacture for export was still manufacture beyond the scope of the Commerce Clause.[94]

Following *Kidd*, the Court routinely upheld state laws regulating agriculture, mining, and manufacturing—processes that, in the Court's

89. For this reason, Barry Cushman praises the decision because, had the decision gone the other way, "it would have been the single greatest act of deregulation in American history." Cushman, *supra* note 19, at 1124.

90. *Kidd*, 128 U.S. at 21.

91. *Id.* at 21–22.

92. *Id.* at 22.

93. *Id.* at 23.

94. *Id.*

view, preceded commerce rightly understood. Thus, the Court upheld Mississippi's requirement that cotton seed oil companies divest themselves of cotton gin operations (because ginning was a manufacturing activity);[95] Ohio's ban on the manufacture of oleomargarine colored to look like butter;[96] Minnesota's occupation tax on mining;[97] and Oklahoma's regulation of the amount of crude oil to be withdrawn from oil fields.[98]

b. Direct Versus Indirect Burdens on Commerce

The more problematic and often-used limitation on the Dormant Commerce Clause developed by the Court during this time was its rule that only state regulations or taxes that "directly" regulated or burdened such commerce, not those that did so only "indirectly" or "incidentally," intruded upon Congress's exclusive commerce power.[99] The underlying rationale for this rule was an understandable and noble one: to preserve state regulatory authority from the disabling impact of a pure "effects test." As the Court correctly explained:

> In modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts. Practical lines have to be drawn, and distinctions of degree must be made.[100]

Unfortunately, the Court never offered a comprehensive definition of what constituted a "direct" versus "indirect" burden on commerce, and, even at the time, the Court acknowledged both that the rule was "occasionally difficult" to apply and that decisions applying the rule had not "been in full accord."[101]

---

95. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 136 (1921).

96. Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245 (1902).

97. Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 178 (1923).

98. Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 235 (1932) ("It is clear that the regulations prescribed and authorized by the act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation, and therefore is not a part of interstate commerce, even though the product obtained is intended to be and in fact is immediately shipped in such commerce.").

99. Simpson v. Shepard (The Minnesota Rate Cases), 230 U.S. 352, 396–97 (1913); Brennan v. Titusville, 153 U.S. 289, 302 (1894); Sherlock v. Alling, 93 U.S. 99, 102 (1876).

100. Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611, 616 (1903).

101. Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925).

At a far enough remove, the direct-indirect test seemed to turn upon whether the regulated or taxed activity was purely intrastate or crossed a state border. Direct regulations of commerce most often involved the regulation or taxation of cross-border commercial activities or companies engaged in such. For example, in *In re State Freight Tax*,[102] the Court invalidated Pennsylvania's freight carriage tax as applied to the shipment of any freight shipped across the state border, leaving the tax applicable only to purely internal freight shipments. The Court expressly acknowledged that the tax was nondiscriminatory,[103] but, because the tax operated in effect as a duty on the interstate shipment of goods, the Court declared it to be a regulation of commerce over which Congress's commerce power was exclusive.[104] Likewise, the Court invalidated numerous license fees imposed on salesmen or agents representing out-of-state manufacturers or railroads,[105] and it struck down state attempts to bar the importation of products from other states, even if the state likewise banned the domestic manufacture and sale of the same product, on the ground that such measures were a

102. 82 U.S. (15 Wall.) 232 (1872).

103. *Id.* at 276–77.

104. *Id.* at 279–80; *see also* Helson v. Kentucky, 279 U.S. 245, 249 (1929) (invalidating a wholesale gasoline tax as applied to interstate ferries); Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89 (1927) (invalidating a rate order for the sale and delivery of electricity to out-of-state distribution company); Missouri v. Kan. Natural Gas Co., 265 U.S. 298, 308 (1924) (invalidating the rate regulation of an interstate natural gas wholesale distributor); Cleveland, Cincinnati, Chi. & St. Louis R. Co. v. Illinois, 177 U.S. 514, 523 (1900) (invalidating an Illinois statute requiring every train to stop at county seat); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204, 222 (1894) (invalidating a Kentucky statute prescribing tolls for the bridge across the Ohio River); W. Union Tel. Co. v. Pendleton, 122 U.S. 347, 358 (1887) (invalidating an Indiana statute that provided a penalty for failure to deliver a telegram, as applied to telegrams sent out of state); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 575–77 (1886) (invalidating an Illinois regulation of railroad rates as applied to journeys across the state line); Pickard v. Pullman S. Car Co., 117 U.S. 34, 46 (1886) (invalidating a Tennessee privilege tax applied to railroad sleeping cars transiting into or out of the state); W. Union Tel. Co. v. Texas, 105 U.S. 460, 466 (1881) (invalidating a Texas tax on telegraph messages sent to out-of-state recipients).

Not surprisingly, businesses attempted to structure their dealings in such a way as to take advantage of the Court's hostility to the regulation and taxation of cross-border transactions. In one notorious case, a gasoline company arranged to deliver gasoline to fishermen, who took possession outside the state, so as to claim that it was engaged in the interstate sale of gasoline and therefore exempt from a state tax on gasoline. Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930). The Court rebuffed the effort as a transparent attempt to transform an otherwise clearly in-state transaction into an interstate one. *Id.* at 396.

105. *See, e.g.*, Brennan v. Titusville, 153 U.S. 289, 306 (1894); McCall v. California, 136 U.S. 104, 109 (1890); Lyng v. Michigan, 135 U.S. 161, 166 (1890); Stoutenburgh v. Hennick, 129 U.S. 141, 148 (1889); Asher v. Texas, 128 U.S. 129, 132 (1888); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

regulation of commerce.[106] Even as late as 1927, in *Di Santo v. Pennsylvania*,[107] the Court invalidated a nondiscriminatory state license requirement for ticket agents of steamboat companies as applied to ticket agents for transatlantic steamboat carriers on the ground that it was a "direct burden" on foreign commerce.[108]

On the other hand, state regulations or taxes imposed on purely intrastate activities were routinely upheld as only "incidentally" or "remotely" affecting interstate commerce. Thus, for example, in *Munn v. Illinois*,[109] the Court upheld Illinois's power to establish maximum rates for grain elevators, even though some of the grain was from or destined to other states, because the grain elevators' business was confined to the state and any impact on commerce outside the state was "indirect."[110] Likewise, the Court upheld state blue sky laws governing the sale of securities on the ground that they applied only to intrastate sales, even though the issuers were often from out of state.[111] And, the Court upheld a New York law forbidding the misleading retail sale of meat as "kosher," even though the meat was imported from other states, because the statute only "incidentally" affected the interstate meat market.[112]

---

106. *See, e.g.*, Schollenberger v. Pennsylvania, 171 U.S. 1, 25 (1898) (invalidating Pennsylvania's ban on importation in original packages of pure, unadulterated oleomargarine); Collins v. New Hampshire, 171 U.S. 30, 33 (1898) (invalidating New Hampshire's ban on the sale of oleomargarine not colored pink as applied to imported oleomargarine). *But see* Plumley v. Massachusetts, 155 U.S. 461, 468 (1894) (upholding Massachusetts law prohibiting the sale of oleomargarine colored to look like butter as applied to imported oleomargarine).

107. 273 U.S. 34 (1927).

108. *Id.* at 37; *see also* Crutcher v. Kentucky, 141 U.S. 47, 56–57 (1891) (holding that a state may not require a license fee from common carriers engaged in interstate transportation). One exception to this rule was the so-called quarantine cases, in which the Court upheld the power of states to prohibit the importation of diseased animals. *See, e.g.*, Reid v. Colorado, 187 U.S. 137, 151 (1902).

109. 94 U.S. 113 (1876).

110. *Id.* at 135 (noting that grain elevators' business is "carried on exclusively within the limits of the State of Illinois"); *see also* Townsend v. Yeomans, 301 U.S. 441, 459 (1937) (upholding a Georgia statute setting maximum rates for the handling and auctioning of leaf tobacco, even though 100 percent of such tobacco was exported, because the impact on interstate commerce was incidental).

111. *See* Hall v. Geiger-Jones Co., 242 U.S. 539, 557–58 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 567–68 (1917); Merrick v. N.W. Halsey & Co., 242 U.S. 568, 586 (1917). An analogous example involves state requirements that foreign corporations "doing business" in the state file a copy of their certificate of incorporation with state officials, which the Court upheld even as to corporations whose business involved some interstate activities. *See, e.g.*, Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611, 616 (1903) (upholding Wisconsin requirement).

112. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 503 (1925); *see also* Wilmington Transp. Co. v. Cal. R.R. Comm'n, 236 U.S. 151, 156 (1915) (upholding a California administrative order prescribing reasonable rates for intrastate ferry service); Gladson v. Minnesota, 166 U.S. 427, 431–32 (1897) (upholding a Minnesota statute requiring intrastate trains to stop at county seats).

Of course, distinguishing between cross-border or purely intrastate activity—or, equivalently, between taxes and regulations on the former versus the latter—was itself a difficult task. Many economic activities consisted of elements of both. When a state imposed a tax on a good that had been imported from another state, was that a tax on some local activity (such as its use) or a cleverly disguised tax on the importation?[113] Throughout this period, the Court struggled to identify principled guidelines, but the Court's resolution of individual cases often rested on thin, seemingly subjective, and eminently manipulable distinctions, such as whether the regulated or taxed goods were awaiting transit to another state,[114] were actually in transit,[115] or had come to "rest" in the destination state.[116]

113. *Compare* Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937) (upholding a use tax on imported goods because tax is levied "after commerce is at an end"), *with* Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 495 (1887) (invalidating license fees imposed on traveling salesmen as effectively a tax on the imported goods sold by them). The same difficulty occurred regarding taxes on goods (or their related services) destined out of state. *Compare* Am. Mfg. Co. v. City of St. Louis, 250 U.S. 459, 464 (1919) (upholding a license fee on manufacturers calculated by reference to gross sales of manufactured goods, including those shipped out of state), *with* Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265, 271 (1921) (invalidating West Virginia's per-barrel oil transportation tax as applied to oil transported out of state).

114. *See, e.g.*, Chassaniol v. City of Greenwood, 291 U.S. 584, 587 (1934) (upholding a municipal occupation tax on purchasers of cotton because purchase by cotton dealers occurs prior to the sale and interstate shipment of the cotton); Fed. Compress & Warehouse Co. v. McLean, 291 U.S. 17, 21 (1934) (upholding Mississippi's license tax for cotton compressors and warehouses because compression and warehousing take place before cotton enters interstate commerce); Edelman v. Boeing Air Transp., 289 U.S. 249, 251–52 (1933) (upholding Wyoming's excise tax on the use of gasoline in the state, even though the planes into which the gasoline is placed fly interstate, because the tax was levied on the act of withdrawal of the gas from the storage tank); Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co., 249 U.S. 134, 151–52 (1919) (upholding a rate regulation for intrastate rail journey of lumber that, upon delivery to the mill, would be manufactured into finished goods for delivery outside the state); Diamond Match Co. v. Village of Ontonagon, 188 U.S. 82, 96–97 (1903) (upholding a property tax assessed on logs awaiting transit for several years to out-of-state mills); Coe v. Town of Errol, 116 U.S. 517 (1886) (holding that states could lay a property tax on goods that were ultimately destined for export to other states so long as actual transit had not begun, but that states could not tax those goods once transit had begun).

115. *See, e.g.*, Kelley v. Rhoads, 188 U.S. 1, 7–8 (1903) (invalidating a Wyoming property tax as applied to sheep being driven through the state for shipment elsewhere, despite the fact that the sheep grazed in the state along the way); *In re* State Freight Tax, 82 U.S. 233, 281–82 (1872) (invalidating a rail freight tax as applied to in-transit, cross-border shipments); *see also* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 292 (1921) (holding that an out-of-state corporation that entered into a contract to purchase goods for delivery to a common carrier for shipment out of state was engaged in interstate commerce).

116. *See* Monamotor Oil Co. v. Johnson, 292 U.S. 86, 95 (1934) (upholding Iowa's excise tax on the use of motor vehicle fuel because the fuel had "come to rest" inside the state at the point of its use); Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 266 (1933) (upholding a Tennessee storage tax on gasoline because the gasoline, "upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce, and lost its

On closer inspection, however, it became clear that the direct-indirect rule did not map cleanly onto the cross-border–intrastate distinction. Some state regulation and taxation of cross-border activities was permitted by the Court. Thus, for example, the Court upheld Indiana's application of its wrongful death statute to torts committed by interstate boats on the Ohio River.[117] Likewise, the Court upheld numerous regulations regarding railroads, mostly involving train safety, even as applied to interstate rail journeys.[118] And, in one curious case, the Court even upheld the authority

immunity as such from state taxation"); Packer Corp. v. Utah, 285 U.S. 105, 111 (1932) (upholding Utah's ban on tobacco billboard advertisements because the ban's "operation is wholly intrastate, beginning after the interstate movement of the poster has ceased"); Leonard v. Earle, 279 U.S. 392, 397 (1929) (upholding a tax on oyster packing even though some oysters originated out of state because packing is "local in character"); Sonneborn Bros. v. Cureton, 262 U.S. 506, 508–09 (1923) (upholding a Texas occupation tax on oil wholesalers as calculated by the amount of sales because oil had come to rest inside the state); Bowman v. Cont'l Oil Co., 256 U.S. 642, 648–49 (1921) (upholding New Mexico's excise tax on the sale and use of gasoline as applied to gasoline used by the dealer at its stations); Wagner v. City of Covington, 251 U.S. 95, 102–03 (1919) (upholding a license fee on vendors of soft drinks manufactured out of state); Pub. Util. Comm'n v. Landon, 249 U.S. 236, 245 (1919) (upholding Kansas's retail rate regulation of natural gas because delivery to consumers and retail sale of such gas, though originating in interstate commerce, is intrastate commerce); Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 240–41 (1915) (upholding Ohio's movie censorship law as applied to movies from out of state because the exhibition of movies in Ohio followed interstate commerce); Browning v. City of Waycross, 233 U.S. 16, 23 (1914) (upholding an occupation tax on the installation of lightning rods manufactured out of state because installation occurs "after interstate commerce had completely terminated"); Banker Bros. Co. v. Pennsylvania, 222 U.S. 210, 213 (1911) (upholding a sales tax on the in-state sales of automobiles manufactured out of state); Brown v. Houston, 114 U.S. 622, 632–33 (1885) (holding that states could lay a property tax on goods that originated in another state so long as they had come to rest in the taxing state, such as by being held for sale there).

117. Sherlock v. Alling, 93 U.S. 99, 103, 104 (1876); *see also* Clyde Mallory Lines v. Alabama, 296 U.S. 261, 267 (1935) (holding that harbor fees assessed on interstate ships were permissible levies to defray the costs of harbor facilities); Sligh v. Kirkwood, 237 U.S. 52, 60–61 (1915) (upholding a ban on the interstate shipment of immature oranges unfit for consumption).

118. *See, e.g.*, Atl. Coast Line R.R. Co. v. Georgia, 234 U.S. 280, 291–92 (1914) (upholding a Georgia law requiring all train locomotives to use electric headlamps); Chi., Rock Island & Pac. Ry. Co. v. Arkansas, 219 U.S. 453, 465–66 (1911) (upholding an Arkansas statute requiring full train crews as applied to interstate trains); Erb v. Morasch, 177 U.S. 584, 585 (1900) (upholding a city ordinance prescribing the maximum speed for trains in the city); N.Y., New Haven & Hartford Ry. Co. v. New York, 165 U.S. 628, 631–32 (1897) (upholding a New York statute forbidding the heating of railcars by certain methods); Nashville, Chattanooga & St. Louis Ry. Co. v. Alabama, 128 U.S. 96, 101 (1888) (upholding an Alabama statute requiring certain railway employees to be tested for colorblindness); Smith v. Alabama, 124 U.S. 465, 482–83 (1888) (upholding an Alabama statute requiring engineers to be licensed by the state board). *But see* Seaboard Air Line Ry. Co. v. Blackwell, 244 U.S. 310, 316 (1917) (invalidating a state law requiring trains to slow before grade crossings as applied to interstate trains).

