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THE LIMITING PRINCIPLE STRATEGY AND CHALLENGES TO THE NEW DEAL COMMERCE CLAUSE

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I. INTRODUCTION

When the Supreme Court announced its decision in *National Federation of Independent Business v. Sebelius*,[1] reaction to the long-awaited decision was initially mixed and confused. In an effort to report the news as quickly as possible in the saturated cable and internet news market, CNN and Fox News Channel reported within minutes of the beginning of the reading of the opinion that the Court had found the Individual Mandate of the Patient Protection and Affordable Care Act unconstitutional.[2] Both networks eventually retracted that announcement to report that the Court had found the law constitutional.[3] The initial confusion was caused by the surprising basis on which Chief Justice John Roberts found the portion of the law requiring minimal health insurance coverage, known as the Individual Mandate, as an unconstitutional use of Congress's Commerce Clause[4] authority, yet constitutional under Congress's taxing authority.[5] Reporters reading the opinion came across the negative ruling first and apparently, those for CNN and Fox reported that without reviewing the remainder of the opinion.

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1 132 S. Ct. 2566 (2012).

2 *Rush to report US health ruling trips up CNN, Fox*, WALL ST. J. (June 28, 2012, 7:26 PM), http://online.wsj.com/article/AP7fb98cdd01154a4d844b1bfc5d3270cd.html.

3 *Id.*

4 The Clause states that the United States Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

5 The issue of the commercial power is from an appeal from the Eleventh Circuit's decision under the citation of Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011). That court, holding that the Mandate was unconstitutional, addressed the question of the existence or non-existence of a principle, which would limit the assertion of Congressional power under the Commerce Clause. *Id.* at 1295–98.

Though supporters of the law applauded the ruling, few reflected on the effect that the decision on the Commerce Clause would have on the commercial power of Congress. Chief Justice Roberts, in a portion of his opinion not joined by any other Justice, found the use unconstitutional because of the absence of a limiting principle that would police congressional authority.[6] By the Chief's reasoning, to engage in commerce, one has to engage in an activity. The condition of not being insured is to not engage in commerce, in this case defined as the buying of insurance. Hence, this characterization of a particular state of being became the basis of announcing a new limiting principle on Congress's commercial authority. And though the value of the Commerce Clause to Congress as it exercises its legislative authority in commercial matters may not have been destroyed, it has been weakened in a decision that allows the Court to scrutinize and perhaps even micro-analyze the bases for congressional authority in commercial cases, and perhaps even in other areas as well. It sets a precedent that suggests that the Court can restrict congressional authority based upon the Court's notion of the appropriate power dynamics between state and federal governments further rooted in the Court's understanding of the structural requirements of the Constitution.

That portion of the opinion, though it did not destroy the Mandate, is another in a series of cases reversing a consensus held among members of the Supreme Court for two generations on the breadth of Congress's power under the Commerce Clause. The tension in Commerce Clause cases centers around the relationship between the broad power of the Commerce Clause within a capitalist system and the need to restrain that authority from overwhelming the nation's federal system and possibly creating a federal police power of general regulation—a power long regarded as forbidden, violative of the Tenth Amendment, and beyond the scope of the Constitution's sys-

6 Justices Scalia, Kennedy, Thomas, and Alito, in a joint dissent, declined to join the opinion of the Chief Justice. The joint dissenters also declined to join the Chief Justice in the conclusion that the Mandate was constitutional as a tax. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Other issues decided by the Court include the constitutionality of the portion of the law requiring state funding of Medicaid expansion as a condition for receiving continued Medicaid funding (found unconstitutional); the applicability of the Anti-Injunction Act prohibiting injunction suits prior to taxation by the federal government (found inapplicable to the present case). On the Individual Mandate portion of the decision, Justices Breyer, Ginsburg, Sotomayor, and Kagan joined the Chief Justice in characterizing the Mandate as a constitutional exercise of the Congress's taxing power, yet dissented on that portion of the opinion finding that Congress had exceeded its authority under the Commerce Clause.

tem of enumerated powers granted to Congress.[7] For sixty years, a period beginning with the "Second New Deal"[8] to the mid 1990s, the Court regularly deferred to Congress upon its judicially confirmed assurance that its legislation was a rational use of the commercial power, a practice that placed the inevitable subjectivity involved in line-drawing with the political body, perhaps the better home for such decisions.[9]

The Chief Justice's opinion notwithstanding, the Constitution provided Congress with the power to do what was necessary and proper to implement its specific enumerated powers. The Necessary and Proper Clause,[10] a practical addendum to the enumerated powers, likely would have had to have been read into the Constitution if it had not been part of the text because of the practical impossibility of utilizing the enumerated powers without legislative freedom to prescribe the means of the implementation.[11]

In addition to the Commerce Clause's authorization to Congress to "regulate commerce among the several states," the Necessary and Proper Clause has been interpreted as allowing Congress to regulate those activities that substantially affect Commerce among the several states.[12] This authority took on enlarged proportions in the second half of the New Deal of the 1930s, allowing Congress to regulate beyond purely interstate commercial activities.[13]

The changes in constitutional jurisprudence brought about by the Great Depression came about during a period of reassessment of traditional constitutional theory, particularly in Commerce Clause juris-

7 United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

8 The term refers to the second presidential term of Franklin D. Roosevelt during which changes in Supreme Court opinions and personnel allowed new legislation enacted by Congress, much of it under the Commerce Clause, to be implemented to counter the effects of the Great Depression. See *infra* Part III.C.

9 *See Lopez*, 514 U.S. at 608 (1995) (Souter, J., dissenting).

10 U.S. CONST. art. I, § 8, cl. 18.

11 McCulloch v. Maryland, 17 U.S. 316, 415 (1819) ("The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers . . . to insure . . . their beneficial execution . . . by confiding the choice of means . . . to adopt any which might be appropriate, and which were conducive to the end.").

12 Gonzalez v. Raich, 545 U.S. 1, 34 (Scalia, J., concurring in judgment) (2005) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.").