Even outside the context of safety-related regulations, the Court upheld regulations applied to interstate railroads. *See* Erie R.R. Co. v. Williams, 233 U.S. 685, 704–05 (1914) (upholding a New York law requiring railroads to pay those employees wholly employed inside the state or "those whose duties take them from the state into other states" semimonthly and in cash as affecting interstate commerce only "indirectly"); Hennington v. Georgia, 163 U.S. 299, 318 (1896) (upholding a Georgia statute forbidding freight train service on Sundays as a permissible police regulation).

of states to regulate the rates of interstate ferry services on the ground that ferries, unlike trains or long-voyage steamships, provided only a local service.[119] At the same time and correspondingly, some state regulations of activities that appeared to be purely intrastate were invalidated as direct burdens on commerce. Thus, despite *Munn*, which had upheld the power of states to regulate grain elevators, the Court invalidated a state law governing the grading of grain at grain elevators as "directly" burdening interstate commerce.[120]

Compounding the doctrinal confusion was the Court's use of obscure or technical distinctions to reconcile otherwise contradictory decisions. For example, in *Robbins v. Shelby County Taxing District*,[121] the Court invalidated a ten-dollar-per-week license fee as applied to traveling salesmen selling out-of-state goods. The Court viewed the license fee as a burden on interstate commerce, because it necessarily raised the cost for out-of-state companies who wished to sell their goods via traveling salesmen in the state.[122] The Court declared in a categorical fashion that interstate commerce, which it expressly defined to include the negotiation of sales of out-of-state goods, "cannot be taxed at all."[123] Yet, five years later, in *Ficklen v. Shelby County Taxing District*,[124] the Court upheld a fifty-dollar license fee on salesmen. The Court declared that, unlike the license tax invalidated in *Robbins* (which ostensibly was borne by the out-of-state manufacturers), this license fee was solely on the occupation of selling, which only incidentally affected the interstate sale of goods.[125] The fact that the salesmen's business consisted "wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state"—a fact of great significance to the Court in *Robbins*—was now minimized, with the Court declaring that taxing salesmen of interstate

119. Port Richmond & Bergen Point Ferry Co. v. Hudson, 234 U.S. 317, 331 (1914). Even more strikingly, the Court acknowledged that interstate conflicts might arise as each state set its own rates for the same ferry, but it dismissed this concern as inapposite. *Id.* at 332. Less than one week later, however, the Court held that the Commerce Clause forbade states from requiring a license for ferries engaged in foreign commerce. *See* Sault St. Marie v. Int'l Transit Co., 234 U.S. 333, 342 (1914); *see also* Town of Vidalia v. McNeely, 274 U.S. 676, 683 (1927) (invalidating a city license requirement for interstate ferry and following *Sault St. Marie*).

120. Shafer v. Farmer's Grain Co., 268 U.S. 189, 201 (1925).

121. 120 U.S. 489 (1887).

122. *Id.* at 495.

123. *Id.* at 497.

124. 145 U.S. 1 (1892).

125. *Id.* at 21.

goods "does not necessarily involve the taxation of interstate commerce, forbidden by the constitution."[126]

Worse, because of its reliance on such ephemeral (or, one might say, illusory) distinctions, the direct-indirect rule invited arbitrary or subjective decisionmaking. Perhaps the most odious example was the Court's decision in *Hall v. DeCuir*,[127] in which the Court invalidated a Louisiana statute that required transportation companies to provide equal accommodations to travelers regardless of race. The Court declared "that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."[128] Although the act applied only in Louisiana territory and waters, the Court was deeply disturbed by the cost (evidently only psychological) that would be incurred as interstate boats desegregated at the border: "A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."[129] "It was," the Court continued, "to meet just such a case that the commercial clause in the Constitution was adopted."[130] That last outlandish claim aside, even sophisticated constitutional commentators of the time approved the Court's ruling, suggesting more pragmatically that, if one state could require integration, others

126. *Id.* *Compare* Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Illinois, 177 U.S. 514, 523 (1900) (invalidating an Illinois statute requiring every train to stop at county seat), *with* Lake Shore & Mich. S. Ry. Co. v. Ohio, 173 U.S. 285, 301, 308 (1899) (upholding an Ohio statute requiring up to three trains per day to stop at stations of designated size); *compare also* Fargo v. Michigan, 121 U.S. 230, 242–44 (1887) (invalidating a Michigan gross receipts tax on foreign corporations engaged in the transportation of goods through Michigan), *and* Phila. & S. Mail S.S. Co. v. Pennsylvania, 122 U.S. 326, 327, 341–42 (1887) (invalidating Pennsylvania's tax on gross receipts of companies "for tolls and transportation" as applied to companies engaged in foreign and interstate transportation because that was a tax on transportation itself), *and In re* State Freight Tax, 82 U.S. 232, 280 (1872) (invalidating a Pennsylvania freight tax as applied to freight shipped interstate), *with* State Tax on Ry. Gross Receipts v. Pennsylvania, 82 U.S. (15 Wall.) 284, 284 (1872) (upholding a Pennsylvania tax on gross receipts of "every railroad, canal, and transportation company," including receipts from cross-border passengers and freight).

127. 95 U.S. 485, 490 (1877).

128. *Id.* at 488.

129. *Id.* at 489.

130. *Id.* The Court in *Hall v. DeCuir* suggested that Congress could order the desegregation of interstate carriers. *Id.* at 490. That alternative was closed several years later, however, when the Court invalidated the Civil Rights Act of 1867, which required equal accommodations regardless of race. United States v. Stanley (The Civil Rights Cases), 109 U.S. 3 (1883) (holding that Congress's power under the Fourteenth Amendment does not extend to private action). It was not until 1950 that the Court held that the Interstate Commerce Commission Act forbade racial segregation on trains. Henderson v. United States, 339 U.S. 816, 825–26 (1950).

could forbid it, leading to a burdensome array of regulatory requirements for interstate ships and trains.[131]

Thirteen years after *DeCuir*, however, the Court upheld against a Dormant Commerce Clause challenge a Mississippi statute *requiring* racial segregation on trains.[132] The Court distinguished *DeCuir* on the ground that the Mississippi statute applied only within the state, and thus the state-mandated segregation did not "directly burden" interstate commerce like the state-mandated desegregation of the earlier act.[133] While the Court in *DeCuir* had worried about the burden on interstate boats of desegregating at the border, the Court with not the slightest sense of shame now declared that the self-evident and substantial monetary cost of segregating trains at the border, which required adding new railcars, was constitutionally immaterial.[134] For Justice Harlan, this was too much: "I am unable to perceive how the former [Louisiana statute] is a regulation of interstate commerce, and the other [Mississippi statute] is not."[135]

The Court's actions in *DeCuir* and *Louisville, New Orleans & Texas Railway Co. v. Mississippi*[136] obviously testify to the corrupting influence of race in the Court's jurisprudence, but they also illuminate a flaw in the direct-indirect rule that affected the Court's decisions in cases not involving race. The Court was able to declare (and perhaps even consciously believe) that there was a difference between the Louisiana and Mississippi

131. *See* Greeley, *supra* note 50, at 178–79.

132. Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587, 592 (1890).

133. *Id.* at 590–91.

134. *See id.* at 591 (noting that adding additional cars "may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state"); *see also* S. Covington & Cincinnati St. Ry. v. Kentucky, 252 U.S. 399, 400, 404 (1920) (upholding a Kentucky statute requiring racial segregation on railroads as applied to interstate street car railroad because the requirement "affects interstate business incidentally and does not subject it to unreasonable demands"); Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U.S. 388, 394 (1900) (upholding the same statute as applied to intrastate passengers on interstate railroad).

135. *Louisville, New Orleans & Tex. Ry.*, 133 U.S. at 594 (Harlan, J., dissenting). When Louisiana followed Mississippi's lead and mandated racial segregation on trains in 1890, the Court upheld the measure against an equal protection challenge in the infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896), prompting another dissent from Harlan. *Id.* at 552 (Harlan, J., dissenting). The Court's decision in *Louisville, New Orleans & Tex. Ry.* was effectively (but not expressly) overruled in 1946 in *Morgan v. Virginia*, 328 U.S. 373 (1946), in which the Court invalidated on Dormant Commerce Clause grounds Virginia's requirement that public carriers racially segregate their passenger areas. *Id.* at 383–86. *DeCuir*, in turn, was also effectively (but not expressly) overruled in 1948 in *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), in which the Court upheld Michigan's application of its antidiscrimination statute to a ferry engaged in foreign commerce. *Id.* at 40.

136. 133 U.S. 587.

statutes only because the distinction between direct and indirect regulations of interstate commerce was entirely artificial and ultimately contentless—it meant whatever (and only whatever) the Court thought it meant. Thus, *DeCuir* was wrongly decided not just because the Court upheld a system of commercial apartheid, but also because the Court thought that requiring common carriers to racially integrate their cabin service differed in some identifiable and constitutionally important way from requiring common carriers to use particular safety equipment or obey myriad other regulatory requirements—requirements that were routinely upheld as imposing only indirect or incidental burdens on commerce.

3. Congressional Overruling

The final change in Dormant Commerce Clause analysis during the postbellum period was initially more subtle, yet ultimately more revolutionary. The antebellum Dormant Commerce Clause rested on the idea that the Commerce Clause itself divested the states of authority over commerce because the commerce power was held exclusively by Congress. Following the Civil War, however, the Court began to shift the theoretical basis for the doctrine. State power over Congress was divested not only because the commerce power was exclusive but also because Congress's failure to regulate or tax a particular commercial activity indicated its intent that the activity be left free of all regulation, federal and state. According to the Court, Congress's "inaction on this subject . . . is equivalent to a declaration that inter-state commerce shall be free and untrammeled."[137] In short, the Court transformed the Dormant Commerce Clause from a constitutional restriction on state authority to a novel form of field preemption—novel because, unlike today, such preemption would be inferred from the absence, not presence, of federal legislation.

Once again, this shift in doctrine was initially threaded through the *Cooley* rule, so that Congress's inaction had preemptive effect only in those

137. Welton v. Missouri, 91 U.S. 275, 282 (1876); *see also* Brennan v. Titusville, 153 U.S. 289, 302 (1894) (noting that "the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free"); Walling v. Michigan, 116 U.S. at 446, 455 (1886) ("We have also repeatedly held that so long as congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammeled, and that any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom.").

areas of national concern subject to Congress's exclusive power.[138] Indeed, the Court treated the *Cooley* rule merely as a presumption about the circumstances in which Congress's inaction indicated its desire to preempt state law. Thus, states could regulate matters of local concern because "[i]naction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authorit[y]."[139] But, once again, with time, the linkage between the *Cooley* exclusivity-based rule and the presumption of preemptive intent weakened and finally lapsed entirely. By 1917, the Court declared that the freedom of commerce provided by the Dormant Commerce Clause "arose *only* from the absence of congressional regulation, and would endure only until Congress had otherwise provided."[140]

The implications of this theoretical shift for the relationship between federal and state power were enormous, for it suggested that Congress could restore state authority over national matters. And, indeed, this is what soon transpired. In *Bowman v. Chicago & Northwestern Railroad Co.*[141] and

138. *See* Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 493 (1887) (noting that "where the power of congress to regulate is exclusive, the failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions"); *see also* Leisy v. Hardin, 135 U.S. 100, 109 (1890) ("Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention."); Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 508 (1888) (Fields, J., concurring) ("The absence of any law of Congress on the subject [of national concern] is equivalent to its declaration that commerce in that matter shall be free."); County of Mobile v. Kimball, 102 U.S. 691, 697 (1880) ("[Congress's] non-action in such cases [of national concern] with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free.").

139. *Kimball*, 102 U.S. at 699; *see also Bowman*, 125 U.S. at 482 ("The absence of legislation on the [local] subject, therefore, by congress, was evidence of its opinion that the matter might be best regulated by local authority, and proof of its intention that local regulations might be made.").

140. Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 328 (1917) (emphasis added); *see also Bowman*, 125 U.S. at 483 ("The question, therefore, may be still considered in each case as it arises, whether the fact that congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states.").

141. 125 U.S. 465.

Leisy v. Hardin,[142] the Court held that states could not prohibit the importation of imported liquor in its original package. The importation of liquor in original packages was, according to the Court, a component of interstate commerce over which Congress had exclusive authority.[143] At the same time, however, the Court expressly observed that Congress could restore state authority over such liquor. As the Court bluntly put it in *Leisy*:

> [T]he responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."[144]

Within months, Congress seized upon this invitation and passed the Wilson Act,[145] which restored state authority to regulate liquor imported from other states.[146] Almost immediately, the constitutionality of the Wilson Act came before the Court in *In re Rahrer*,[147] which upheld the Act. The Court acknowledged, as *Cooley* suggested, that "congress can neither delegate its own powers, nor enlarge those of a state."[148] Nevertheless, the Wilson Act was constitutional because, by the Act, Congress "simply removed an impediment to the enforcement of the state laws . . . created by the absence of a specific utterance on its part."[149] Stated differently, the Wilson Act did not transfer federal authority to the states but merely negated the presumption that Congress's regulatory silence denoted its intent to preempt state authority. With the door opened, Congress enacted other statutes restoring state authority divested by the Dormant Commerce Clause, which were in turn upheld by the Court on the same grounds.[150]

---

142. 135 U.S. 100 (1890).
143. *See id.* at 123; *Bowman*, 125 U.S. at 479, 481, 493, 498.
144. *Leisy*, 135 U.S. at 123–24.
145. Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (2000)).
146. *Id.*
147. 140 U.S. 545 (1891).
148. *Id.* at 560.
149. *Id.* at 564.
150. *See, e.g.*, Whitfield v. Ohio, 297 U.S. 431, 440 (1936) (upholding the Hawes-Cooper Act, ch. 79, 45 Stat. 1084 (1929) (codified as amended at 49 U.S.C. § 11507 (1978) (repealed 1995)); Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 328 (1917) (upholding the Webb-Kenyon Act, 27 U.S.C. § 122 (2000), which overruled *Rhodes v. Iowa*, 170 U.S. 412, 423–25 (1898)). For a more thorough (and critical) exploration of Congress's power in this regard, see Williams, *supra* note 57.

B. The Affirmative Commerce Clause

In the wake of the Civil War, the Court was initially receptive to broad federal regulatory authority. Thus, for example, the Court upheld the power of Congress to provide for the recording of mortgages and bills of sales of ships,[151] and, in *The Daniel Ball*,[152] the Court upheld the power of Congress to require a federal license for a ship whose voyage was purely intrastate. In the latter case, the mere fact that the ship carried goods from or destined to other states was sufficient to render it an instrumentality of commerce within Congress's commerce power.[153] After citing *Gibbons v. Ogden*,[154] the Court observed that Congress's power must necessarily extend to purely intrastate journeys because much interstate commerce obviously involved such journeys.[155]

The first signs of a change of approach came in 1868 in *United States v. Dewitt*,[156] the first case in which the Court invalidated a federal statute as beyond Congress's commerce power. At issue was a federal statute prohibiting the sale of illuminating oil that could ignite at less than 110 degrees Fahrenheit.[157] Invalidating the law, the Court tersely declared that the measure was "plainly a regulation of police . . . . relating exclusively to the internal trade of the States."[158] In a potentially ominous sign for how the postbellum Court would analyze federal measures, the Court did not even mention Chief Justice Marshall's extensive discussion of federal power in *Gibbons*, but rather relied exclusively on Dormant Commerce Clause decisions.[159] Doctrinal rules announced by the antebellum Court to preserve state authority were now being used by the postbellum Court to constrain federal authority.

The Court's new approach to the Commerce Clause would have particular significance as Congress began to use its commerce power in a more comprehensive fashion. In 1887, Congress undertook to regulate the

151. White's Bank v. Smith, 74 U.S. (7 Wall.) 646, 655–56 (1869).
152. 77 U.S. (10 Wall.) 557 (1870).
153. *Id.* at 565.
154. 22 U.S. (9 Wheat.) 1 (1824).
155. *The Daniel Ball*, 77 U.S. (10 Wall.) at 565–66. *But see In re* Trade-Mark Cases (The Trade-Mark Cases), 100 U.S. 82, 96–98 (1879) (invalidating the federal trademark law because it applied to all trademarks, including those used in connection with purely intrastate sales of goods).
156. 76 U.S. (23 Wall.) 41 (1870).
157. Internal Revenue Act of 1867, ch. 169, § 29, 14 Stat. 484.
158. *Dewitt*, 76 U.S. (23 Wall.) at 44–45.
159. *Id.* at 45 n.4 (citing The License Cases, 46 U.S. (5 How.) 504 (1847); The Passenger Cases, 48 U.S. (7 How.) 283 (1849); License Tax Cases, 72 U.S. (5 Wall.) 462 (1867)).

railroad industry, adopting the Interstate Commerce Commission Act,[160] and, in 1890, Congress outlawed anticompetitive business combinations in American industry, enacting the Sherman Antitrust Act.[161] As *Dewitt* had presaged, the Court deployed doctrinal rules developed in the Dormant Commerce Clause context in assessing the validity of actions taken pursuant to the new statutes. Yet, as close examination of the decisions reveals, the Court applied the doctrine in a more liberal fashion in assessing federal authority, thereby preserving a regulatory area over which both the states and Congress had constitutional authority. Stated differently, the fields of federal and state authority over commerce were not flip sides of the same dual federalist coin.

1. The Compartmentalization of Commerce

In *United States v. E.C. Knight Co.*,[162] the Court held that the Sherman Act could not constitutionally be applied to combinations in restraint of trade in the sugar industry, because sugar refining was manufacturing and manufacturing was not commerce. Echoing *Kidd v. Pearson*,[163] the Court tersely declared that "[c]ommerce succeeds to manufacture, and is not a part of it."[164] And, as *Kidd* had also indicated, the basis for this rule was not any refined notion that production was economically distinct from commerce (or had been so understood by the framers), but rather the fear that, if the Court did not exclude productive activities such as mining and manufacturing from congressional control, "comparatively little of business operations and affairs would be left for state control."[165]

Moreover, it did not matter to the Court whether or to what extent the sugar monopoly would affect the interstate price of sugar. The American Sugar Refining Company (whose actions were at issue in *Knight*) had acquired four Philadelphia-based sugar refiners, which accounted for 33 percent of the nation's sugar, thereby leaving American Sugar in control of approximately 98 percent of the nation's refined sugar supply.[166] As one might expect, American Sugar used that control to raise the price of sugar.

160. Ch. 104, 24 Stat. 379 (1887) (repealed 1996).
161. Ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7903 (2000)).
162. 156 U.S. 1 (1895).
163. 128 U.S. 1 (1888).
164. *Knight*, 156 U.S. at 12. Indeed, the Court quoted liberally and at length from *Kidd v. Pearson*. *Id.* at 14–15 (citing *Kidd*, 128 U.S. at 20–22).
165. *Id.* at 16; *see also* Cushman, *supra* note 19, at 1099–1100 (noting that the Court's formal division of commerce was rooted in a fear of unbridled federal power).
166. *Knight*, 156 U.S. at 5.

Nevertheless, the Court dismissed that fact as immaterial, declaring that such monopolistic acquisitions "might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable, and whatever its extent . . . ."[167]

Even at the time, though, *Knight*'s stated holding was misleadingly broad, as the Court quickly backed down from its categorical proclamation and began searching for ways to accommodate its formal rule with the economic reality that much commerce (as the Court understood it) depended on antecedent or subsequent economic activities. One move made by the Court was to acknowledge Congress's power over manufacturing and other precommercial activity when it was conjoined with interstate commerce. Thus, for example, in *Swift & Co. v. United States*,[168] the Court upheld a Sherman antitrust action against slaughterhouses that purchased cattle, slaughtered them, and then sold the meat to dealers.[169] According to the complaint, among other noncompetitive acts, the slaughterhouses collusively agreed to refrain from bidding against each other in purchasing cattle from ranchers so as to keep prices low.[170] The Court saw no need to resolve whether slaughterhouses were engaged in commerce because the purpose of the anticompetitive behavior was to impact prices in an interstate market for cattle and beef. Thus, the Court concluded that, in contrast to *Knight*, "the subject-matter [of the agreement] is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales."[171]

Of course, looking to the purpose of the anticompetitive agreement rendered the categorization of the underlying industry as productive or commercial largely meaningless. Few, if any, restraints of trade would not have the object of affecting the interstate price of the resulting good. And, indeed, the Court regularly upheld antitrust complaints against manufacturers where the purpose of the anticompetitive behavior was to impact the price of the manufactured good in other states.[172] By 1924, the Court had

167. *Id.* at 16; *see also id.* at 13 (noting that "[t]he fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce").

168. 196 U.S. 375 (1905).

169. *Id.*

170. *Id.* at 394.

171. *Id.* at 397.

172. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 68–69, 75 (1911); *see also* N. Sec. Co. v. United States, 193 U.S. 197, 331 (1904) (declaring that "combinations, even among *private* manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act"); Montague & Co. v. Lowry, 193 U.S. 38, 47–48 (1904) (upholding antitrust suit based on anticompetitive agreement between a tile manufacturer and dealers in another state); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 240–41 (1899) (upholding antitrust

effectively reduced *Knight* to a historical curio involving bad lawyering, contending that the decision there rested on the fact that there was no evidence that American Sugar had intended to raise the interstate price of sugar by monopolizing its manufacture.[173]

More profoundly, the Court's commitment to its manufacturing-commerce formalism began to wane. The first signs of this occurred in *Swift*, in which the Court announced that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."[174] To that provocative statement—*Knight* had implicitly held just the opposite—the Court added that there was "a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."[175] The Court retuned to this idea of a "current" or "stream" of commerce in *Stafford v. Wallace*.[176] Upholding the power of Congress to prescribe rates for and comprehensively regulate the practices of the stockyards, Chief Justice Taft rejected the idea that commerce was comprised of distinct and independent economic activities and, instead, declared that there were

> streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered

---

action against manufacturers of pipe because "[t]he direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made"); Cushman, *supra* note 19, at 1094–99 (discussing the significance of antitrust cases).

The Court applied the Sherman Act to unions striking against manufacturing and mining companies in a similar fashion. The Court regularly dismissed such suits where there was no evidence that the unions intended anything more than disruption of the companies' manufacturing operation, even though the necessary consequence was to reduce the companies' interstate sales. *See, e.g.*, United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457, 471 (1924); United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 407–13 (1922).

173. *United Leather Workers*, 265 U.S. at 468–69 (noting that *United States v. E.C. Knight* Co. "is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to control its making").

174. *Swift*, 196 U.S. at 398.

175. *Id.* at 399.

176. 258 U.S. 495 (1922).

> alone and without reference to their association with the movement of which they were an essential but subordinate part.[177]

And, again, in *Board of Trade of Chicago v. Olsen*,[178] the Court upheld Congress's power to regulate the grain futures market at the Chicago Board of Trade because the Board sat astride and was "indispensable to the flow of wheat from the West to the mills and distributing points of the East and Europe . . . ."[179]

This was a direct assault on the atomistic compartmentalization of interstate commerce, and, at least for a time, the Court understood it as such. In *Olsen*, Chief Justice Taft declared that *Swift* was a "milestone" that "recognized the great changes and development in the business of this vast country" and "fitted the commerce clause to the real and practical essence of modern business growth."[180] The compartmentalization of economic activity, the Court now appreciated, artificially cast each individual transaction in a local light presumptively immune from federal regulation and obscured the economic reality that all interstate commerce is comprised of local, intrastate activities that, put together, form an organic, interstate whole.[181] This insight led inexorably to the conclusion that Congress's power over interstate commerce could only be made real by allowing Congress to reach nominally "local" activities that were a part of such streams of commerce.

The stream of commerce idea would ultimately have profound significance for the Court's Commerce Clause jurisprudence, but, despite Taft's conviction that *Swift* and *Stafford* had authoritatively resolved the matter, the Court was not prepared to jettison entirely the notion that interstate commerce was comprised of component parts, some of which were beyond Congress's reach. In 1935, in *A.L.A. Schechter Poultry Corp. v. United States*,[182] the Court held that a Brooklyn-based slaughterhouse, which purchased its chickens from out of state through agents in New York City and which then sold the slaughtered chickens to local retail

177. *Id.* at 519.
178. 262 U.S. 1 (1923).
179. *Id.* at 36.
180. *Id.* at 35.
181. *Id.*; *see also* Corwin, *supra* note 8, at 497 (noting that production and transportation "are but part and parcel of something much broader, and that something is interstate 'commerce' in the original understanding of the term"); *id.* at 502 (arguing that all economic activity is connected to "the Interstate Market").
182. 295 U.S. 495 (1935).

butchers, was beyond Congress's authority to regulate.[183] The Court dismissed the suggestion that the slaughterhouse was part of a stream of commerce because all of its chickens had come from out of state:

> The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states.[184]

The Court did not deny that there were streams of commerce. Rather, the key point was that such streams ultimately terminate somewhere, and where they do, Congress's power cannot reach.

A year later, in *Carter v. Carter Coal Co.*,[185] the Court invalidated the Bituminous Coal Conservation Act of 1935,[186] which, among other things, regulated the wage and labor conditions of coal miners. Drawing on *Knight*, the Court declared categorically that "[p]roduction is not commerce; but a step in preparation for commerce."[187] Once again, the Court rejected the applicability of the stream of commerce idea and expressly embraced the pre-*Swift* compartmentalization of economic activity:

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce.[188]

---

183. *Id.* at 543 ("Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.").

184. *Id.*

185. 298 U.S. 238, 310 (1936).

186. 15 U.S.C. §§ 801–27 (Supp. I 1935).

187. *Carter*, 298 U.S. at 303; *see also id.* ("The employment of men, the fixing of their wages, hours of labor, and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade.").

188. *Id.*

Swift and *Stafford* were confined to the facts of those cases, which, as the Court now emphasized, only dealt with stockyards, not production generally.[189]

2. The Regulation of Interstate Transportation

In addition to the manufacturing-commerce distinction, the Court also imported the direct-indirect burden test from its Dormant Commerce Clause decisions. As noted above, the distinction often (but not always) turned on whether the regulated or taxed activity crossed a state line: If it did, state regulation directly burdened interstate commerce; if it did not, state regulation would have only an indirect or incidental impact.

As this rule suggested, it was for Congress to regulate cross-border activities, and, with one exception, the Court embraced this view. Congress enacted numerous statutes forbidding the interstate shipment or transportation of various items, such as lottery tickets and stolen motor vehicles.[190] In *Champion v. Ames (The Lottery Case)*,[191] the Court upheld Congress's power to forbid the interstate carriage of lottery tickets.[192] As the Court noted, the federal legislation supplemented state efforts to eradicate lotteries, protecting those states that had outlawed lotteries from being inundated with lottery tickets from other states that still permitted that form of gaming.[193] Following *The Lottery Case*, the Court upheld Congress's power to forbid the interstate shipment of adulterated food,[194] to forbid the interstate transportation of women for prostitution or other "immoral purpose,"[195] to prohibit the interstate transportation

189. *Id.* at 305–06; *see also* United States v. Butler, 297 U.S. 1, 63–64 (1936) (holding that a federal tax on farming could not be upheld under the commerce power because farming is not commerce); Barry Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, 55 ARK. L. REV. 1009, 1023 (2003) (contending that the Court limited the stream of commerce idea to industries that are affected with a "public interest" and that processed items—such as grain and livestock—that originated and were destined out of state).

190. *See* Corwin, *supra* note 8, at 478–79 (compiling federal statutes).

191. 188 U.S. 321 (1903).

192. *Id.* at 354.

193. *Id.* at 357 (noting that "Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce").

194. Hipolite Egg Co. v. United States, 220 U.S. 45, 57–58 (1911).

195. Hoke & Economides v. United States, 227 U.S. 308, 320–23 (1913); *see also* United States v. Popper, 98 F. 423, 424–25 (N.D. Cal. 1899) (upholding the power of Congress to forbid the interstate carriage of contraceptives). *But cf.* Keller v. United States, 213 U.S. 138, 139, 148–49 (1909) (invalidating a federal statute prohibiting the

of liquor in violation of state law,[196] and to forbid the interstate shipment of misbranded food or drugs.[197] Indeed, the Court dismissed any concern that Congress's exercise of its authority in this fashion might interfere with state police powers. Thus, the Court even upheld Congress's power to prohibit the interstate transportation of a woman for the noncommercial purpose of becoming a man's mistress.[198] As the Court categorically put it, "no trade can be carried on between the states to which [the commerce power] does not extend."[199]

The clarity of the *The Lottery Case* rule, however, was obscured by the Court's decision in *Hammer v. Dagenhart*,[200] in which the Court invalidated a federal statute barring the interstate transportation of goods made with child labor.[201] The Court acknowledged the general power of Congress to control interstate shipment, but it limited that power to the shipment or carriage of items that were noxious in and of themselves, which the Court insisted was not the case with furniture made by children.[202] In the Court's view, the purpose of the act was not to prohibit states from exporting injurious items to other states, but rather to compel those states to forbid child labor and thereby "standardize the ages at which children may be employed in mining and manufacturing within the states."[203] This last proposition was the key step in the argument for it allowed the Court then to invoke the rule that the regulation of manufacture was beyond Congress's authority.[204]

But what about the interests of other states that had forbidden child labor in their manufacturing industries? Could not Congress regulate the interstate shipment of such goods to protect those states from being deluged with such items? No, answered the Court: "The grant of authority over a purely federal matter was not intended to destroy the local

---

harboring of an alien for prostitution or another immoral purpose within three years of entry as beyond Congress's naturalization power).

196. United States v. Hill, 248 U.S. 420, 424–27 (1919).

197. Seven Cases of Eckman's Alternative v. United States, 239 U.S. 510, 514–15 (1916); McDermott v. Wisconsin, 228 U.S. 115, 128, 131 (1913).

198. Caminetti v. United States, 242 U.S. 470, 491–92 (1917).

199. *Hipolite Egg*, 220 U.S. at 57; *see also Hoke*, 227 U.S. at 323 (noting that "Congress has power over transportation 'among the several states'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations").

200. 247 U.S. 251 (1918).

201. *Id.*

202. *Id.* at 272 ("The goods shipped are of themselves harmless.").

203. *Id.* at 271–72.

204. *Id.* at 272–73.

power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution."[205] And, in the Court's view, upholding this statute would effectively transfer control over all economic activity, including local matters, to Congress:

> To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.[206]

The Court's decision in *Hammer* is significant in several respects. First, for a Court supposedly committed to a formalist interpretation of the Commerce Clause, *Hammer* was strikingly nonformalist. The federal child labor statute was no different in form than any of the previous federal statutes that had closed the channels of interstate commerce to particular items or persons. Such structural identity was irrelevant to the Court, however, which instead peered beneath the surface of the statute to determine its aim and effect on commerce—a patently realist approach to the Commerce Clause. Second, of perhaps more importance, was the Court's invocation of the Tenth Amendment as an independent limit on Congress's commerce power. In the Court's view, that Amendment served to protect the states' police powers from federal interference. This, of course, was a novel idea—no case before *Hammer* had suggested such a role for the Tenth Amendment—and it was one drawn entirely from a dual federalist conception of the Constitution that presumed a strict separation of federal and state authority. Third, the consequence of the Court's decision was to leave the interstate shipment of goods made with child labor free of all regulation. *Hammer* precluded federal regulation, and the Dormant Commerce Clause barred states from banning the import or sale of such goods, at least in their original packages.[207] In a very real sense, then, *Hammer* was inconsistent with the dual federalist model it espoused, not because it acknowledged an area of overlapping federal and

205. *Id.* at 274.
206. *Id.* at 276.
207. *Cf.* Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465 (1888); *see also* Corwin, *supra* note 8, at 498 (observing that, after *Hammer v. Dagenhart*, "neither Congress nor the states, nor both together, can stop interstate commerce in the products of child labor").

state jurisdiction (as *Gibbons v. Ogden* and *Cooley v. Board of Wardens* had), but because it created an area free from regulation by either sovereign.[208]

Not surprisingly, the Court's opinion in *Hammer* drew withering criticism. Justice Holmes penned a fierce dissent, castigating the Court for focusing on the aim of the statute, which he declared to be none of the Court's business.[209] In Holmes's view, a federal statute regulating the interstate transportation of a good, whatever its aim, was clearly within Congress's commerce power.[210] Moreover, the fact that the federal law might interfere with some states' policy preferences was immaterial.[211] Indeed, for Holmes, the states had no "right" protected by the Tenth Amendment to export their products to other states in contravention of federal statutes:

> The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States.[212]

Likewise, Thomas Reed Powell, the prominent constitutional commentator, echoed Holmes's criticisms, lambasting the Court for neglecting "history, logic and judicial precedents."[213]

As was the case with *Knight*, the Court's commitment to its ruling began to erode immediately. In fact, every post-*Hammer* challenge to a federal statute regulating the interstate shipment or transportation of

---

208. *See* Corwin, *supra* note 8, at 498 ("'Dual Federalism' thus becomes *triple* federalism—inserted between the realm of the National Government and that of the states is one of no-government—a governmental vacuum, a political 'no-man's land.'").

209. *Hammer*, 247 U.S. at 280 (Holmes, J., dissenting). And, even if it were, Holmes thought that child labor was at least as odious as alcohol or other items whose interstate shipment Congress had prohibited with the Court's approval. *See id.* ("But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor.").

210. *Id.* at 277–78.

211. *Id.* at 278 (noting that "the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State").

212. *Id.* at 281.

213. Thomas Reed Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 S. L.Q. 175, 189 (1918).

a good was upheld. Only seven months after the Court's decision in *Hammer*, in *United States v. Hill*,[214] the Court upheld the Reed Amendment, which prohibited the interstate shipment of liquor into a state in which the manufacture and sale of liquor was outlawed.[215] Although West Virginia prohibited the manufacture and sale of liquor in the state, it permitted residents to import one quart of liquor per month for personal use. When Hill did so from neighboring Kentucky, he was arrested for violating the federal statute, and his conviction was upheld on the ground that Congress had the power to control the interstate transportation of goods.[216] That the federal statute interfered with West Virginia's policy was dismissed with the proclamation—utterly inconsistent with *Hammer*—that "[t]he control of Congress over interstate commerce is not to be limited by state laws."[217] Likewise, in *Brooks v. United States*,[218] the Court unanimously upheld the power of Congress to forbid the interstate transportation of stolen motor vehicles.[219] *Hammer*, the Court instructed, was distinguishable because it involved goods that "were harmless and could be properly transported without injuring any person who either bought or used them."[220]

Finally, in *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, the Court upheld the federal prohibition on the interstate transportation of convict-made goods.[221] This was, for all practical purposes, the death knell of *Hammer* since convict-made goods were no different than child-made goods in any constitutionally material way. The goods were harmless in and of themselves, and the federal interest in banning their interstate transportation was to protect states that had banned that form of

214. 248 U.S. 420 (1919).