13 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (affirming that intrastate activities may be regulated by Congress if they have a close and substantial relation to interstate commerce); *see also* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that Congress can regulate local activities that exert a substantial economic effect on interstate commerce).

prudence. This reassessment was spawned by the extreme need to confront unprecedented problems in the national economy. The crisis precipitated two direct confrontations between the political branches and the Judiciary, the first being on the issue of what kind of legislation was appropriate for the economic crisis. The second confrontation was even more direct, to the point of constitutional crisis—Franklin D. Roosevelt's failed Court Packing Plan, which he proposed out of frustration with the Court's rulings that gutted that legislation during his first term.

In the period running from 1933 to 1936, the Supreme Court was at the end of a several-decade run of economically conservative decisions reflecting a laissez-faire economic philosophy.[14] During the 1933–36 period, the Court declined to recognize congressional power in several economic cases that lay at the heart of the Roosevelt Administration's economic recovery agenda.

Among the decisions that frustrated Roosevelt's first term were decisions rejecting key New Deal initiatives such as the National Recovery Act,[15] the Railroad Retirement Act,[16] and the Bituminous Coal Conservation Act of 1935,[17] each of which was based on the Congress's authority under the Commerce Clause, whose meaning was expanded significantly following the realignment of the Supreme Court during Roosevelt's second term. The decisions of the first term, however, were based on reasoning that had been around for several decades before. Under the former interpretation, the Court's limiting principle was based on the "identity" of the items actually moving between the several states.[18] In addition, those activities which facilitated the movement, or were part of the process of moving or within the stream of the commerce, were also subject to con-

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14 ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 39–74 (1941) (describing the evolution of judicial supremacy from 1865 to 1932).

15 *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the delegation of legislative power sought to be made to the president in the National Industrial Recovery Act to be unconstitutional).

16 *See* R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (striking down the Railroad Retirement Act as violative of the Due Process and Commerce Clauses).

17 *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the Bituminous Coal Conservation Act of 1935 was unconstitutionally outside of the scope of Congress's enumerated powers).

18 For example, in United States v. E. C. Knight, 156 U.S. 1 (1895), the Court ruled that application of the Sherman Anti-trust Act to a sugar manufacturing trust in Pennsylvania was unconstitutional. Under that Court's reasoning, because manufacturing was a purely intrastate activity, its affect on "interstate commerce" was at best indirect and out of the reach of Congressional authority under the Commerce Clause. *See infra* Part III.B.

gressional regulation.[19] The new-New Deal Commerce Clause interpretation essentially expanded the close and substantial relation test used in some of the earlier cases by broadly allowing regulation of all activity having a substantial effect on interstate commerce.[20] This new meaning changed federalism principles of Commerce Clause litigation for the next several decades and represented a foundational change in constitutional theory and the relationship between the Court and political branches of government. Judicial deference to rational regulation by Congress became the rule of the day and for decades after.

The New Deal was a break in the prevailing approach to constitutional interpretation in the sense that the legal designers of the economic reforms believed in a constitution flexible enough to address contemporary problems.[21] The New Deal constituted a rare open and unabashed acknowledgment that the specific needs of society, the crisis of the moment, dictated the appropriate constitutional theory. Legislation under the New Deal was a bold intrusion by the federal government into the economic life of the nation—apparently heretofore regarded as a matter of purely private concern.[22] To accomplish

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19 Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914) (regulation of railroad freight rates ruled as having a close and substantial relation to commerce); Swift & Co. v. United States, 196 U.S. 375 (1905) (holding that the monopoly of sales in interstate commerce as within Congress's authority to regulate under the "stream of commerce" theory).

20 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (holding that Congress has regulatory authority to regulate various operations of an interstate company, including labor relations in manufacturing having a substantial effect on interstate commerce).

21 Consider Robert Jackson's description of the tension between the Court and the political branches:

> But liberal-minded lawyers also recognized that constitutional law is not a fixed body of immutable doctrine. We knew its rules had their beginnings and endings, their extensions and their recessions many times in the checkered history of the Court. We saw that those changes were identified with the predominant interests or currents of opinion of past epochs, though they were often made in the name of the Constitution itself. The peculiar character of judicial tenure had enabled a past that was dead and repudiated in the intellectual and political world to keep firm grip on the judicial world. What we demanded for our generation was the right consciously to influence the evolutionary process of constitutional law, as other generations had done.

JACKSON, *supra* note 14, at xiv.

22 As noted by a contemporary observer:

> The technique of the New Deal had been based almost entirely upon the exercise of untried national power to cope with extraordinary economic conditions. As soon as test cases reached the Supreme Court the broad regulatory powers assumed by the 'administration were sharply deflated. Both agriculture and local business were removed from the domain of federal agencies attempting to regulate output, prices, etc. Even the special problem industries were held to lie beyond the reach of national planning. And the power of the States to deal with economic problems appeared to be very narrowly limited.

this, the reformers in the Roosevelt Administration argued for a re-articulation of constitutional economic theory on the basis that without it the nation will fail.[23] In so doing, the reformers challenged the notion that the Constitution is a static document with a single meaning with judges as the truth-seekers. In fact, it challenged constitutionalism to embrace a broader vision of the document, one responsive to the policy imperatives of the democratically elected Congress.[24]

The new understanding of the Clause and the implementing authority provided by the substantial effects doctrine effectively dismissed dual federalism—the view that state and federal power regimes are completely separate and distinct[25]—allowing Congress to regulate intrastate activities as appropriate to the circumstances. The limiting principle was Congress's own rationality assessment of its legislation.[26] The new application of the Necessary and Proper Clause allowed the expansion of federal power into areas previously thought reserved for the states. The result was that the understanding of federalism of the older cases was dealt with perhaps dismissively as in Justice Stone's relegation of the Tenth Amendment to the status of a truism in *United States v. Darby*,[27] and in Justice Blackmun's demotion of the provision to the political sphere in *Garcia v. San Antonio Metropolitan Transit Authority*.[28]

The present regulatory environment is faced with Commerce Clause jurisprudence where congressional power under the Clause is defined by artificial notions of federalist limits. *United States v. Lopez*[29]

MERLO J. PUSEY, THE SUPREME COURT CRISIS 3 (1937).