215. *Id.*

216. *Id.* at 421–22, 424, 427.

217. *Id.* at 425. The Court made no effort to reconcile that statement with its recent, contrary claims in *Hammer*. Only Justice McReynolds, joined by Justice Clarke in dissent, saw the contradiction. *Id.* at 428 (McReynolds, J., dissenting).

218. 267 U.S. 432 (1925).

219. *Id.* at 436–37. According to the Court, Congress could prohibit the interstate transportation of items so as to prevent "immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin." *Id.* at 436. While that rule clearly sustained the motor vehicle statute—interstate transportation of stolen vehicles clearly made the theft of vehicles easier to accomplish and therefore more likely to occur—that rule just as clearly called into question *Hammer*. Congress, after all, had determined that child labor was immoral and that allowing states that used child labor to export their goods throughout the country would harm those states that had forbidden the practice, thereby inducing them to permit child labor.

220. *Id.* at 438; *see also id.* (contending that *Hammer* involved a situation in which "the use of interstate commerce had contributed to the accomplishment of harmful results to people of other states").

221. 299 U.S. 334 (1937).

manufacturing from being undersold by goods from states that permitted such labor.[222] Although the Court was not prepared to overrule *Hammer*, the Court now distinguished it as involving a statute having "as its aim the placing of local production under federal control."[223] The implication was clear: Congress had unfettered authority to regulate the cross-border shipment or transportation of goods.

3. The Regulation of Intrastate Activities

The Gilded Age Court generally upheld state regulations of purely intrastate activities on the ground that such regulations only indirectly regulated or burdened interstate commerce. The dual federalist implication of this practice was that Congress was powerless to regulate such activities in light of dual federalism's rigid demarcation between state and federal spheres of authority. Although the Court was less receptive to the federal regulation of intrastate activities than it was to federal regulation of cross-border activities, it upheld concurrent federal power over many intrastate activities clearly within state authority.

To be sure, not every federal regulation of intrastate activities met with judicial approval. When Congress subjected common carriers engaged in interstate commerce to liability for injuries suffered by their employees as a result of the carriers' negligence, the Court invalidated the measure in *Howard v. Illinois Central Railroad Co. (The Employers' Liability Cases)*.[224] The Court acknowledged that Congress could provide for such liability with respect to employees whose job duties involved them in interstate commerce, but it denied that the Federal Employers Liability Act (FELA) could constitutionally be applied to employees whose own job duties were purely intrastate.[225] Even more restrictively, that same year, in *Adair v. United States*,[226] the Court held that Congress could not prohibit common carriers from discharging employees because of their union membership.[227] According to the Court, Congress could regulate only those activities having "some real or substantial relation to or connection with" interstate commerce.[228] Although the railroad was an interstate common carrier and

222. *Id.* at 351.
223. *Id.* at 350.
224. 207 U.S. 463 (1908).
225. *Id.* at 498–99.
226. 208 U.S. 161 (1908).
227. *Id.*
228. *Id.* at 178.

the discharged union employee was involved in its interstate operations, the Court could not see how prohibiting the termination of an employee because of his union status would affect interstate commerce.[229]

The Court, however, was not prepared to wall off all intrastate activities, even those clearly within state authority to regulate, as beyond Congress's commerce power. After *The Employers' Liability Cases*, Congress reenacted FELA but limited the scope of the carriers' liability to "any person suffering injury while he is employed by such carrier in [interstate] commerce."[230] In *Mondou v. New York, New Haven, & Hartford Railroad Co. (Second Employers' Liability Cases)*,[231] the Court upheld this act against constitutional challenge on the ground, which had been expressly implied in the first case, that Congress could regulate the master-servant relationship involving those employees engaged in interstate commerce.[232] But what if an interstate employee's injury had been caused by the negligence of a fellow employee engaged exclusively in intrastate commerce? The Court's answer was striking: Congress could regulate the actions of the intrastate employee where his actions impacted employees engaged in interstate commerce. As the Court said, it was not "the source of the injury" but rather "its effect upon interstate commerce" that was determinative of congressional power.[233] Indeed, Congress's "power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it."[234]

This was a surprising embrace of an effects test. In the Dormant Commerce Clause context, the Court had rejected such a rule on the ground that, because virtually all human activity could be said to affect commerce, an effects test would severely constrain state authority. Yet, in reviewing federal legislation, the Court embraced such a rule, potentially expanding federal regulatory authority to a great extent. Moreover, the basis for the Court's new approach was distinctly nonformalist: Only if

229. *Id.* at 178–79.
230. 45 U.S.C. § 1 (2000).
231. 223 U.S. 1, 48–49 (1912).
232. *Id.*
233. *Id.* at 51.
234. *Id.*; *see also* Balt. & Ohio R.R. Co. v. ICC, 221 U.S. 612, 618–19 (1911) (upholding the power of Congress to limit hours worked by employees engaged in interstate rail operations, even if those employees also worked in intrastate operations, because the two are interwoven); S. Ry. Co. v. United States, 222 U.S. 20, 26–27 (1911) (upholding the power of Congress to regulate the safety of intrastate railcars used on interstate railways because of the "close" relationship between intrastate and interstate commerce).

Congress could reach those intrastate activities that affected interstate commerce could its power over interstate commerce be made real.

The implication of the Court's more realist approach for congressional power became clearer in *Houston, East & West Texas Railway Co. v. United States (Shreveport Rate Cases)*.[235] There, the Interstate Commerce Commission (ICC) discovered that several Texas railroads were engaging in patent discrimination against interstate commerce, charging much more per mile for the interstate shipment of commodities between Louisiana and East Texas than between points in Texas.[236] The ICC ordered the companies to cease and desist from such discrimination—an order that effectively required the companies to raise their intrastate rates or lower their interstate rates so as to equalize the respective prices.[237] Upholding the ICC order, the Court disclaimed any power held by Congress to regulate the purely internal commerce of a state, but it expressly declared that Congress's commerce power extends to "all matters having such a close and substantial relation to interstate traffic . . . ."[238] Elaborating, the Court said that Congress "has the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."[239] And, in the Court's view, such discriminatory action with its evident impact on interstate commerce "furnishes abundant ground for Federal intervention."[240]

One should be careful before characterizing *Shreveport Rate Cases* as an unqualified victory for federal power. Barry Cushman is undoubtedly right that the Court at the time did not see it in revolutionary terms.[241] Instead, much like the situation with respect to the stream of commerce idea of *Swift & Co. v. United States* and *Stafford v. Wallace*, the Court cabined the reach of the generous approach to assessing federal regulatory authority used in *Second Employers' Liability Cases* and *Shreveport Rate Cases*. As Cushman has noted, the Court confined *Shreveport*'s reach as precedent to railroad cases,[242] and, even then, the Court did not read the decision as

235. 234 U.S. 342 (1914).
236. *Id.* at 346–47.
237. *Id.* at 349–50.
238. *Id.* at 351.
239. *Id.* at 353. The Court attempted to harmonize this rule with its decision in the first *Employers' Liability Cases* by declaring that, in the latter case, Congress had sought to regulate the liability to employees who "had no connection whatever with interstate commerce." *Id.* at 353.
240. *Id.* at 354.
241. *See* Cushman, *supra* note 19, at 1130–31.
242. *See* Cushman, *supra* note 189, at 1016.

giving Congress unbridled authority to regulate the intrastate activities of railroads. In *Railroad Retirement Board v. Alton Railroad Co.*,[243] the Court invalidated the Railroad Retirement Act of 1934,[244] which established a pension system for all railroad employees, on the ground that providing pensions for retired workers had no bearing on interstate commerce.[245] Like in *Adair* with respect to labor relations, the Court could not see how providing pensions for railroad workers, particularly ones that had already retired, would impact interstate rail operations.[246]

Moreover, the Court did not understand *Shreveport* to authorize the federal regulation of all intrastate activities that could be said to be related to or affect interstate commerce. Thus, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court held that the regulation of the labor and marketing operations of slaughterhouses that sold poultry only to local butchers for retail sale was beyond federal authority because those operations did not directly affect interstate commerce in chickens.[247] And, in *Carter v. Carter Coal Co.*, the Court held that the regulation of the wages and labor rights of coal miners only indirectly affected interstate commerce.[248] Only by distinguishing between direct and indirect effects in this way, the Court still insisted, could the legislative prerogatives of the states be preserved.[249]

Nevertheless, Cushman is too dismissive of the impact of the *Second Employers' Liability Act Cases* and *Shreveport Rate Cases*' on the Court's understanding of federal power. Perhaps, as Cushman argues, the Court's generous approach to federal power was circumscribed by the Court's substantive due process jurisprudence, which walled off certain economic

243. 295 U.S. 330 (1935).

244. Pub. L. No. 73-485, 48 Stat. 1283 (1934).

245. *R.R. Ret. Bd.*, 295 U.S. at 368–69.

246. *See also* Cushman, *supra* note 189, at 1040–41 (noting that the Court in *Railroad Retirement Board v. Alton* did not disagree that intrastate activities of railroads could be regulated by Congress, only that a mandatory pension system was a regulation of interstate commerce).

247. 295 U.S. 495, 548–50 (1935).

248. 298 U.S. 238, 309 (1936) ("Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.").

249. *Schechter Poultry*, 295 U.S. at 548; *Carter Coal*, 298 U.S. at 307. The Court conceded that distinguishing between "direct" and "indirect" effects was "not always easy to determine." *Carter Coal*, 298 U.S. at 307. Nevertheless, the Court attempted to give some principled content to the distinction, defining the terms in quasi-proximate cause terms. *Id.* at 307–08 ("The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.").

choices as distinctly private and therefore beyond either federal or state regulation.[250] That insight, however, does not diminish the fact that, within the realm of permissible governmental action, the Court was increasingly accepting of federal authority. What made *Shreveport* important—and, most tellingly, what made commentators at the time see it as important[251]—was not that it authorized unbridled federal regulation but that it recognized that, for Congress's commerce power to be fully effective, Congress must have the authority to regulate some purely intrastate conduct even at the expense of state legislative authority. In so doing, the *Second Employers' Liability Act Cases* and *Shreveport Rate Cases* corrosively undermined the Court's attachment to formal boundaries on Congress's commerce power.

Indeed, the impact of *Shreveport* can be seen even in those early New Deal decisions in which the Court invalidated federal regulatory measures. In *Schechter Poultry*, for example, the Court declared that Congress's commerce power "extends, not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury."[252] That last part was the key, for it acknowledged that intrastate activities not themselves part of interstate commerce were reachable by Congress. And, in so doing, the Court opened the door to the federal regulation of many intrastate activities that were clearly within state authority to regulate. While the Court was not prepared to accept any and all federal regulations of commerce, it would not categorically bar Congress from intruding upon areas traditionally thought to be and expressly upheld by the Court as within state authority.

C. Dual Federalism and the Gilded Age

During the period between the Civil War and the New Deal, the Court's affirmative Commerce Clause decisions obviously borrowed from the Dormant Commerce Clause decisions, but, as the foregoing discussion indicates, the two doctrines were not symmetrical opposites as dual federalism would require. Even at the time, the Court repeatedly cautioned that it was not the case "that the rule which marks the point at which state

250. Cushman, *supra* note 19, at 1130–31.

251. *See, e.g.*, William C. Coleman, *The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases*, 28 HARV. L. REV. 34, 79–80 (1914); John S. Sheppard, Jr., *Another Word About the Evolution of the Federal Regulation of Intrastate Rates and the Shreveport Rate Cases*, 28 HARV. L. REV. 294, 298 (1914); Edwin C. Goddard, Note and Comment, *Interstate Commerce Commission—Intrastate Rates*, 16 MICH. L. REV. 379, 380–82 (1918); Note, *Power of Congress to Regulate Intrastate Rates*, 14 COLUM. L. REV. 583, 585 (1914).

252. *Schechter Poultry*, 295 U.S. at 544.

taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states."[253] Indeed, the Court recognized that there remained a class of activities over which both Congress and the states had authority.[254] Thus, in the *Second Employers' Liability Cases*, the Court expressly acknowledged that the states could continue to regulate the master-servant relationship for employees of common carriers in the absence of conflicting federal regulations.[255] And, likewise, even after *Shreveport*, the Court continued to uphold the authority of states to set intrastate railroad rates.[256]

The Court's continuing recognition of a jurisdictional overlap between the federal government and the states with regard to interstate commerce was a byproduct of the underlying theoretical concerns driving the two doctrines. The Court's affirmative Commerce Clause doctrine was torn between the felt need to limit federal power so as to preserve a realm of state authority free from federal interference and the appreciation that, in an increasingly integrated national economy, Congress's commerce power must reach some quintessentially intrastate activities if it were to be made real. This latter recognition produced several doctrinal innovations, such as the stream of commerce idea and *Shreveport*'s "close and substantial relation" test, that had no counterpart in the Dormant Commerce Clause doctrine and that were not intended to be transported into the Dormant Commerce Clause.[257] Indeed, the Court's acceptance of greater federal authority did not mean *pro tanto* that the states were constitutionally divested of the authority over those matters.

The Court's Dormant Commerce Clause doctrine during this time was likewise torn between competing concerns, but, significantly, those concerns differed markedly from those animating the Court's affirmative doctrine. Barry Cushman is undoubtedly right that the Court desired to preserve state regulatory authority that would otherwise be

253. Swift & Co. v. United States, 196 U.S. 375, 400 (1905); *see also* McDermott v. Wisconsin, 228 U.S. 115, 136–37 (1913) ("To determine the time when an article passes out of the interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune.").

254. The Minnesota Rate Cases, 230 U.S. 352, 402–03 (1913) ("Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power.").

255. Second Employers' Liability Cases, 223 U.S. 1, 54–55 (1912).

256. *See* Bd. of R.R. Comm'rs v. Great N. R.R. Co., 281 U.S. 412, 426–29 (1930).

257. Cushman, *supra* note 189, at 1025.

constitutionally divested if Congress's commerce power were deemed fully exclusive.[258] Given the absence of substantial federal regulatory programs, much of American commerce would have been left free from any regulation had the Court not developed some limits to the doctrine. In Cushman's view, there was therefore a "pro-regulation valence" to the Court's Dormant Commerce Clause decisions.[259]

It is a mistake, however, to view the Gilded Age Court as preoccupied with the preservation of state authority. The postbellum Court was hardly proregulatory. This was, after all, the same Court that gave us *Lochner v. New York*.[260] What the Court "gave" to the states in its Dormant Commerce Clause decisions, it often retracted or limited via its substantive due process decisions.[261] Moreover, the Gilded Age Court's Dormant Commerce Clause doctrine was more restrictive of state authority than the *Gibbons-Cooley* regime that preceded it. Even with respect to ostensibly "local" regulations, the slightest whiff of a parochial motive to favor in-state businesses at the expense of out-of-state competitors was enough to trigger the Court's ire. The direct-indirect distinction, in turn, was employed to invalidate numerous nondiscriminatory measures that the antebellum Court would have likely upheld.[262] The preservation of state authority was not the exclusive concern driving the Dormant Commerce Clause, as it had been during the antebellum era.

Rather, the Gilded Age Court was fearful that, left unconstrained, states would use their regulatory and taxation powers in ways that hindered national economic union and impeded interstate trade among the states. This was not some crude laissez-faireism; indeed, the Court upheld numerous state and local regulations and taxes on commerce. Instead, the Court's hostility was directed—in the main though far from perfectly—to those measures that would unduly or severely handicap cross-border commerce. Discriminatory measures that sought to protect local industry from out-of-state competition clearly implicated this fear. Likewise, nondiscriminatory measures that in practice significantly discouraged interstate commerce were likely to be viewed and condemned as directly regulating or burdening interstate commerce. Unlike the antebellum

258. Cushman, *supra* note 19, at 1099–1100.
259. *Id.*
260. 198 U.S. 45 (1905).
261. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating a minimum wage law for women).
262. *Compare* The License Cases, 46 U.S. (5 How.) 504 (1847), *with* Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

Court, which viewed the Dormant Commerce Clause in strictly structural terms, the Gilded Age Court attempted to tailor the doctrine to promote the emergence of a national common market.

Lastly, even in those areas in which its Dormant Commerce Clause doctrine divested states of authority, Congress could overrule those limitations and restore state authority. This extraordinary doctrine was the byproduct of the Court's switch in Dormant Commerce Clause theory from one of exclusivity to one of presumed preemption by silence. And, even more at odds with dual federalism, the Court's acceptance of congressional authority to restore state authority meant that Congress, not the Court, was the final arbiter of state authority over commerce.

What emerges then is a much more complex and nuanced (and decidedly non–dual federalist) conception of commercial federalism during this period. The states were barred from enacting discriminatory or burdensome measures, although, even then, Congress could restore such authority to the states by legislation. Congress, meanwhile, had plenary authority over cross-border activities (such as the interstate transportation of goods) and those intrastate activities that had a "close and substantial relation" to interstate commerce, which in turn included some intrastate activities that only "indirectly" affected interstate commerce when it was the validity of state regulation or taxes that was at issue. In sum, although the Court used the same terminology and often spoke in terms seemingly drawn from dual federalism, there was a substantial and accepted overlap between Congress's and the states' authority over interstate commerce. In contrast to dual federalism's rigid demarcation of federal and state regulatory authority over commerce, the Gilded Age Court's approach reflected a more accommodating and pragmatic acceptance of shared authority than that historically attributed to it.

III. THE POST–NEW DEAL COURT AND DOCTRINAL DUALISM

The New Deal—or, more particularly, the Court's reaction to it—has been one of the most studied aspects of American constitutional law. Commentators continue to disagree about exactly what the New Deal Court wrought and the extent to which it was revolutionary.[263] Most of the scholarly attention has been directed to the Court's acceptance of

263. *Compare* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991), *and* Scheiber, *supra* note 12, at 646, *with* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998) (arguing that the changes wrought by the New Deal Court resulted more from internal doctrinal dynamics than from external political pressures).

broad federal regulatory authority, which has led some to conclude that the New Deal was a nationalist revolution that came at the expense of state authority.[264] Less noticed but equally important was the Court's reformation of the limits on state authority, including those imposed by the Due Process Clause and—more importantly for purposes of this Article—the Dormant Commerce Clause.[265] Stephen Gardbaum correctly reminds us that the New Deal Court was not concerned simply with expanding federal authority but also sought to liberate state authority from what it saw as overly restrictive, judicially imposed limits on state socioeconomic legislation.[266]

For present purposes, it is unnecessary to sort out and comprehensively characterize the New Deal's transformation of American federalism. The goal of this Article is more limited: to show how and why the Court's affirmative and Dormant Commerce Clause doctrines diverged during this time. At the same time that the Court was embracing expanded federal authority, it also was loosening the Dormant Commerce Clause's restrictions on state authority, thereby producing as a constitutional matter a large area of concurrent federal and state authority over commercial matters. This acceptance of overlapping federal and state authority, however, was not the product of some newfound embrace of Kent's concurrency theory—the Dormant Commerce Clause was expressly reaffirmed by the New Deal Court, though with a more limited scope. Rather, it was the result of the Court's rejection of the notion that there was a principled, judicially enforceable, categorical boundary between interstate and intrastate commerce. And, interestingly, this "realist" insight, which became the foundation of the Court's affirmative Commerce Clause doctrine, first emerged in Dormant Commerce Clause decisions.

A. The Dormant Commerce Clause

As with many areas of American law, doctrinal changes that were to occur had been presaged in dissenting opinions in earlier cases. In the

---

264. *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

265. In addition to the reduction in the scope of the Dormant Commerce Clause, the New Deal Court also expanded state authority in its repudiation of economic substantive due process, its recalibration of federal preemption doctrine, and its embrace of expanded state court lawmaking authority. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997) (cataloguing these pro-state changes in doctrine).

266. *Id.* at 491.

Dormant Commerce Clause area, one of those earlier cases was *Di Santo v. Pennsylvania*,[267] in which the Court invalidated Pennsylvania's requirement that ticket agents for steamboat companies procure a license, holding that the measure "directly" burdened foreign commerce.[268] *Di Santo*'s holding, viewed from a modern perspective, is clearly problematic. As Justice Brandeis pointedly observed in dissent, the Pennsylvania statute was a reasonable, nondiscriminatory measure applicable to all ticket agents and was designed to prevent fraud by ticket agents.[269] Its impact on foreign commerce, in Justice Brandeis's view, was only "indirect."[270]

Justice Stone's dissenting opinion, though, suggested something more far reaching. For Stone, the whole project of attempting to differentiate between direct and indirect burdens on commerce, as the Court had done for the past half century, was problematic. Justice Stone viewed the function of the Dormant Commerce Clause to be the promotion of a national common market—as he put it, its purpose was "to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign."[271] The direct-indirect test, though, did not help identify state measures that ran afoul of these twin prohibitions. Indeed, for Stone, the test was a contentless makeweight that concealed more than it illuminated:

> In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.[272]

Rather, Stone proposed to substitute for the direct-indirect test a more holistic and detailed investigation, urging the Court to engage in "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce."[273]

267. 273 U.S. 34 (1927).
268. *Id.* at 37; *see also supra* text accompanying note 108.
269. *Di Santo*, 273 U.S. at 39–40 (Brandeis, J., dissenting).
270. *Id.*
271. *Id.* at 44 (Stone, J., dissenting).
272. *Id.*
273. *Id.*

A decade later with the advent of the New Deal Court, Stone's approach became the Court's doctrine. In 1938, in *South Carolina State Highway Department v. Barnwell Bros*,[274] Justice Stone, now writing for the Court, upheld South Carolina's prohibition on semi-tractor trailers beyond a certain width and weight using state highways. Tellingly, Stone did not rely on any suggestion that the measure only "incidentally" affected commerce; rather, Stone pointed to the state's historically acknowledged interest in highway safety and emphasized that the measure was nondiscriminatory.[275] A year later, in *Milk Control Board v. Eisenberg Farm Products*,[276] the Court upheld a Pennsylvania statute requiring milk dealers to pay a minimum price to dairy farmer even as applied to a dealer that shipped all its milk out of state. Although the Court made passing mention of the direct-indirect rule, it declared that the constitutionality of the measure "can be answered only by weighing the nature of the [dealer's] activities, and the propriety of local regulation of them."[277] The Court observed that, while the particular dealer challenging the measure engaged exclusively in interstate commerce, only a small fraction of Pennsylvania's milk was exported; at the same time, exempting such exported milk from the price control scheme would, as

274. 303 U.S. 177 (1938).

275. *Id.* at 187 (noting that the state has "a primary and immediate concern in [state roads'] safe and economical administration"). Stephen Gardbaum has argued that, from 1938 to 1945, the Court viewed the Dormant Commerce Clause as policing only against discriminatory measures. Gardbaum, *supra* note 265, at 520–21. For support, Gardbaum points to Stone's opinion in *South Carolina State Highway Department v. Barnwell Bros.* and suggests that, by 1945 when the Court decided *Southern Pacific Co. v. Arizona*, Stone had a "change of heart" and embraced a balancing inquiry for nondiscriminatory measures. *Id.* at 521. Gardbaum, however, misreads the Court's Dormant Commerce Clause decisions during this time period, particularly *Barnwell*. While it is true that in *Barnwell*, Stone emphasized the nondiscriminatory nature of the South Carolina statute, he never suggested that this fact alone was sufficient to decide the case. Indeed, Stone's ensuing discussion of the historical role of states in regulating the safety of highways and the deference that courts must accord state judgments on the matter belies such a holding. Moreover, Gardbaum ignores Stone's earlier comment in his *Di Santo* dissent that the Dormant Commerce Clause prohibited both discrimination and "the erection of barriers or obstacles to the free flow of commerce, interstate or foreign." 273 U.S. at 44. And, not to gild the lily, when Stone in *Southern Pacific* expressly announced the balancing test, he cited both the Court's 1943 decision in *Parker v. Brown*, which Stone authored, and his own dissent in *Di Santo*, demonstrating that Stone (at least in his own mind) had not experienced any change of heart on the matter. S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945).

276. 306 U.S. 346 (1939).

277. *Id.* at 352.

the Court put it, "cripple" the effectiveness of the regime.[278] The contrast to *Di Santo* in both tone and result was patent.

The interment of the direct-indirect test became complete in *Southern Pacific Co. v. Arizona*.[279] There, the Court invalidated an Arizona statute limiting the length of trains traveling through the state. Stone, now Chief Justice and writing for the Court yet again, declared the validity of state regulations of commerce depended on an "appraisal and accommodation of the competing demands of the state and national interests involved."[280] This was, pure and simple, a balancing inquiry, as made clear by Stone's ultimate conclusion: "Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail."[281]

Nor was Stone's hostility confined to the direct-indirect test. In *Parker v. Brown*, the Court downplayed the significance of the *Kidd-Knight* manufacturing-commerce distinction, and upheld California's adoption of a raisin-marketing system in which growers were forced to sell their raisin crops to an agricultural committee, which in turn marketed the raisins in such a way as to preserve an adequate price.[282] Stone acknowledged that prior cases had established that manufacturing and agriculture were not components of commerce, but he belittled this branch of the Dormant Commerce Clause doctrine as a "mechanical test sometimes applied by this Court."[283] He conceded that, under this test, the California program survived challenge,[284] but he then declared that "courts are not confined to

278. *Id.* at 353. Of course, *Di Santo v. Pennsylvania* had implicitly rejected such a facial approach to assessing the burden on interstate commerce, holding that a nondiscriminatory statute was unconstitutional as applied to businesses engaged in foreign commerce. 273 U.S. at 37. In *Milk Control Board v. Eisenberg Farm Products*, however, the Court distinguished *Di Santo* on the patently erroneous ground that it involved a statute "direct[ed] solely at foreign commerce" and hence was a discriminatory statute. 306 U.S. at 353.

279. 325 U.S. 761.

280. *Id.* at 769. Performing that assessment, Stone found that the measure imposed a serious burden on interstate commerce by requiring interstate trains to be disassembled at the state border, cross the state in multiple trains, and reassemble on the other side of the state. *Id.* at 773. At the same time, he found that there was no countervailing safety benefit because the law required more trains to traverse the state. *Id.* at 775, 779.

281. *Id.* at 783–84; *see also* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 48–49 (1940) (upholding a sales tax as applied to an out-of-state company taking orders for coal delivered from out of state).

282. 317 U.S. 341, 366–68 (1943).

283. *Id.* at 360.

284. *Id.* at 361 ("Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to

so mechanical a test."[285] The clear implication was that it was not sufficient to uphold a state regulation or tax to conclude that the measure applied only to productive activities. Rather, the validity of a state measure turned on whether

> upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.[286]

Ironically, *Parker*'s repudiation of the *Kidd-Knight* rule, which treated productive activities as categorically subject to state regulation, was the lone instance in which the New Deal Court's reformation of the Dormant Commerce Clause produced a doctrinal principle that was less favorable to state authority than the Gilded Age rule that it replaced. That loss for state regulatory authority, however, was more than offset by the Court's antecedent rejection of the direct-indirect burden test. After *Parker*, nondiscriminatory state regulations of productive activities were not per se immune from constitutional challenge, but their constitutional validity was assessed under the forgiving balancing inquiry of *Barnwell* and *Southern Pacific*.

While the New Deal Court's transformation of the Dormant Commerce Clause was substantial, not all of the Gilded Age Court's doctrinal framework was jettisoned. Most notably, the New Deal Court reaffirmed the constitutional commitment to rooting out measures that discriminated against interstate commerce. The paradigmatic example of this doctrinal continuity is *H.P. Hood & Sons, Inc. v. Du Mond*.[287] There, the Court invalidated a New York order banning an out-of-state milk dealer from establishing another plant in the state because it would compete with other in-state purchasers of milk. The Court viewed the measure as a patently protectionist act forbidden by the Dormant Commerce Clause.[288]

---

interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce.").

285. *Id.* at 362.

286. *Id.* at 362–63. Even though almost all California raisins were ultimately exported and even though the marketing system necessarily would raise the interstate price of the raisins—indeed, that was its purpose—the Court upheld the measure as a necessary and reasonable response to the price collapse in the California raisin industry that threatened the financial viability of California growers. *Id.* at 364–65.

287. 336 U.S. 525 (1949).

288. *Id.* at 530–31.

Justice Jackson's opinion for the Court, though, is remembered primarily for its express embrace and paean to the role of the Dormant Commerce Clause in creating a national common market.[289] As Jackson put it, "our economic unit is the Nation."[290]

Even here, though, the New Deal Court put its mark on the constitutional doctrine in ways that would shape the modern doctrine. The Gilded Age Court had justified the invalidation of discriminatory measures on historical grounds—namely, that the framers intended to divest the states of authority over interstate commerce because of the fear of such discriminatory provisions.[291] To this historical justification, however, the New Deal Court added the idea that discriminatory measures were also constitutionally suspect because the political process could not be trusted to refrain from adopting them (and therefore judicial review was necessary). This process-based antagonism to discriminatory measures, which had no precursor in the Gilded Age,[292] first appeared in *Barnwell*. As Justice Stone had noted in that case, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[293] On the other hand, the fact that a regulation or tax's burden falls equally on in-state and out-of-state interests alike was "a safeguard against their abuse."[294]

More than just providing an additional justification for the Court's actions, the process theory gave additional momentum to the Court's efforts

289. *Id.* at 533–34 (noting that aversion to discrimination was "deeply rooted in both our history and our law").

290. *Id.* at 537; *see also id.* at 539 ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.").

291. Indeed, Justice Johnson in his concurrence in *Gibbons* had defended the idea of a Dormant Commerce Clause on precisely this ground. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 222–39 (1824) (Johnson, J., concurring).

292. Gardbaum, *supra* note 265, at 522.

293. S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184–85 n.2. Stone made this point even more express in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), observing that "to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *Id.* at 45 & n.2, 46; *see also* S. Pac. Co. v. Arizona, 325 U.S. 761, 767–68 n.2 (1945) (noting that "the Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

294. *Barnwell*, 303 U.S. at 187.

to root out discriminatory measures and provided a way to reconcile the New Deal Court's professed deference to legislative action with its continued commitment to a Dormant Commerce Clause. For the New Deal Court, the resolution of socioeconomic matters was for the political process. The New Deal Justices believed deeply, as Holmes had argued in dissent in *Lochner v. New York*, that the Constitution did not commit the nation to any given economic model and that it was consequently for the democratic process to decide how to structure socioeconomic relationships.[295] The New Deal Court's repudiation of economic substantive due process is perhaps the best indicator of this commitment. By identifying a type of state legislation in which the political process could not be trusted, however, Stone's process theory rescued the Dormant Commerce Clause from the doctrinal oblivion implied by this commitment to judicial restraint and deference to the political process. Implicit in Stone's reformulation of the role of the judiciary with regard to the Dormant Commerce Clause was the notion that judicial scrutiny was necessary and therefore justified (and perhaps only justified) when the political process could not be trusted—a notion that Stone would famously expand more generally to the judicial review of all legislation, federal and state.[296]

The other facet of the Gilded Age Court's doctrinal framework embraced and perpetuated by the New Deal Court was the principle that Congress had the power to overrule the Court's Dormant Commerce Clause decisions and restore state authority to act in otherwise unconstitutional ways. The seminal case was *Prudential Insurance Co. v. Benjamin*,[297] in which the Court upheld Congress's power to validate a patently discriminatory South Carolina tax on insurance premiums on policies issued by out-of-state insurers.[298] The New Deal Court's embrace of this authority was all the more striking because the Court made clear that it no longer subscribed to the underlying theory—that Congress's legislative silence indicated its intent to preempt state authority—that made this exceptional doctrine possible.[299] Rather, the Court offered a new theoretical justification for this power: When Congress and the states act together,

295. Indeed, contrary to the rest of the Court, Justice Black believed so deeply in this view of the appropriate role of the Court that he, like Chief Justice Taney before him, rejected the idea of a Dormant Commerce Clause in principle and only begrudgingly was willing to prohibit discriminatory acts (which he thought were better viewed as a violation of equal protection). *See H.P. Hood*, 336 U.S. at 551 n.2 (Black, J., dissenting).

296. *See infra* text accompanying notes 331–333.

297. 328 U.S. 408 (1946).

298. *Id.* at 433.

299. *Id.* at 425–26.

constitutional limitations imposed on one or the other, such as the Dormant Commerce Clause, are inapplicable.[300]

The modern Dormant Commerce Clause is the lineal descendant of these New Deal decisions and their underlying theoretical attachments. As foreshadowed by the New Deal decisions, the modern doctrine has coalesced around two, distinct branches. Following *Hood*, the Court has regularly invalidated state and local measures that, in the Court's view, favor local economic interests at the expense of out-of-state competitors.[301] As a doctrinal matter, the modern Court applies a form of strict scrutiny to discriminatory measures, asking whether they serve some legitimate local purpose and whether there are nondiscriminatory alternative means available to accomplish that purpose.[302] Only one state law has survived such exacting review,[303] and the Court itself has spoken of a rule of "virtual per se" invalidity for discriminatory measures.[304] Indeed, the Court's hostility to discriminatory measures runs so deep that the principal issue dividing the modern Court has been how to define and identify, outside the context of facially discriminatory measures, what types of laws are discriminatory.[305]

At the same time, the Court continues to police nondiscriminatory regulations that, in its view, unduly burden interstate commerce.[306]

---

300. *Id.* at 434–35. For a critical assessment of the Court's new rationale, see Williams, *supra* note 57, at 193–95.

301. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 582 (1997) (invalidating a discriminatory property tax exemption); Or. Waste Sys. Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 101 (1994) (invalidating a discriminatory waste disposal fee); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (invalidating a discriminatory waste flow control ordinance); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 367 (1992) (invalidating a discriminatory waste disposal ordinance that prohibited the disposal of waste generated outside the county); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 348 (1992) (invalidating a discriminatory hazardous waste disposal fee).

302. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); *see also Fort Gratiot*, 504 U.S. at 359; Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

303. Maine v. Taylor, 477 U.S. 131, 151–52 (1986) (upholding a state ban on the importation of live baitfish from other states).

304. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

305. *Compare* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350–52 (1977) (invalidating a statute that burdened out-of-state businesses), *with* Exxon Corp. v. Maryland, 437 U.S. 117, 133–34 (1978) (upholding a statute whose burdens were felt almost entirely by out-of-state businesses). For a comprehensive assessment regarding the determination of discriminatory measures, see Norman R. Williams, The American Common Market (Apr. 17, 2007) (unpublished manuscript, on file with author).

306. The balancing test applies only to regulations. Nondiscriminatory taxes are evaluated under a different test. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (holding that, to be valid, a state tax (1) must be applied to an activity with a "substantial nexus" with the taxing state; (2) be "fairly apportioned"; (3) must not "discriminate against interstate commerce"; and, (4) must be "fairly related to the services provided by the State"). The third

Following *Barnwell*, *Parker*, and *Southern Pacific*, the Court applies a balancing test to these measures. The current formulation of the test, which was first announced in *Pike v. Bruce Church, Inc.*,[307] focuses on whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits:"[308] Applying this test, the Court has invalidated state measures requiring cantaloupes to be packaged in state at substantial cost;[309] requiring semi-tractor trailers to use curved mudflaps;[310] limiting the length of semi-tractor trailers;[311] and requiring administrative approval of tender offers for foreign corporations with a specified number of in-state shareholders.[312] These cases, however, are exceptional; most measures survive the balancing test.[313]

Lastly in this regard, the modern Court, like its New Deal and Gilded Age predecessors, continues to accept the authority of Congress to overrule the Dormant Commerce Clause and restore state authority.[314] In fact, the modern Court has recognized another exception to the Dormant Commerce Clause, allowing states to act in otherwise impermissible fashion when they are using their proprietary powers as a market participant, rather than regulating or taxing private parties.[315]

In sum, the modern Dormant Commerce Clause is a faint echo of its former self. The contrast between the Gilded Age and the present may

---

prong is the same antidiscrimination requirement discussed above. For a discussion of the Court's application of this test, see Williams, *supra* note 305, at 95–96.

307. 397 U.S. 137 (1970).

308. *Id.* at 142.

309. *Id.* at 144–46.

310. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

311. Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).

312. Edgar v. MITE Corp., 457 U.S. 624 (1982).

313. *See, e.g.*, CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987). Because these cases turn on a case-specific assessment of the purposes of the law and its burden on interstate commerce, it can be difficult to discern principled differences among the cases. Indeed, Justice Scalia has argued that there can be no principle because the balancing test weighs incommensurable values and should therefore be jettisoned. Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 79–80 (1993) (Scalia, J., concurring in part and concurring in the judgment); Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (declaring that the comparison of benefits and burdens is akin to "judging whether a particular line is longer than a particular rock is heavy"); *see also* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (criticizing the balancing test).

314. *See* Williams, *supra* note 57, at 155 n.8 (collecting decisions).

315. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 432–33 (1980) (upholding a state policy of reserving cement produced by a state-owned plant for in-state customers). *But see* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (limiting the market participant exception to state action in the market in which the state participates, not downstream markets).

be illustrated by comparing *Robbins v. Taxing District of Shelby County*[316] with *Breard v. City of Alexandria*.[317] As discussed above, *Robbins* invalidated a ten-dollar-per-week license fee imposed on a traveling salesperson from out of state soliciting orders for an out-of-state company.[318] The case was a masterpiece of formalism: "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made," the Court said, "is interstate commerce," and such commerce "cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."[319] More than a half century later in *Breard*, however, the Court upheld a municipal ordinance that forbade traveling salesmen from approaching a residence without the owner's consent.[320] Although the salesmen challenging the law were, as in *Robbins*, from out of state and soliciting orders for out-of-state goods, the Court declared that the municipal ordinance was "not an added financial burden upon sales in commerce or an exaction for the privilege of doing interstate commerce but a regulation of local matters."[321] In contrast to the Gilded Age, the Court was prepared to accept extensive state and local regulation and taxation of interstate commerce.[322]

B. The Affirmative Commerce Clause

The New Deal, of course, also wrought a fundamental change in the affirmative Commerce Clause doctrine, upholding congressional power over purely local activities so long as Congress had a rational basis for believing those activities, viewed as a class, substantially affected interstate commerce. By the end of the century, however, the Rehnquist Court attempted to cabin Congress's commerce power. Strikingly, though, the Rehnquist Court's New Federalism did not herald a resurrection of the Gilded Age's limitations on federal power, nor was it presaged by or intellectually linked to any similar evolution in Dormant Commerce

316. 120 U.S. 489 (1887).
317. 341 U.S. 622 (1951).
318. *See supra* notes 121–123 and accompanying text.
319. *Robbins*, 120 U.S. at 497.
320. *Breard*, 341 U.S. at 638.
321. *Id.*
322. *See also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281 (1977) (noting that "the Court consistently has indicated that 'interstate commerce may be made to pay its way,' and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology").

Clause doctrine. In that ironic respect, the New Federalism laid bare the extent to which the affirmative and Dormant Commerce Clauses had diverged both doctrinally and theoretically by century's end.

1. The New Deal and Economic Realism

The first sign of change in the Court's approach to federal legislation came in 1937 in *NLRB v. Jones & Laughlin Steel Corp.*[323] At issue was whether the National Labor Relations Act (NLRA), which, among other things, forbids firing employees because of their union activities, could constitutionally be applied to Jones & Laughlin, the fourth largest steel company in the United States at the time. In hindsight, it looked preposterous for the company to have challenged the matter; Jones & Laughlin was a vertically integrated steel empire with operations across the nation.[324] Its Aliquippa, Pennsylvania plant—the plant at which the unfair labor practices allegedly occurred—employed 10,000 men and shipped 75 percent of its steel to out-of-state customers.[325] If Congress did not have the authority to regulate the labor relations of an industrial behemoth like Jones & Laughlin, it was not clear what company it could regulate.

On its behalf, Jones & Laughlin invoked *Knight*, arguing that, because it was a manufacturer, it was outside Congress's commerce power. The Court, however, turned to the *Shreveport Rate Cases* and declared that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[326] "[I]t is thus apparent," Chief Justice Hughes continued, "that the fact that the employees here concerned were engaged in production is not determinative."[327] In so doing, Hughes effectively gutted *Knight*, treating it as an exceptional case confined

323. 301 U.S. 1 (1937).

324. Based in Pennsylvania, Jones & Laughlin owned, among other things, mines in Michigan, Minnesota, and West Virginia; railroads throughout the East; fabricating shops in New York and Louisiana; and sales offices in twenty cities. *Id.* at 26–27.

325. *Id.* at 27.

326. *Id.* at 37. Interestingly, the government had attempted to distinguish *Knight* by invoking the stream of commerce idea from *Swift* and *Stafford*. The Court, though, found it unnecessary to resolve whether those cases and the stream of commerce idea were applicable to Jones & Laughlin. *Id.* at 36.

327. *Id.* at 40. Also divested of precedential force was *Carter v. Carter Coal Co.*, which was reinterpreted as resting exclusively on the nondelegation doctrine and due process, not the Commerce Clause. *Id.* at 41.

essentially to its facts. And, given the nationwide scope of Jones & Laughlin's activities, it was hardly surprising that the Court found that labor strife at its Aliquippa plant would have a significant impact on interstate commerce and was therefore sufficiently related to interstate commerce as to come within Congress's commerce power.[328]

Jones & Laughlin was clearly a transitional case. The Court did not expressly overrule any decision, but the Court's tone and application of doctrine to the facts at hand belied a change in approach. Indeed, the four dissenters in *Jones & Laughlin* clearly thought so, accusing the majority of departing from "well established principles."[329] The Court's decision in a companion case upholding the applicability of the NLRA to a clothing manufacturing company with only eight hundred employees, all employed in the same state, revealed perhaps

328. *Id.* at 41–42. This holding interred *Adair*, in which the Court had held that Congress's prohibition on the termination of railway employees because of their union status was not sufficiently related to interstate commerce. *See supra* text accompanying notes 226–229. In fairness, the Court had effectively overruled *Adair* in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 571 (1930), in upholding the Railway Labor Act of 1926's requirement that railway workers be allowed to unionize. There, the Court distinguished *Adair* on the fanciful (and illusory) ground that the 1926 act did not interfere with the employers' right to terminate employees. *Id.* By 1941, the Court, citing *Texas & New Orleans* and *NLRB v. Jones & Laughlin Steel Corp.* among others, expressly observed that *Adair* was no longer good law. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

329. *Jones & Laughlin*, 301 U.S. at 76 (McReynolds, J., dissenting). For this reason, I disagree with Erwin Chemerinsky's assessment that *Jones & Laughlin* can be reconciled within the Commerce Clause decisions from the Gilded Age. *See* CHEMERINSKY, *supra* note 5, § 3.3, at 257; *see also* United States v. Lopez, 514 U.S. 549, 573 (1995) (Kennedy, J., concurring) (claiming that *Jones & Laughlin* "mark[ed] the Court's definitive commitment to the practical conception of the commerce power"). Interestingly, the four dissenters in *Jones & Laughlin* offered a parade of horribles if the Court's opinion were right:

> If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch? The products of a mine pass daily into interstate commerce; many things are brought to it from other states. Are the owners and the miners within the power of Congress in respect of the latter's tenure and discharge? May a mill owner be prohibited from closing his factory or discontinuing his business because so to do would stop the flow of products to and from his plant in interstate commerce? May employees in a factory be restrained from quitting work in a body because this will close the Factory and thereby stop the flow of commerce? May arson of a factory be made a federal offense whenever this would interfere with such flow? If the business cannot continue with the existing wage scale, may Congress command a reduction? If the ruling of the Court just announced is adhered to, these questions suggest some of the problems certain to arise.

Jones & Laughlin, 301 U.S. at 97–98 (McReynolds, J., dissenting). Their prediction as to the future scope of federal power, of course, turned out to be correct, though one need not subscribe to the inference they drew from it.

even more clearly that the Court's understanding of the scope of Congress's commerce power had changed.[330]

Although *Jones & Laughlin* ostensibly adhered to the Gilded Age's doctrinal framework, the Court soon dispensed with that restrictive approach. In *United States v. Carolene Products Co.*,[331] the Court upheld Congress's power to prohibit the interstate shipment of "filled milk" (skimmed milk combined with other fats or oils to resemble whole milk or cream). The Court's opinion, authored by Justice Stone, is most famous for its rejection of *Lochner*esque intrusive judicial review of the substantive merits of legislation under the Due Process Clause. In the now-mythic footnote four, Stone suggested that intrusive judicial review might nevertheless be justified for legislation that targets "discrete and insular minorities" because such discriminatory legislation inhibits those political processes that typically operate to protect minority rights.[332] This, of course, was a more comprehensive elaboration of his political process account of the Dormant Commerce Clause first articulated in *Barnwell*, which Stone expressly referenced. And, while one need not believe "because *Barnwell*, therefore Ely,"[333] it is worth remembering that Stone's political process account of judicial review—particularly its most striking feature that the Court should intervene to protect "discrete and insular minorities"—had its origins in the Dormant Commerce Clause.

Amidst all the attention lavished on Stone's substantive due process analysis, it is often easy to forget that the Court also rejected the Commerce Clause challenge to the federal statute. Stone's analysis was brief and curt: Congress's commerce power includes the power to prohibit the shipment of goods in such commerce; this power is plenary; and "[s]uch regulation is not a forbidden invasion of state power either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination."[334] Tellingly, Stone made no mention of the Court's contrary holding in *Hammer v. Daggenhart*.[335]

---

330. NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); *see also* United States v. Wrightwood Dairy Co., 315 U.S. 110, 118–21 (1942) (upholding Congress's power to set minimum prices for milk produced and sold intrastate because it competed with milk produced in other states); United States v. Rock Royal Coop., Inc., 307 U.S. 533, 568–69 (1939) (same).

331. 304 U.S. 144 (1938).

332. *Id.* at 152–53 n.4.

333. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (constructing an entire theory of judicial review based upon footnote four).

334. *Carolene Prods.*, 304 U.S. at 147.

335. 247 U.S. 251 (1918).

The implications of the pregnant silence of *Carolene Products* became clear in *United States v. Darby*,[336] in which the Court—again speaking through Justice Stone—unanimously upheld the Fair Labor Standards Act (FLSA). That act both directly regulated the wages and hours of workers and forbade the interstate shipment of goods made in violation of the act. With regard to the prohibition on interstate shipment, Stone closely tracked (almost quoting verbatim) his opinion in *Carolene Products*. As Stone brusquely declared, "the shipment of manufactured goods interstate is [interstate] commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."[337] But this time Stone did not ignore *Hammer*; rather, he dismantled the *Hammer* rule piece by piece. First, it was for Congress, not the Court, to decide what items were harmful if shipped in interstate commerce.[338] Second, the fact that Congress's purpose was to alter the conditions of local employment was immaterial because "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[339] Third, the Tenth Amendment, upon which *Hammer* had rested its rule, did not impose a substantive limit on Congress's powers but stated merely "a truism that all is retained which has not been surrendered."[340] In short, "regardless of its purpose or motive," Congress has plenary control over the shipment in interstate commerce of goods and services. *Hammer*, Stone declared, was erroneous when decided and "should be and now is overruled."[341] Justice Holmes, who had dissented in *Hammer*, was vindicated.

336. 312 U.S. 100 (1941).

337. *Id.* at 113.

338. *Id.* at 114 ("Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.").

339. *Id.* at 115.

340. *Id.* at 124; *see also id.* ("There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.").

341. *Id.* at 117; *see also id.* at 116–17 ("The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted.").

Even more strikingly, Stone upheld those provisions of FLSA directly regulating the wages and hours of employees "engaged in the production of goods for interstate commerce." That the regulated activity—employment of workers in manufacturing—was intrastate in character was of no moment. "[T]he power of Congress to regulate interstate commerce," Stone said, "extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it."[342] Applying that rule, Stone had no doubt that the payment of substandard wages affected such commerce.[343] *Carter Coal*, though not expressly overruled, was limited to its facts.[344] And, perhaps most significantly, presaging future decisions limiting the ability of litigants to challenge the constitutionality of federal statutes as applied to them on the ground that their actions, viewed individually, did not affect interstate commerce,[345] Stone declared that it was immaterial whether the particular lumber manufacturer in question itself affected interstate commerce:

> Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great.[346]

In other words, Congress could directly regulate the intrastate conduct of even small businesses in order to protect interstate commerce.

The coup de grace for the Gilded Age's restrictions on Congress's commerce power came in *Wickard v. Filburn*,[347] in which the Court upheld the applicability of the Agricultural Adjustment Act to a farmer's growth of wheat for his own personal consumption. The personal growth and consumption of wheat was surely a local activity whose effect on interstate commerce, under the Gilded Age precedents, would be characterized as "indirect." The Court's Dormant Commerce Clause decisions, such as

342. *Id.* at 119–20.
343. *Id.* at 123 (noting that "the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power").
344. *Id.*
345. *See infra* text accompanying notes 387–393 (discussing *Gonzales v. Raich*).
346. *Darby*, 312 U.S. at 123.
347. 317 U.S. 111 (1942).

Barnwell and *Eisenberg*, had already discredited that rule as applied to state action,[348] and now Justice Jackson banished it from the analysis of federal measures: "[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."[349] Rather, as that statement suggested, the key question was whether the regulated activity "exerts a substantial economic effect on interstate commerce."[350] And, as Jackson famously concluded, wheat grown for personal consumption—which comprised more than 20 percent of the nation's wheat production—affected the interstate commerce in wheat by overhanging the market and reducing the demand for marketed wheat.[351] Moreover, it did not matter that the individual farmer's wheat consumption was too small to affect commerce by itself. Rather, citing *Darby*, Jackson declared that, although the farmer's own consumption was "trivial," "his contribution, taken together with that of many others similarly situated, is far from trivial."[352] Lastly, Jackson made clear that it was not for the Court to decide for itself whether homegrown wheat substantially affected interstate commerce, but rather whether Congress could conclude that it did.[353]

As Edwin Corwin aptly observed at the time, these decisions left the Gilded Age's limitations on federal authority "in ruins."[354] And, in so doing, these decisions opened the door to federal legislation governing

348. *See supra* text accompanying notes 274–281. It is for this reason that I disagree with Barry Cushman, who attributes the collapse of the direct-indirect rule in the Dormant Commerce Clause context to *Wickard v. Filburn*. *See* Cushman, *supra* note 19, at 1147.