23 JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT 139–41 (2009) (contrasting with Roosevelt's vision, the conservative Justices "scoffed at the notion that the economic crisis justified . . . a new understanding of the Constitution").

24 One of the new post-Court-Packing Plan justices, Felix Frankfurter, is regarded as an opponent of judicial activism. Though well regarded in civil rights circles as an academic at Harvard Law School prior to joining the court, responding to the "activism" of the *Lochner* era, his deference to the legislative process often cast him later in his career as conservative. Book Note, *Six Justices on Civil Rights*, 97 HARV. L. REV. 618, 618–21 (1983).

25 BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 141–42 (1998).

26 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2649 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (acknowledging the rationality test as the basis of Congressional authority under the Commerce Clause).

27 312 U.S. 100, 124 (1941) ("The [Tenth] amendment states but a truism that all is retained which has not been surrendered.").

28 Dismissively perhaps, but not incorrectly. As will be demonstrated in Part V, the Tenth Amendment does not lend itself well to interpretation—so much so that by the end of the twentieth Century, the Court is unable to articulate a principled interpretation of the Commerce Clause that incorporates principled interpretations of the Tenth Amendment.

29 514 U.S. 549 (1995).

stands for the proposition that the coincidence of the adjudication of *economic* activity in previous cases delimits the congressional authority. The focus in the Chief Justice's opinion is on the "activity" and "non-activity" distinction. Both theories are justified on the basis that otherwise, there would be no limit on Congress's power, the consequence being a national police power. Missing from these arguments, however, is any articulation of principle, for the precision by which the Court has chosen to draw its federalist lines, and certainly each justification is dependent upon subjective federalist preferences of some members of the Court. Indeed the current jurisprudence does not pretend to follow the textual connection to the "among the several states" language in the Clause, which was the primary basis of pre-1937 Commerce Clause opinions.[30]

But returning to the text of the Commerce Clause without the interference of the substantial effects doctrine as it was used in 1936 and afterward would be the only principled way to re-invigorate earlier understandings of the Clause that incorporated dual sovereignty principles into the definition of commerce as Justice Thomas suggested in his concurrence in *Lopez* and separate dissent in *National Federation of Independent Business v. Sebelius*.[31] Doing this would contain whatever perceived danger of the creation of a national police power by locating dual sovereignty principles in the definition of Congress's commercial power and create a limiting principle based on congressional regulation only of economic activity "among the several states."[32]

Yet without a broadly utilized substantial effects doctrine, the Second New Deal could not have produced legislation designed to address a specific problem during a specific moment in the country's economic history and survive constitutional scrutiny—hence the radical change left was designed for the emergency at hand. Yet, despite the changes in the national economy in the last eighty years, the con-

30 As will be developed in Part III.B, the Court's reasoning in Commerce Clause cases included the argument that a particular regulated activity bore a "close and substantial relation" to interstate commerce. This rationale has been viewed as based on the Necessary and Proper Clause allowing Congress to pass implementing legislation in furtherance of its enumerated powers. *See* Gonzales v. Raich, 545 U.S. 1, 33 (2005) (Scalia, J., concurring in judgment).

31 *See Lopez*, 514 U.S. at 602 (Thomas, J. concurring) ("If we wish to be true to a Constitution that does not cede police power to the Federal Government, our Commerce Clause's boundaries simply cannot be 'defined' as being 'commensurate with the national needs . . . .'"); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2649 (2012) (Thomas, J., dissenting).

32 U.S. CONST. art. I, § 8, cl. 3.

stitutional doctrines that were introduced as emergency measures have been maintained in much calmer times creating a regulatory state and congressional power affecting everything from pensions to civil rights. In other words, the New Deal remains a vital part of the nation's economy. Essentially, a national regulatory system has been created since 1937 based upon the substantial effects test. Jettisoning the test would undermine a significant amount of national regulation. The possibility of a major disruption of the national regulatory system aside, the events of 2008 and after demonstrate the need for a flexible constitutional approach to the national economy and the substantial effects test provides that flexibility. It is a flexibility that is perhaps better checked by the political process and not by artificial, and, as will be demonstrated, ultimately subjective distinctions whose sole purpose is to check national economic power.

In reviewing *National Federation* and the Court's focus on limiting principles on Congress's use of the Commerce Clause, the article will examine and distinguish the bases for the current push and the pre-1937 Commerce Clause opinions. It will suggest that the earlier jurisprudence's limiting principles were based on a more principled constitutional theory. It will also demonstrate how the New Deal Commerce jurisprudence so overwhelmed the earlier arguments of the meaning of "among the several states" through the substantive effects test that only two judicial options are available now to roll back the congressional role in economic regulation. Under the first option, the Court can continue its recent attempts to restrain the commerce power through artificial non-textual theories based solely on an insertion into the definition of interstate commerce dual sovereignty concerns about a national police power. Under the second option, it can dismantle the substantive effects test, an approach that would essentially challenge present day understandings of a national economy. The article will demonstrate that the latter is a more principled, yet costly (and unlikely), strategy of the Court, while the former has no solid basis in constitutional theory. The net result is, and should be, retention of post-New Deal Commerce Clause principles allowing the political process to police the Tenth Amendment's truism emanations.

II. LIMITING PRINCIPLES, JUDICIAL RESTRAINT AND *CAROLENE PRODUCTS'* FOOTNOTE FOUR

As described in this article, the search for limiting principles on congressional power under the Commerce Clause following the judicial changes of the late 1930s has ranged from deference to the will

of Congress to the tighter scrutiny of the Supreme Court in later years. The article takes the obvious position that where the Court sought to employ a tighter rein on commercial legislation, it utilized a better doctrinal and principled case before 1937 than it did in the modern incarnation of that effort. The modern attempts found a limiting principle in state government as employer (*National League of Cities v. Usery*[33]) which was later overruled,[34] in the re-characterization of the Commerce Clause doctrine as one based upon Congress's authority to regulate economic activities only (*United States v. Lopez*[35]), a characterization which itself has no connection to federalist principles, and in the latest activity/inactivity disqualifying distinction of *National Federation*. But in seeking to satisfy in some way a particular idea of the Tenth Amendment federalism, separation of powers concerns are undermined. The result is that the essence of judicial activism has been exhibited in those periods when the Court did not adequately defer to the judgment of the democratically elected legislative bodies, on matters of policy, often demonstrating its "readiness to invent new constitutional rules not directly derivable from the text of the Constitution."[36]

Of course the Civil Rights Movement was aided by the kind of judicial decision making many considered, at the time, judicial activism,[37] though few serious people today would regard finding state laws mandating separate but equal facilities, and laws that required separate facilities without regard to equality, unconstitutional to be a bad thing. But *Brown v. Board of Education*[38] and *Missouri ex rel. Gaines v. Canada*[39] were activist decisions to the extent that they overturned legislation passed by democratically elected bodies and did not defer to those legislative judgments. Yet there is a distinction between the kinds of activism demonstrated in those early civil rights cases and what appears to be on display in Commerce Clause decisions of late.

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33 426 U.S. 833 (1976); *see infra* discussion at Part IV.A.

34 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that the Fair Labor Standards Act did not violate the Commerce Clause when applied to employees of the San Antonio Metropolitan Transit Authority).

35 *See Lopez*, 514 U.S. at 549.

36 LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA 13 (1993).

37 David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

38 347 U.S. 483 (1954).

39 305 U.S. 337 (1938).

The Court's decision in *United States v. Carolene Products*[40] provides a justification for this dichotomy. The Court let stand congressional legislation prohibiting the sale in interstate commerce of adulterated milk of which milk fat was replaced with a substitute. After making the case for the regulation's constitutionality under the Commerce Clause and the plenary power to regulate commerce among the several states, the Court addressed the Fifth Amendment concerns under the Due Process Clause prohibition against property takings. On that issue the Court stated:

> Even in the absence of such aids [legislative findings] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[41]

The language is noteworthy not simply for being a clear declaration of a deferential judicial policy that the Court was to employ from that point forward for years in Due Process cases; it is also noteworthy for the footnote attached to it. Footnote Four is credited with laying out the justification for heightened scrutiny in matters addressing civil and political rights and discrimination against "discrete and insular minorities" before the court.[42] Because errors on the part of legisla-

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40 304 U.S. 144 (1938).

41 *Id.* at 152.

42 Footnote Four reads:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. *See Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, *see Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, *see Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with political organizations, *see Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242, and *see* Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, *see De Jonge v. Oregon*, 299 U.S. 353, 365.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously

tures, including Congress, in these kinds of cases, take an unacceptable toll on the democratic process—by undermining the means of democratic "repeal of undesirable legislation"[43] (a problem not identifiable in litigation raising federalism concerns),[44] —deference alone, in the form of rational basis analysis, would be inappropriate in the areas outlined in the Footnote. Carving out those concerns leaves other matters, particularly economic regulation, to the good sense of the elected Congress with the Court applying a rational basis scrutiny—admittedly a minimal scrutiny—to the process, thereby precluding a carte blanche on the part of legislative bodies.[45]

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to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Compare McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n 2, and cases cited."

43 *Carolene Products*, 304 U.S. at 152 n.4 (1938).

44 *See infra* discussion of *Garcia* at Part V.B. Our system of federalism must certainly be regarded as a foundational attribute of the American polity. As Justice Kennedy pointed out in *Lopez*, "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself," 514 U.S. at 576 (quoting THE FEDERALIST NO. 51, at 350–51 (James Madison) (Clinton Rossiter ed., 1961)). As Professor Lusky describes the background to *Carolene Products* Footnote Four, the Court's "latitudinarian interpretation of the Due Process Clauses" (and the term liberty in particular) prior to 1937, bore some fruit in the area of civil rights and civil liberties. LUSKY, *supra* note 36, at 122. However with the break from this jurisprudence in 1937, the principle of deference threatened to undermine progress in this area. Footnote Four was designed to exempt rights that could affect the political process, and to protect those groups that were particularly vulnerable to majoritarian political preferences. Those rights, as well as the specific rights of the Bill of Rights, became subject to heightened scrutiny. It is the particular vulnerability of political rights that lay in the development of the language in the Footnote. *Id.* at 122–27. Political considerations of federalism included a less absolute potential for failure than the categories covered in Footnote Four. As was Justice Blackmun's point in *Garcia*, discussed *infra* Part V.B, the rationale for heightened scrutiny does not exist in matters having to do with federalism. Undesirable legislation, or legislators can be removed via the political process, whereas politically discriminatory or oppressive legislation cannot typically be corrected through by the same means. *See Garcia*, 469 U.S. 528 (1985).

45 This reasoning in favor of deference to Congress in economic matters was made part of the Commerce Clause jurisprudence in *Katzenbach v. McClung*, where the Court employed a rational basis test to the Civil Rights Act of 1964 and its prohibition of segregation in privately owned facilities. 379 U.S. 294, 303–04 (1964). As Justice Souter explained in his dissent in *Lopez*, "because complete elimination of the direct/indirect effects dichotomy and acceptance of the cumulative effects doctrine . . . so far settled the pressing issues of congressional power over commerce as to leave the Court for years without any need to phrase a test explicitly deferring to rational legislative judgments." 514 U.S. at 607 (Souter, J., dissenting) (internal citations omitted).

This is doubtful. By virtue of an insistence on specific notions of the concept of an "activity" being apparent in congressional assertions of authority, several members of the Court are of the opinion that more than Congress's statement of a rational basis for commercial legislation is warranted in cases where the Tenth Amendment is an issue because prior to *Lopez*, there was no foundation for that position.[46] This would be a new gloss on Commerce Clause litigation when one considers the fact that those cases, by their very nature, raise Tenth Amendment concerns, some greater than others, and the Court in the past has declined to press this issue in deference to the separation of powers principle. To do so at this point brings into question prior cases that did not explicitly address federalism concerns out of deference to Congress. As will be discussed later, to the Court majority in *Lopez*, the issue of whether the covered activity, gun possession was economic, was a federalism issue. The fact that the Court had not addressed a case so distinct from economic activity indicates, according to this reasoning, that previous decisions were cognizant of Tenth Amendment concerns. However, in reality, once the post-1937 Court decided that the power was plenary in Congress, federalism became a non-issue to the Court which deferred to the wisdom of the Congress, reserving only a rational basis check on that power[47] until it reappeared in *Lopez* in the guise of economic activity.