349. *Wickard*, 317 U.S. at 120; *see also id.* at 124 ("Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production,' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'").

350. *Id.* at 125.

351. *Id.* at 128 ("It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.").

352. *Id.* at 127–28.

353. *Id.* at 128–29 (noting that "Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices").

354. Edwin S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950).

myriad, diverse activities. Most famously, when Congress sought to forbid racial discrimination in places of public accommodation, it did not invoke its enforcement powers under the Reconstruction Amendments. The Court's deplorable decision a century earlier in the *Civil Rights Cases*[355] forestalled that route. Rather, Congress invoked its commerce power, which the Court upheld.[356] Thus, a hotel that served interstate travelers and a roadside barbecue restaurant that purchased food from a local vendor (who itself purchased some of the food from out of state) were declared to be within Congress's commerce power. Of course, the notion that Ollie's Barbecue's decision to segregate its food services had affected its purchases of out-of-state food one way or the other seemed tenuous,[357] but, as the Court instructed, its role was limited to determining whether Congress had a "rational basis" for believing such a link existed.[358] And, again, it did not matter whether Ollie's Barbecue's meager interstate food purchases affected commerce, so long as Congress could conclude that segregated restaurants in general affected commerce.[359] Federal legislation prohibiting loan sharking[360] and requiring coal mining companies to restore the land to premining condition were among the statutes upheld under this deferential approach.[361]

355. 109 U.S. 3 (1883) (holding that Congress's enforcement powers under the Reconstruction Amendments does not authorize it to prohibit racial discrimination by private individuals).

356. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964); Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964).

357. Of course, Congress's need to resort to its commerce power to enact the civil rights measure was the result of the Court's erroneous decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), holding that Congress's enforcement powers under the Reconstruction Amendments did not extend to private conduct.

358. *Katzenbach*, 379 U.S. at 303–04.

359. *Id.* at 303 (citing *Darby*); *see also Heart of Atlanta*, 379 U.S. at 275 (Black, J., concurring) (noting that "in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow").

360. Perez v. United States, 402 U.S. 146, 156–57 (1971).

361. Hodel v. Indiana, 452 U.S. 314, 329 (1981) (upholding "prime farmland" provisions of the Surface Mining Control and Reclamation Act (SMCRA) of 1977, 91 Stat. 445 (codified at 30 U.S.C. § 1201)); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 283 (1981) (upholding the "steep slope" provision of SMCRA).

The proliferation of federal regulatory programs during the New Deal also affected the Court's preemption jurisprudence, leading the Court to narrow the circumstances under which a federal statute would preempt state authority. *Compare* Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915) ("When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."), *with* Parker v. Brown, 317 U.S. 341, 354–55 (1943) (holding that the state raisin marketing program was not preempted by the federal Agricultural Marketing Agreement Act of 1937, despite the similarity of purposes).

To be sure, the Court's embrace of expansive federal regulatory authority reflected in part the recognition of profound economic changes. In the century since the Civil War, a truly national, integrated economy had emerged. Even such a nominally local activity as the sale of a shirt might involve numerous states: The cotton might be grown in Mississippi, milled in North Carolina, fabricated into a shirt in Virginia, which was then stored in Illinois, and which was ultimately sold to a consumer in California. Even without any changes in the Court's doctrinal structure, this process of national economic integration—a process that the Court's Dormant Commerce Clause jurisprudence had promoted—opened the door to greater federal involvement. As the Court recognized:

> [T]he fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce.[362]

At the same time, the Court's acceptance of a broad, federal regulatory power cannot be attributed solely to changed economic circumstances. The New Deal Court unmistakably altered the doctrinal framework according to which federal regulatory programs would be assessed. The Gilded Age's formalisms—distinguishing production from commerce and direct burdens from indirect regulations—were first discredited and then jettisoned. As the Court appreciated, such tests did not correspond to any economic reality. The actions of a large coal mine operator or steel manufacturer would undoubtedly impact the national economy more than the actions of a mom-and-pop candy wholesaler; the establishment of a pension system for all railroad workers would indisputably affect the

362. *Heart of Atlanta*, 379 U.S. at 251; *see also* United States v. Lopez, 514 U.S. 549, 556 (1995) (noting that the post–New Deal embrace of federal regulation "[i]n part" reflected "a recognition of the great changes that had occurred in the way business was carried on in this country"). Thomas Reed Powell had made the same observation a half century earlier, ironically at a time when the Court harbored a more hostile approach to federal measures. Powell, *supra* note 213, at 201 ("What is changing is not our system of government, but our economic organization. . . . Congress acquires no new powers, but powers always possessed have more to lay hold on.").

national economy as much as the requirement that trains use certain safety equipment. In short, economic realism trumped jurisprudential formalism. That was a clear loss for state regulatory authority, but, as the Court now understood, its task was not to construct formal, economically artificial boundaries on Congress's commerce power so as to preserve some sphere of state authority from federal regulation. Indeed, it was precisely that aspect of the Gilded Age that the New Deal Court found so distressing.[363] Rather, the Court saw its role as to give effect to the power that the Constitution entrusted to Congress—how and to what extent such power might be used was for the political process, not the Court, to resolve in the first instance.

2. The Rehnquist Court's "New Federalism"

The triumph of economic realism has not been unequivocal or complete. Reacting to what it perceived to be a too-willing acceptance of federal power, the Rehnquist Court developed several limits on Congress's commerce power. The less important one for present purposes involves the Tenth Amendment. In the 1970s, the Court held that the Tenth Amendment forbade Congress from regulating the conduct of state officials involved in "integral governmental functions."[364] That ruling was subsequently overruled,[365] but the Court continues to enforce a more limited rule, holding that, by virtue of the Tenth Amendment, Congress may not compel state legislators to adopt or state executive officials to enforce federal regulatory programs.[366] The substantive content of those programs, though, is unaffected; so long as Congress adopts and federal officials enforce the regulatory program, there is no Tenth Amendment issue no matter how much the federal program may intrude into state legislative prerogatives.[367] *Hammer* has not been restored.

363. *Lopez*, 514 U.S. at 556 (noting that "the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce").

364. Nat'l League of Cities v. Usery, 426 U.S. 833, 851, 855 (1976) (invalidating FLSA as applied to state police and fire employees).

365. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985). Even prior to *Garcia*, the Court had distinguished *Usery* in several cases, upholding the federal regulation of state officials. *See* EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (upholding the application of the Age Discrimination in Employment Act to state game wardens).

366. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

367. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 608 (2004) (rejecting a Tenth Amendment challenge to the federal bribery statute as applied to state and local officials).

The more pertinent limitation is that announced by the Court in *United States v. Lopez*[368] and *United States v. Morrison*.[369] *Lopez* invalidated the Gun Free School Zones Act, which prohibited the possession of a firearm within 1000 feet of a school, while *Morrison* struck down a part of the Violence Against Women Act that provided a civil remedy for victims of gender-motivated violence. In both cases, the Court reaffirmed the rule that Congress may regulate intrastate activities that substantially affect interstate commerce, but it held that such activities must be economic in nature.[370] The possession of a firearm near a school and the rape of a college undergraduate, the Court held, were not economic acts and were therefore outside Congress's commerce power.[371]

The Court's decisions in *Lopez* and *Morrison* have been the subject of substantial academic commentary, which need not be rehashed here.[372] There are, though, several elements of the decisions that do warrant discussion. First, neither *Lopez* nor *Morrison* resurrected the limitations on the Commerce Clause adopted and applied by the Court during the Gilded Age. Rather, the Court expressly embraced *Jones & Laughlin*, *Darby*, and *Wickard* and declared that the Gilded Age decisions "artificially had constrained the authority of Congress to regulate interstate commerce."[373] Second, unlike the Gilded Age's constraints on federal authority, the Court's economic activity rule did not originate in nor was it evidently intended to apply correspondingly to state action reviewed

368. 514 U.S. 549 (1995).

369. 529 U.S. 598 (2000).

370. *Lopez*, 514 U.S. at 558–60; *Morrison*, 529 U.S. at 609, 611. As might be expected given his favorable view of dual federalism, Justice Thomas was prepared to revisit the New Deal decisions. *See Lopez*, 514 U.S. at 596–601 & n.8 (Thomas, J., concurring); *Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (declaring that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress's powers and with this Court's early Commerce Clause cases").

371. *Lopez*, 514 U.S. at 561–64; *Morrison*, 529 U.S. at 613–17. Relying on *United States v. Lopez* and *Morrison*, the Court also has construed federal statutes narrowly so as not to reach particular intrastate conduct that, in the Court's mind, would be troublingly close to the constitutional line. *See, e.g.*, Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001) (construing the federal Clean Water Act, which regulates "navigable waters" of the United States, to not apply to wetlands unconnected to navigable waters so as to avoid the *Lopez* issue); Jones v. United States, 529 U.S. 848, 857–58 (2000) (construing the federal arson statute, which prohibits arson of any building "used" in an activity affecting interstate commerce, to not apply to arson of an owner-occupied residence so as to avoid the *Lopez* issue).

372. For a sampling of this debate, see generally Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199 (2003).

373. *Lopez*, 514 U.S. at 556; *see also Morrison*, 529 U.S. at 654 (Souter, J., dissenting) ("Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived.").

under the Dormant Commerce Clause. Indeed, the Court inferred the rule from post–New Deal cases that had reviewed (and upheld) federal regulations.[374] In this respect, *Lopez* and *Morrison* confirmed the formal break between the Court's affirmative and Dormant Commerce Clause doctrines.

Third, and at the same time, *Lopez* and *Morrison* were like their Gilded Age forebears in that the economic activity rule rested on the Court's felt need to draw some judicially enforceable limitation on Congress's commerce power for fear that the absence of such a rule would obliterate state police powers.[375] And, just as it had in the Gilded Age, this line of reasoning opened the Court to charges of unprincipled, subjective decisionmaking by an activist Court overstepping its constitutional role.[376] The Court's actions seemed particularly hard to square with its claim that it was for Congress in the first instance to decide what activities affected commerce and that the Court would uphold federal legislation so long as Congress had a rational basis for its concluding that the regulated activity affected interstate commerce.[377] In *Morrison*, for example, the Court rejected Congress's express, documented finding that gender-motivated violence affected commerce, not because that finding was false as an empirical matter, but because such finding was irrelevant under the Court's economic activity rule.[378]

In any event, the *Lopez* rule did not herald the substantial restriction on federal legislative authority that many either hoped or feared. Indeed, the Court's economic activity rule has proven as unprincipled or porous

374. *Lopez*, 514 U.S. at 559–60 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, *Perez*, *Katzenbach*, *Heart of Atlanta*, and *Wickard*); *Morrison*, 529 U.S. at 611 (noting that prior cases upholding federal legislation all involved "some sort of economic endeavor"); *see also* Cushman, *supra* note 19, at 1149 (viewing *Lopez* as following ineluctably from *Wickard*).

375. *Lopez*, 514 U.S. at 566–67; *Morrison*, 529 U.S. at 614–15, 616 n.6; *see also* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 795 (2004) (noting that the Rehnquist Court "regularly institutes limitations on powers using an entitlements jurisprudence that harkens back to the old notion of dual federalism").

376. *See, e.g.*, *Morrison*, 529 U.S. at 639 (Souter, J., dissenting) ("The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur."); *id.* at 644–45 (Souter, J., dissenting); *Lopez*, 514 U.S. at 608 (Souter, J., dissenting) ("The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly."); *id.* at 627–28 (Breyer, J., dissenting).

377. *Lopez*, 514 U.S. at 613 (Souter, J., dissenting); *Morrison*, 529 U.S. at 637 (Souter, J., dissenting) (arguing that Court "supplant[ed] rational basis scrutiny with a new criterion of review"); *id.* at 660–61 (Breyer, J., dissenting) (urging that it is primarily for Congress to decide what affects commerce).

378. *Morrison*, 529 U.S. at 614–15; *see also id.* at 628–36 (Souter, J., dissenting) (discussing in detail Congress's findings and evidence before Congress).

(and maybe both) as the Gilded Age's formalisms. In the seven years since *Morrison*, the Court has upheld several federal statutes that regulate noncommercial activity—the very type of activity *Lopez* and *Morrison* said was beyond Congress's authority. In *Pierce County v. Guillen*,[379] the Court unanimously upheld section 409 of the Highway Safety Act,[380] which banned the discovery and admissibility into evidence in any state or federal court proceeding of materials compiled or collected by a state agency for purposes of planning safety enhancements of dangerous roads.[381] The discovery of accident reports is, of course, quintessentially noneconomic activity.[382] Nevertheless, without any discussion of *Lopez* or *Morrison*, the Court cursorily declared that Congress "could reasonably believe" that affording confidentially to accident reports and other such documents "would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads."[383] As a consequence, the congressional measure "can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce."[384]

This last statement was the linchpin in the Court's decision for it suggested that, of the three categories of activity that Congress's commerce power reaches—channels of interstate commerce, instrumentalities of interstate commerce, and intrastate activities substantially affecting interstate commerce—the *Lopez* rule was entirely inapplicable to the first two categories. Stated differently, Congress's commerce power authorized it to regulate noncommercial activity as part of its regulation of the channels or instrumentalities of interstate commerce. This was an incongruous limitation on *Lopez*,[385] but, more fundamentally, it undermined the theoretical basis for the *Lopez* rule, which rested on the Court's apprehension that some limitation on Congress's power was necessary to preserve state authority over noncommercial activities. If Congress could regulate noncommercial, intrastate activity when such activity was related to a channel or instrumentality of interstate commerce, it made no sense to prohibit Congress from regulating such conduct when it substantially

379. 537 U.S. 129 (2003).
380. 23 U.S.C. § 409 (2000).
381. *Id.*
382. *See* Michell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1501 (2004).
383. *Guillen*, 537 U.S. at 147.
384. *Id.*
385. Berman, *supra* note 382, at 1504.

affected interstate commerce. The Court surely did not argue that the regulation of noncommercial activities in the latter category would intrude upon state prerogatives in some, more constitutionally troubling fashion, and any such claim would be highly dubious. At the same time, the *Guillen* Court's implicit recognition that Congress must be able to reach noncommercial activity so as to make real its power over interstate commerce would apply equally to the regulation of noncommercial activities that substantially affected interstate commerce.

Moreover, in limiting *Lopez* in this fashion, *Guillen* introduced yet another layer of formalism into the modern Court's Commerce Clause jurisprudence. As noted above, the modern Court identified three categories of permissible federal regulation. The Court, however, had never defined the three categories, let alone suggested that they were mutually exclusive or jurisprudentially significant. In fact, they initially had been listed merely as examples of what Congress could do.[386] *Guillen*, however, gave these categories profound significance because the *Lopez* rule would only apply to regulatory measures falling in the third category. Thus, it became incumbent on the Court (and on Congress and litigants challenging congressional action) to identify into which category a given federal regulation fell. And, because the Court had never (and still has not) given any guidance as to how to make that determination, that task invited unbridled discretion on the Court's part. Indeed, attesting to this fact, the Court typically declares in a conclusory fashion into which category a given regulation falls.

Adding further confusion was the Court's decision in *Gonzales v. Raich*,[387] in which the Court upheld Congress's power to prohibit the intrastate growth and personal consumption of marijuana for medical reasons. Once again, the growth and personal consumption of marijuana seemed to be prototypical noncommercial conduct within the meaning of *Lopez*. Moreover, the *Guillen* limitation on *Lopez* was inapplicable because, as the Court cursorily declared, the federal regulation of medical marijuana did not involve a channel or instrumentality of interstate commerce but rather implicated the third category of congressional action involving intrastate activities substantially affecting interstate commerce.

386. The Court first mentioned the three categories only in 1971 in *Perez v. United States*, 402 U.S. 146, 150 (1971). Not only did the Court there give no comprehensive definition of the three categories, its statement that the three categories define the reach of the commerce power "in the main" made clear that the categories were illustrative only. *Id.*

387. 545 U.S. 1 (2005).

The Court's opinion hardly provides clear guidance. At first, the Court agreed that the cultivation of marijuana for personal, medicinal use was noncommercial activity, but it incongruously then declared that fact to be immaterial. Invoking *Wickard* (which *Lopez* and *Morrison* had viewed as limited to economic activity), the Court said that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[388] And, because allowing the personal cultivation of marijuana would impact the market for the drug, Congress was acting within its commerce power.[389] Later in the opinion, though, the Court declared that the growth and consumption of marijuana were "quintessentially economic" activities and therefore within the *Lopez* and *Morrison* rule.[390] That conclusion was made possible, however, only by adopting a capacious definition of "economic activity" as including "the production, distribution, and consumption of commodities"—a definition that clearly encompassed the activity in *Lopez*.[391] And, adding formalism to confusion, the Court then distinguished those cases also on the "pivotal" ground that, there, the challenges were to an entire provision of a federal act, rather than, as here, the application of an otherwise valid provision to particular conduct.[392] The Court seemed to be suggesting that facial challenges were permissible but that as-applied challenges were impermissible, even if the regulated conduct was outside Congress's power.[393]

Guillen and *Raich* are undoubtedly in some tension with *Lopez* and *Morrison*, but to point out that incongruity is not to make any claim about the correctness or prospective vitality of individual decisions. Academic commentators have been quick to offer theories to reconcile the decisions,

388. *Id.* at 18.