Members of the Court who feel that Congress has tended to abuse the commercial power have sought a limiting principle that is constitutionally questionable in two respects. First, as will be demonstrated later in this article, the principles developed have been outside of the constitutional text because the use and approval of necessary and proper assertions of the commercial power have so overwhelmed the alternative position of congressional commercial authority that the Court would have to overrule decades of post-1937 Court opinions deferring to Congress on matters of the exercise of that power, to return to the pre-1937 standard that will be described in the next section. Moreover, the search itself is constitutionally unnecessary because it raises questions of a sort of judicial activism not justified by the political theory behind the exception to the judicial deference carved out in *Carolene Products* Footnote Four. Maintenance of the federal system through political means is both feasible and preferable to vesting decisions of such magnitude in an appointed judiciary.

46 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2649 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

47 *McClung*, 379 U.S. at 302–04.

III. BEFORE 1937—FEDERALISM, COMMERCIAL REGULATION, AND LIMITED CONSTITUTIONAL MEANING

The history of the Commerce Clause can perhaps be divided into four parts. For the better part of the Constitution's first century, the Commerce Clause was seen primarily as a basis for assessing state power in commercial matters in relation to the plenary power of the federal government—today referred to as Dormant or Negative Commerce Clause jurisprudence.[48] Instead of monitoring how closely Congress complied with the parameters of its authority, the Court in the first period focused primarily on protecting the plenary power from state encroachment.

In the second period, beginning in the late nineteenth century to just prior to President Roosevelt's second term, the Supreme Court seemed preoccupied with containing the powerful source of congressional authority with theories strictly interpreted from the text of the Clause. By the time of the Great Depression, the commercial power had not developed into the all-encompassing force that it would become after 1937, the first year of the second term and what is called the Second New Deal. This third period saw an expanded use of the Commerce power due to more open interpretations of the Clause—a period that lasted arguably until the middle of the 1990s.

A fourth period is the period during which the Court attempted to restrain the "New Deal Commerce Clause" in a manner that was perhaps detached from the text of the Constitution. The Court began a period of re-regulation of Congress from what many of its members regarded as a clear command of the document to limit federal power whenever it overlapped its boundaries. As will be discussed, this command is far from clear textually.

A. *Early Formulations of the Commerce Power—Nineteenth Century Negative Commerce Jurisprudence*

The Commerce Clause is particularly susceptible to the downside of what Chief Justice Marshall described as an attribute of the United States Constitution. In *McCulloch v. Maryland,* Chief Justice Marshall established that the abbreviated descriptions of the powers of Congress in section 8 of Article I would not work as a straitjacket, but as an opening to employ whatever methods "necessary and proper" for the accomplishment of the legitimate enumerated ends in the provi-

48 Gibbons v. Ogden, 22 U.S. 1 (1824); Cooley v. Bd. of Wardens, 53 U.S. 299 (1852).

sion.[49] The Necessary and Proper Clause was a crucial part of the development and description of a national federal power because it provided the means of implementation. Other national constitutional traditions might and have since chosen more comprehensive ways of defining governmental power, particularly in the economic area. Compared to the economic provisions of more recent constitutions and treaty-based constitutional documents the language is rather paltry.[50] However our Constitution's brevity has become almost a trademark of sorts since Chief Justice Marshall said anything more detailed would be essentially a code, and not a constitution.[51] The result has been nearly two centuries of constitutional controversy over the meaning of several constitutional provisions, most notably the two that figure most prominently in this discussion, the Commerce Clause and the Tenth Amendment.

Marshall and his successors on the Court did not give twentieth century courts much to work with—most of the cases involving commercial regulation in the early to mid-nineteenth century addressed the negative aspects of the commercial power to restrain state regulation within the area reserved for Congress's plenary commercial power.[52] But the early cases provided that though the power was plenary, the states might regulate the same things in the same way for different reasons, implying some overlap between state and federal authority.[53]

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49 McCulloch v. Maryland, 17 U.S. 316, 413 (1819).

50 Craig Jackson, *Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 139, 164–67 (2003) (discussing the level of detail in the economic provisions of the Treaty of Rome and the Constitutive Document for African Union).

51 *McCulloch*, 17 U.S. at 407.

52 *Gibbons*, 22 U.S. at 17 (1824) ("The States may legislate, it is said, wherever Congress has not made a *plenary* exercise of its power. But who is to judge whether Congress has made this *plenary* exercise of power?"); *Cooley*, 53 U.S. at 305 (1852) (reinforcing that "[t]he decision in *Gibbons v. Ogden* has never been in the least degree questioned or shaken").

53 *Gibbons*, 22 U.S. at 196 (implicating federal authority when stating, "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution"). Of course, *Gibbons* has been used to support both expansive and narrow readings of the commerce power. Consider the exchange between Justice Sotomayor and Paul Clement, attorney for the respondents in oral arguments in *Department of Health and Human Services v. Florida*:

JUSTICE SOTOMAYOR: But that's exactly what Justice Marshall said in *Gibbons*. He said that it is the power to regulate; the power like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution. But there is no conscription in the—set forth in the Constitution—

MR. CLEMENT: I agree—

Accordingly, Commerce Clause jurisprudence has been as rudderless a jurisprudence as one can imagine given the brevity of the Clause, the susceptibility to multiple meanings of early court opinions purporting to explain the Clause, and the willingness of judges to use their own judgments of economic policy to define what was surely recognized as an open power amenable to anyone's interpretation. Yet despite this indeterminate quality, a principled limiting principle was possibly rooted in the language of the Clause—"among the several states."[54] Though susceptible to any number of plausible meanings, "among the states" suggests at the very least some kind of motion, a mingling or interaction of a commercial product with multiple states. It does not suggest, at least plausibly, anything more.

B. Gilded Age Commerce Clause Jurisprudence

Concurrent with the first Supreme Court cases addressing congressional assertions of authority under the Commerce Clause was the American Industrial Revolution, the development of the modern corporation and federal laws to regulate them, and legal rights accorded the institution under the Fourteenth Amendment.[55]

Contrary to congressional policy designs to regulate the national problem of trusts and their deleterious effects on competition[56] was the Court's interpretation of "among the several states." The limited meaning was the dominant constitutional presumption of the Court at that time. That interpretation produced rulings against federal power in economic activity if that activity was not actually in commerce "among the states" or that did not directly affect such commerce. The second descriptor (direct effects) acknowledged that federal power was not limited to items actually in transit across state borders—that even a conservative approach to commerce would ac-

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JUSTICE SOTOMAYOR: —with respect to regulating commerce.

MR. CLEMENT: I agree 100 percent, and I think that was the Chief Justice's point, which was once you open the door to compelling people into commerce based on the narrow rationales that exist in this industry, you are not going to be able to stop that process. Transcript of Oral Argument at 77–78, Department of Health and Human Services v. Florida, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

54 U.S. CONST. art. I, § 8, cl. 3.

55 Harry Scheiber, *State Law and "Industrial Policy" in American Development, 1790–1987*, 75 CALIF. L. REV. 415, 418 (1987) (arguing that, in addition to federal policies, "state industrial policies have had a significant impact and can be effective in important respects so long as they are not impeded or counteracted by national industrial policies").

56 Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L. J. 775, 831 (1965) (suggesting that courts adopted a goal of wealth promotion—via competition—to the exclusion of competing alternative ends).

commodate internal activity that directly affected interstate commerce. According to the Court in *United States v. E. C. Knight*,[57] federal regulation must *directly affect* those matters identified as commerce among the several states. Inasmuch as anything short of the regulation of items in transit or that otherwise are closely related to those items was prohibited, "direct effects" is essentially a matter of identity—the regulation must actually be or "touch" the interstate commerce. All else not falling within that precise definition of federal power was exclusively within the authority of the states. As a result, a coalition of sugar manufacturers in Pennsylvania controlling the majority of the national sugar market was not reachable under the Sherman Act because manufacturing was deemed stationary and hence intrastate and not part of or touching moving traffic among the states.[58]

The Court's approach in *E. C. Knight* has been termed as representing the doctrine of dual federalism, which treats state and federal areas of authority as separate, distinct, and inviolable, eschewing all areas of possible overlap.[59] And though the Court took great pains to define its terms ("[t]hat which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State,"[60]) the direct effects test was an acknowledgment of the intersection between internal and external commerce proposed by the early negative Commerce Clause cases (though this acknowledgment in those cases tended toward defining state police power and not expanding federal authority).[61] However, the Court's direct affects jurisprudence drew a narrow focus that did not include the creation of the items that later became interstate commerce—manufacturing and production were deemed neither commerce, nor as directly af-

57 156 U.S. at 12 (asserting that if the exercise of the power results in bringing the operation of commerce into play—but only affects it incidentally and indirectly—then the power does not control it).

58 *Id.* The Court quotes from Chief Justice Marshall's opinion in *Gibbons*: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Gibbons v. Ogden, 22 U.S. 1, 189–90 (1824).

59 BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 142 (1998) ("In practice, the theory of dual federalism yielded a narrow construction of the scope of the federal government's power to regulate commerce.").

60 United States v. E. C. Knight, 156 U.S. 1, 12 (1895).

61 *Id.*

fecting commerce.[62] Because corporate decisions of the parties affecting the essentially in-state practice of manufacturing were said to only remotely affect interstate commerce, it was not interpreted to be interstate commerce and subject to the Commerce Clause.

The Court's opinion and its dual federalist approach to commercial matters suggest rigidity in its division of power between the states and the federal government, but not necessarily in the definition of the federal commercial authority. The Court defined that authority as encompassing not just commerce among the several states, but also those matters directly affecting commerce (without resort to the Necessary and Proper Clause), all while staying within the text of the Constitution.

Yet the federalism debate had its limits. Cases involving state police power were also subject to attack by the Court by virtue of the claim that individual substantive due process rights of contract were violated.[63] The Court found a right to contract as among the body of unarticulated rights protected by the Due Process Clause when it turned back a minimum hours law passed by the New York legislature in *Lochner v. New York*,[64] a case that continued as precedent through the late 1930s. The proposition of that case and those that followed was that of rigidity in the parsing of regulatory power to the states, supposedly the possessor of infinite police power. When added to the Commerce Clause jurisprudence and a Congress whose power was contained in specific enumerations of authority, what one gets is the jurisprudential script of the Gilded Age Supreme Court, traditionally regarded in constitutional law literature as driven by an economic jurisprudence of the day which constrained both federal and state regulation in key areas.[65]

With regard to the Commerce Clause, the fact that Chief Justice Marshall had interpreted the Constitution almost a century earlier as saying that Congress had the authority to do all that was necessary and proper to implement its authority was not terribly clarifying in the federalism debate—instead it has guaranteed nearly two centuries of debate about the meaning of the Clause.

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62 *Id.*

63 Lochner v. New York, 198 U.S. 45, 46 (1905) (holding that freedom of contract is a right protected by the Constitution).

64 *Id.* at 64–65.

65 Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (noting that *Lochner* was widely regarded as an "illegitimate intrusion by the courts into a realm properly reserved to the political branches of government").

Accordingly, the Court of this era consistently held to its textually based limiting principle in commerce cases. At the same time, it reserved the right to address the definition of commerce in a manner that seemed expansive. The Court's interpretation of the commerce power in the *Houston, East and West Texas Railroad Co. v. United States*,[66] known as the *Shreveport Rate Case*, exemplify this. Justice Hughes wrote that the Commerce Power:

> [N]ecessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.[67]

Where the Court in *E. C. Knight* focused on the identity of items as actually being in commerce, the Court in *Shreveport* was willing to find authority to regulate matters (like setting transportation rates) having a close and substantial relation to interstate traffic, an obvious use of necessary and proper authority.[68] Similarly the Court was willing to accept congressional authority over meat pricing practices over meat products in transit through several states.[69] The point in common in each case is that the focus of the decisions can be traced to the text of the Clause itself—identity of the subject of regulation as within interstate commerce or directly touching and facilitating the movement of specific interstate commerce.