389. *Id.* at 19 (noting that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions"); *id.* (noting that "the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity").

390. *Id.* at 25.

391. *Id.*

392. *Id.* at 23.

393. As the dissenting Justices correctly observed, that made Congress's power turn on clever legislative draftsmanship: Had Congress not prohibited possession of marijuana in general but rather prohibited possession for various purposes, each purpose identified in a separate statutory provision (for example, "possession of marijuana for medical purposes is hereby prohibited"), *Lopez* and *Morrison* would have been applicable. *Id.* at 45–47 (O'Connor, J., dissenting).

such as that Congress may regulate intrastate activities so long as it does so with a "commercial purpose."[394] Alternatively, one might view *Guillen* and *Raich* as indications that *Lopez* and *Morrison* were erroneous aberrations in the same way *Hammer* was and that, like *Hammer*, the latter two decisions will wither unused until the Court finally jettisons them entirely.[395] For present purposes, there is no need to judge which view is the correct one; rather, the key point is that dual federalism remains very much dead, despite calls for or fears of its resurrection.[396] After *Guillen* and *Raich*, it is clear that, in addition to its unbridled authority over intrastate commercial activities, Congress has the power to regulate noncommercial intrastate activities within the traditional ambit of state authority. In fact, Congress's commerce authority far exceeds what the Gilded Age Court was prepared to accept. Whatever their proponents hoped, *Lopez* did not herald a return to *Carter Coal*, and *Morrison* did not presage a revival of *Hammer*.[397]

IV. AMERICAN COMMERCIAL FEDERALISM IN THE TWENTY-FIRST CENTURY

Dual federalism is dead; indeed, it was never really alive. The Court's Commerce Clause jurisprudence differs substantially depending on whether it is federal or state action that is under review. For federal action, the Court applies a generous and deferential inquiry, asking whether Congress

394. *See, e.g.*, Berman, *supra* note 382, at 1512–13; *see also id.* at 1514 n.125 (listing academic scholars who also embrace this approach). This purpose-based theory is not new: Louis Greeley first advocated it over a century ago. *See* Greeley, *supra* note 50. For other theories of reconciliation, see George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 OHIO ST. L.J. 947, 983–86 (2005).

395. *See, e.g.*, Jonathan H. Adler, *Is* Morrison *Dead? Assessing a Supreme Court Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 753, 777 (2005); Glenn H. Reynolds & Brannon P. Denning, *What Hath* Raich *Wrought: Five Takes*, 9 LEWIS & CLARK L. REV. 915, 932 (2005). One might also agree that the decisions are irreconcilable but conversely believe that it is *Guillen* and *Raich* that should and will be jettisoned. *See, e.g.*, Steven K. Balman, *Constitutional Irony:* Gonzales v. Raich, *Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause*, 41 TULSA L. REV. 125, 150, 176 (2005).

396. *See, e.g.*, Jesse H. Choper, *Taming Congress' Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 754 (2003) (arguing that "it is this venerable 'dual federalism' dynamic that appears to me to be the driving force at the core of the Rehnquist Court's overall revival of judicially secured federalism"); Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN'S L. REV. 523, 537 (2003) (arguing that the Rehnquist Court "has revived, even if the Court has not admitted it, the doctrine of dual federalism").

397. BORIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.04[G], at 71 (Cumulative Supp. 2005) (contending that "it seems a trifle alarmist to compare the Court's present orientation *vis a vis* the Commerce Clause to that of the pre-1937 Court").

could rationally believe that the regulated activity involves a channel of interstate commerce, an instrumentality of such commerce, or intrastate activity substantially affecting such commerce. The *Lopez-Morrison* limitation that Congress may regulate only "economic activities" applies only to regulations falling into the third category, and, even then, the lesson of *Gonzalez v. Raich* appears to be that Congress may regulate noneconomic, intrastate activity that is part and parcel of some larger commercial activity regulated by Congress.

With regard to state action, the categorization of the subject matter of the regulation, the determination that its nature is commercial or economic, and the identification of a relationship to some broader regulatory scheme are entirely irrelevant. Rather, under the Dormant Commerce Clause, states may not act in a parochial fashion, favoring in-state economic interests at the expense of out-of-state competitors or needlessly exposing interstate commerce to great burdens for little or no justification. There is no formal linkage between the affirmative and Dormant Commerce Clause doctrines.

This divergence is entirely understandable, for the underlying theoretical concerns driving the two doctrines are themselves unconnected. In the affirmative context, the Court is torn between two competing concerns.[398] On the one hand, the Court has acknowledged that commerce is a practical, economic phenomenon and that Congress, if its power to govern interstate commerce is to be made real, must necessarily have the authority to reach those intrastate activities that substantially affect interstate commerce. Given the highly interconnected nature of the American economy, this pragmatic, economic understanding of Congress's commerce power has licensed the adoption of numerous comprehensive regulatory schemes governing much of American life. On the other hand, and as reaction to that observation, the Court is also driven by the impulse to circumscribe federal authority so as to reserve some matters exclusively for state or local regulation. This concern has led the Court to grasp for formal boundaries, such as the commerce-manufacturing rule of *United States v. E.C. Knight Co.*, the direct-indirect rule of *A.L.A. Schecter Poultry Corp. v. United States*, and, most recently, the economic activity rule of *United States v. Lopez*. These, of course, are mutually exclusive concerns, which accounts for the incoherence in the Court's doctrine when it has tried to accommodate both. As *Raich* indicates most clearly, the Court can embrace an economically realistic conception of

398. Berman, *supra* note 382, at 1490–91.

Congress's commerce power or a formalist one, but it cannot coherently embrace both at the same time.

In the dormant context, the Court is driven by a concern for national economic union, a desire to inhibit retaliatory acts by other states, and a distrust that state political processes will act in nation-regarding ways. These interests have manifested themselves most clearly in the Court's prohibition on state protectionism.[399] And even in the absence of such discrimination, the Court's undue burden branch of the Dormant Commerce Clause also draws upon a fear that state parochialism may corrupt state political processes, leading to the adoption of ineffectual but costly measures whose costs are largely exported to other states.[400]

As a result of this doctrinal and theoretical decoupling, the Court's decisions regarding federal authority have no impact on the judicial review of state measures (and vice versa). Were Texas, for example, to prohibit the possession within 1000 feet of a school of any firearm manufactured outside Texas (but not those manufactured within the state), there would be no doubt that the Court would invalidate the measure. That Congress may not prohibit such gun possession would not (and should not) have any bearing on the Court's consideration whether a state could adopt such a discriminatory gun possession statute. Whatever its precise scope, *Lopez* does not immunize any state action from constitutional challenge.

So is this doctrinal decoupling cause for concern? There is only one Commerce Clause in the text of the Constitution, so perhaps efforts should be made to harmonize (or at least minimize the differences between) the affirmative and dormant components of the clause. But why? Doctrinal unitarianism has some intuitive appeal with regard to the Constitution's individual rights provisions. Under a liberal, nonutilitarian account, individual rights promote and protect a conception of the individual as distinct from the state and possessing certain forms of autonomy that the state must respect.[401] This classic, liberal view of individual rights is indifferent to the federal structure of our government; a right exists in the same form and to the same extent regardless whether it is the federal government or a state allegedly infringing it. This doctrinal unitarianism is only a presumption—there may be institutional or other

399. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 472 (2005) (invalidating as impermissibly and patently discriminatory several states' efforts to restrict to in-state wineries the right to ship wine directly to consumers).

400. Williams, *supra* note 305, at 7–10.

401. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

reasons why the Court's doctrine should be sensitive to federal roles[402]—but it is a strong presumption. Departures from it bear the heavy burden of demonstrating that they are consistent with the underlying commitment to the right at stake.

With respect to federalism provisions, such as the Commerce Clause, however, there is no universal, a priori definition of what a federal government may do and what residual power state governments must have. There are a number of permissible models of constitutional federalism, of which dual federalism is only one.[403] Nations can also choose a concurrent system in which both sovereigns have plenary authority over all commerce or a mixed system of partially exclusive, partially concurrent control, of which there are numerous subvariations. The exact model that a particular nation selects necessarily rests on a host of political, economic, and other factors, and what may be appropriate for one nation may be inappropriate for another. (It is for this reason, incidentally, that it is dangerous to make cross-national prescriptions.)

Of course, to acknowledge that there are other, legitimate models of federalism besides dual federalism does not conclusively resolve the validity of the modern American model, which entails a broad and selectively exclusive federal commerce power. As the foregoing Parts have documented, the American model of commercial federalism was not handed down by the framers in clarion and immutable form. Rather, it emerged over time as succeeding generations of Justices worked to accommodate the Commerce Clause doctrines to the political and economic realities of the time. The modern end result, like any organic entity, is a doctrinal amalgamation containing the pockmarks, blemishes, and partially healed scars of prior contests. Moreover, like any complex, nuanced model, it defies simple description.

Compared to its more theoretically pure competitors, though, the modern American model seems markedly preferable. Take, for example, Kent's proposed concurrent power model, according to which both the federal

402. *See, e.g.*, Williams, *supra* note 3, at 966–67 (arguing for a "Madisonian" theory of judicial review that would scrutinize state and local governments' infringements of rights more rigorously because of a fear that those governments are more susceptible to factionalism). A similar institutional concern animates Larry Sager's underenforcement theory, which distinguishes between the right properly understood and what the Court is willing to enforce (which is less than the full right). *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

403. Canada is an example. *See* Constitution Act, 30 & 31 Vict. Ch. 3 § 91 (1867) (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985) (entrusting exclusively to the federal government the power to regulate "trade and commerce").

government and the states would possess the authority to regulate interstate commerce. These days, this is not a widely shared view.[404] And for good reason. For one, it rests on a historically unfaithful reading of the framers' expectation regarding the effect of the adoption of the Commerce Clause. As Albert Abel documented, the framers understood the Commerce Clause itself to limit state authority over interstate commerce.[405] Even nonoriginalists should be troubled by the prospect of adopting an interpretation directly at odds with the historical record.

Moreover, as a practical matter, the concurrent power model leaves interstate commerce too vulnerable to state and local regulation. The concurrent power model entrusts the protection of interstate commerce entirely to Congress, whose responsibility it is (on this view) to police state and local regulations of commerce and to preempt those measures that it finds problematic. Congress, though, surely does not have either the time or the ability to review and assess each and every commercial regulation and tax adopted by one of the fifty states, much less those adopted by the 18,000 local governments in the United States.[406] As Justice Jackson aptly observed:

> It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry.[407]

Indeed, even those Justices most hostile to the Dormant Commerce Clause, such as Justices Scalia and Thomas, acknowledge the need for a

404. Of the current Justices, only Justice Thomas appears sympathetic to this view, and, even then, his embrace of the concurrent model is limited to the review of state regulations and taxes. *See* Camps Newfound/Owatonna Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (expressing skepticism of the Dormant Commerce Clause and urging the reinterpretation of the Import-Export Clause to apply to taxes on interstate trade).

405. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 470, 493 (1941).

406. *See* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006) (noting that there are 3000 county governments and 15,000 municipal governments).

407. Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring); *see also* Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 222 (1957) (noting that Congress has no legislative mechanism for reviewing state or local measures when adopted, much less when subsequently applied).

continuing judicial role to prevent the adoption of protectionist measures by state and local governments.[408]

Or, take the dual federalist model endorsed by Charles Culberson: By rigidly walling off the federal and state spheres of authority from one another, it would produce an utterly foreign and impractical system of commercial regulation. Given Congress's refusal to enact comprehensive federal regulatory programs for the first century of the nation's existence, dual federalism would have necessarily resulted in large areas of the American economy being left free from any regulation. And, even today, when both the federal government and states are prepared to act to address public policy problems, there are benefits to allowing cooperation. Indeed, many regulatory programs, such as those regarding the protection of the environment, involve joint, cooperative measures by the federal and state governments. Such cooperative regulatory programs would be jeopardized by the strict jurisdictional separation mandated by dual federalism.

Moreover, by linking the affirmative and dormant components of the Commerce Clause, dual federalism would almost certainly produce an unstable Commerce Clause jurisprudence. The Court would find itself torn between the desire to embrace (in cases involving state measures) a crabbed interpretation of federal authority so as to preserve state authority and the need to articulate (in cases involving federal measures) a restrictive interpretation of state authority so as to preserve federal authority. And since the task of defining the single, dividing line between intrastate and interstate commerce would necessarily be presented in cases involving the narrow question of the validity of a particular state or federal regulation or tax, it would be difficult for the Court to appreciate the consequences of its actions for federal and state regulation generally. Doctrinal inconsistencies would assuredly result.

The American model of commercial federalism, which entails a broad federal regulatory power and which restricts the states from enacting measures that unduly interfere with a national common market, does not

408. Justice Thomas urges a reinterpretation of the Import-Export Clause so as to prohibit much of the same state conduct as the Dormant Commerce Clause has historically forbidden. *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting). Similarly, Justice Scalia, who also has expressed misgivings about the Dormant Commerce Clause but announced his intention to continue to enforce it on stare decisis grounds, has pointed to the Privileges and Immunities Clause of Article IV as the appropriate textual basis for limiting state authority. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring); Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

suffer from these defects. It is historically faithful: The framers entrusted to Congress the power to regulate interstate commerce. The breadth of that power today is the result of the profound growth and integration of the national economy that has rendered many noncommercial activities of national economic importance. The twenty-first-century American economy is not the locally based, agrarian system of the late eighteenth century, and, hence, it is no surprise that the level of federal regulation required by modern-day conditions exceeds what many of the framers could have contemplated. Conversely, the Dormant Commerce Clause makes real the framers' expectation that state regulatory authority may not be used to disrupt interstate commerce.

Moreover, the modern American model offers a pragmatic accommodation of federal and state authority. The American model accepts in practice a large overlap between federal and state authority. As a result, public policy issues may be addressed by one sovereign acting alone or by both sovereigns acting jointly in a cooperative endeavor to improve the nation's well-being. Modern, pressing social or economic problems do not avoid remediation because of some doubt harbored by the federal government or the states that they are constitutionally unauthorized to act—such problems avoid correction for other reasons. Narrowing this jurisdictional overlap (as dual federalism would require) would serve only to reduce public policy flexibility.

Of course, the American model does have its difficulties. It is a complex model, and, as history has shown, the task of defining the precise scope of both federal and state authority is no easy task. But neither complexity nor judicial trepidation is reason to embrace dual federalism with its attendant and more serious flaws. Separating the affirmative and Dormant Commerce Clauses has served the Court and the nation well.

CONCLUSION

In *Gibbons*, the Court rejected Kent's concurrency theory and accepted in principle that the Commerce Clause both empowers Congress to regulate interstate commerce and limits state authority even in the absence of federal regulation. From that point in time, the Court has struggled to identify the limits on both federal and state authority over commerce. During the Gilded Age, the Court used some of the same terminology in both contexts, but the two doctrines were distinct even then. Congress could regulate certain intrastate activities, even those activities within the acknowledged power of the states to regulate. At the same time, the

Dormant Commerce Clause forbade some state regulations and taxes that were beyond federal authority to control. This divergence was the product of the Court's appreciation, which grew over time, that formal, doctrinal categories did not capture or correspond to the economic realities of the new, national economy. By the New Deal, the last attachment to formalism gave way to this economic realism as the Court jettisoned the constitutional restrictions on federal authority and substantially loosened those on state power, thereby creating a sizeable area of constitutional overlap between the two sovereigns. Though the Rehnquist Court narrowed that area modestly, its New Federalism bore no resemblance in form or theory to dual federalism. In short, since the beginning of the Republic and to this day, the Court has acknowledged a substantial, constitutionally acceptable realm of overlapping regulatory authority possessed by both the federal government and the states.

Understanding this history will not dissuade proponents of a dual federalist interpretation of the Commerce Clause. One suspects that the attraction of the model is not really historical after all but rather is purely instrumental—its promise of greater restrictions on federal regulatory authority appeals to those who believe that the modern, federal regulatory state has grown too large. Nevertheless, a proper understanding of the Supreme Court's treatment of the Commerce Clause reveals a much more complicated and nuanced account of the Court's Commerce Clause jurisprudence than that promoted by proponents of dual federalism. And, most importantly, the reasons for the Court's rejection of dual federalism in the past counsel just as heavily against embracing dual federalism now.