Even in the so-called "morality cases," though the Court showed a willingness to accept a broad view of congressional power even where the motive may not have been strictly economic, its focus did not stray far from the text of the Clause. For example in cases dealing with the federal regulation of lottery tickets[70] and prostitution,[71] the item or activity was classifiable as commercial, and because the jurisdictional basis for the legislation was movement across a state line, the Court found Congress's assertion of power constitutional. On the other hand, where child labor was involved in the manufacture of goods engaged in interstate commerce, the Court held its ground on the manufacturing issue and declined to approve federal legislation

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66 234 U.S. 342 (1914).

67 *Id.* at 351.

68 *Id.* ("Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement.'" (quoting The Daniel Ball, 77 U.S. 561, 564 (1870))).

69 Swift & Co. v. United States, 196 U.S. 375, 398 (1905).

70 Champion v. Ames (*Lottery Case*), 188 U.S. 321 (1903).

71 Hoke v. United States, 227 U.S. 308 (1913).

prohibiting the interstate sale of those items.[72] Yet each of these decisions maintained a certain consistency. State and federal power were indeed separate while the definition of the power (actual goods in transit, manufacturing as not being commerce, transportation or channels, or streams of commerce being so closely related to commerce in interstate transit that congressional regulation was appropriate) remained somewhat flexible, but close to the actual movement of specific commerce.

The decisions may have reflected the economic thinking of the time or of the Court's membership. They may have reflected a legitimate or excessively cautious fear of encroaching federal government power on the states. Yet the Court did draw its limiting principle from the language of the Clause itself—the identity of the matters regulated would have to be a part of the traffic across state lines or closely or directly related to those matters so identified—commerce among the several states.

C. New Deal Confrontation and the Need for Expansive Commercial Power to Legislate During the Great Depression

The Great Depression drew the assumptions of the role of the federal government into question in a number of areas, and not the least of which was Congress's regulatory authority under the Commerce Clause. New Deal reformers would need more tools than what the Court's narrow list would provide to the federal government through the commerce power.[73] Because there was no precedent for the economic collapse, there was no legislative precedent for the kind of changes thought needed, and the New Deal reformers were treating the Constitution, and in particular the Commerce Clause, as an opportunity to get a desired goal accomplished—expand the role of the federal government in the national economy. Yet the jurisprudence of the Commerce Clause continued to uphold a limiting principle based on the older cases focused on the concept of federalism traceable to the "among the several states" language of the Clause.

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72 Hammer v. Dagenhart, 247 U.S. 251, 271–74 (1918).

73 To Robert Jackson, writing before becoming a member of the Court, the government's need for the means to address a national economic problem became subject to the federalism not of the Constitution, but of the Supreme Court, which read into the document the notion of dual federalism. Dual federalism, according to Jackson, restricted the national government from intrastate regulation despite nothing in the Constitution indicating any particular subject within exclusive control of the states. JACKSON, *supra* note 14, at 69–70.

Schechter Poultry v. United States[74] dealt with the New Deal legislation known as the National Industrial Recovery Act, which required industries to adopt codes of fair competition, including minimum wages, collective bargaining, and the like. The case involved a Brooklyn chicken slaughterer and a deficient Government record to prove a nexus between Brooklyn chicken slaughterers and the interstate poultry business, especially since Schechter, whose supply came from interstate commerce, sold only to in-state retailers.[75] The Court applied the direct effects test, which Chief Justice Sutherland characterized as a close and substantial relation to interstate commerce:

> We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service.[76]

(Given better facts) the idea that wages, even at Schechter's small New York operation, could have an effect on interstate commerce was dismissed by Cardozo, who in concurrence noted that the connection was too imprecise and remote:

> Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions.[77]

The fate of a chicken slaughterhouse would appear to be at least analogous to that involved in the sale of cattle in *Swift & Co. v. United States.* However, the rationale for the rejection of the regulation here, and the acceptance of it in *Swift*, is consistent. Schechter's operation was so isolated that a reasonable claim to national effect alone would not be realistic even though, as Cardozo acknowledges, Schechter's practices would have some minor effect. *Swift* involved livestock in the process of travel to market, and pricing practices facilitating the transit of that commerce.[78] The difference in the two outcomes is that the Court's limiting principle was used as a quantitative metric in *Schechter*, (direct equals "a lot") where the limiting principle

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74 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23 (1935).

75 *Id.* at 520–21.

76 *Id.* at 544.

77 *Id.* at 554 (Cardozo, J., concurring) (internal citations omitted).

78 196 U.S. 375, 391 (1905).

in previous cases was more closely associated with the identity of the activity itself or the closeness to specific commerce in transit between states. Though textual, the distinction perhaps reveals that the limiting principle that Congress's authority extended only to traffic in commerce among the states was not warranted as the exclusive means of interpreting the Clause's coverage other than to entertain the Court's notion of where Tenth Amendment lines have to be drawn.[79]

Carter v. Carter Coal Co.[80] involved the Bituminous Coal Act of 1935. Under the Act, penalties were assessed for non-compliance with the fair competition standards. Because the matter involved labor and production, Justice Sutherland, for the majority, found no direct effect, explaining the limiting principle as an absence of efficient intervening agency or condition.[81] The question to be examined under this jurisprudence was not the extent of the local activity or condition, or the extent of the effect. The question was what is the relation between the activity and the commerce—is the activity the interstate commerce itself or something close to it?

IV. EXPANDING CONGRESS'S POWER UNDER THE COMMERCE CLAUSE

Following the 1936 landslide re-election of Franklin Roosevelt and the unveiling of the "Court Packing Plan," the Court issued a series of opinions that differed significantly from its previous jurisprudence. Modern historical analysis confirms that the legend of the "switch in time that saved nine" really did not happen in such an obviously gratuitous manner as had been suggested.[82] Nonetheless, the Court

79 The Court's attitude toward the utilitarian New Deal legislation can be summed up in the words of the Chief Justice: "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment . . . ."

Schechter Poultry, 295 U.S. at 528–29 (internal footnote omitted).

80 298 U.S. 238 (1936).

81 *Id.* at 307–08.

82 The "legend" arose when the Court issued its opinion in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), a Due Process Clause case which effectively overturned *Lochner* by upholding a state minimum wage law for women. That decision however, was decided before Roosevelt's announcement of the Court Packing plan and only released several weeks later. Furthermore, it is suggested that the Court understood that political forces in the Senate were aligned to, at the very least, filibuster the plan or defeat it outright

gradually convened a jurisprudence that entertained a more expansive role for Congress to go beyond the narrow confines of a commodity-based power, to a power designed to affect a national economy—a power needed to address a national economic depression. The change involved a fundamental change in constitutional theory.

The fundamental change was possible because both the Commerce Clause and the Necessary and Proper Clause are basically general provisions capable of many meanings, though the conservatives on the pre-1937 Court sought to limit the meaning to actual traffic and those activities that so facilitated that traffic that there was an "absence of an efficiently intervening agency."[83] The Necessary and Proper Clause is even less specific and this lack of definitional clarity conveniently takes advantage of the excessively vague Tenth Amendment in the sense that while defining what power is possessed by the states, it does not specify what power is prohibited to the national government nor prescribe an area of exclusivity to the states.[84] Accordingly Roosevelt's reformers exploited this opening to create constitutional scope responsive to immediate needs of society. Absent such an emergency, a theory of the constitution the old interpretation, one that satisfied the regulatory needs of a less dangerous era, would be just fine.

But this was a dangerous era and the reformers, with a Court gradually changing, were able to put into operation an expansive view of the Commerce Clause. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[85] the Court finally recognized the theory that economic activities that are connected affect each other whether or not individually such activities take place entirely within a state or in both the state and across state borders, albeit in the context of a relatively new kind of corporate endeavor, the extended interlocking interstate corporation.[86] The Court continued its reliance on the limiting principle that Congress regulates only those matters so connected to interstate commerce that there was an absence of an efficient intervening agency or condition, a rejection of such a principle was really not needed within the context of an interstate interlocking corporation.

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when it issued the second opinion of the new jurisprudence in Commerce Clause cases, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *See* CUSHMAN, *supra* note 59 at 18–20.

83 Carter v. Carter Coal Co., 298 U.S. 238, 307 (1936).

84 JACKSON, *supra* note 14, at 69.

85 301 U.S. 1 (1937).

86 *Id.* at 25–27.

Later, with a Court comprised of seven Roosevelt appointees,[87] it would abandon all pretense of remaining true to old thinking and establish that activities not attached in an interstate corporate structure may still affect commercial activities in other states by a device called aggregation in *Wickard v. Filmore*.[88] One farmer's protest over a wheat acreage cultivation limitation to grow product for private consumption was acknowledged by the Court to be essentially insubstantial, but when combined with thousands of other farmers doing the same thing, in the aggregate the effect on interstate commerce would be substantial.[89] A constitutional theory of economics that did not allow federal regulation over recurring economic events affecting the national economy would render the government helpless to address the problems of agricultural over-supply.[90] This opinion, and others like it during the same time period, flew in the face of Justice Cardozo's concurrence in *A. L. A. Schechter Poultry Corp. v. United States*[91] where he compared the economy to an earthquake-monitoring device. Cardozo sought to describe an economy so interlocked and integrated that even modest economic activity could reverberate beyond its location. This basic fact, in Cardozo's view, himself a liberal, required some sort of limiting principle—absent a limiting principle Cardozo worried that the commerce power would undermine all limitations on federal regulatory power.[92] *Wickard* also ran afoul of Chief Justice Hughes' warning that the Constitution could and should not be interpreted for specific outcomes no matter what the emergency.[93] So despite the warnings from a conservative and liberal of the preceding era, the Administration and Congress put forth a legislative agenda with the help of a sympathetic "Roosevelt Court" picked by the President after a series of retirements after the Court-Packing Plan failed, giving him more influence over the future of economic consti-

87 The Roosevelt appointees on the Court at the time of the *Wickard* decision were Hugo Black, Stanley Reed, Felix Frankfurter, William Douglas, Frank Murphy, James Byrne, and Robert Jackson.

88 317 U.S. 111 (1942).

89 *Id.* at 128.

90 *Id.* at 129.

91 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) ("There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center.").

92 *Id.*

93 *Id.* at 528–29.

tutional litigation for generations than a packed court of fifteen members likely would have.[94]

Though *National Labor Relations Board v. Jones* and *Wickard v. Filburn* perhaps stand out as particularly stunning departures from previous doctrine, the former because of the timing, and the latter because of the sheer audacity of the aggregation theory, *United States v. Darby* may be the most important of the post-1936 Commerce Clause cases for two reasons. First, the decision overturned the notorious "manufacturing is not commerce" opinion of *Hammer v. Dagenhart* that repudiated Congress's power to regulate child labor. The second reason is Justice Stone's take on the Tenth Amendment:

> The amendment states but a truism that all is retained, which has not been surrendered. 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.[95]

Stone's relegation of the Tenth Amendment to the status of a rhetorical device underscores the position that the Court would take in Commerce Clause matters from that point on. Even when the Court in the earlier cases applied the close and substantial relation test, it stuck with its "among the states" guns sanctioning rather obvious areas of federal jurisdiction because of the Necessary and Proper Clause. Yet by the time *Darby* was before the Court, the jurisprudence had shifted substantially. The use of the "close and substantial relation" doctrine had evolved, with the help of the *Jones* case, into the substantial effects doctrine. In doing so, it took congressional authority outside of the bounds of the Commerce Clause's own limiting principle of "among the states." In theory, legislation under the Clause and the substantial effects doctrine would still be subject to the limiting principle of the Tenth Amendment, but those limits would have to be determined another way in light of Justice Stone's truism characterization.

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94 This point is based on the speculation that the next Republican conservative President (Eisenhower) would also have a court of fifteen members and vacancies to appoint and the influence of the seven members appointed by Roosevelt would have been subject to the diluting affects of the Eisenhower's appointments. Of course President Eisenhower appointed perhaps the two most liberal justices of the twentieth century, Earl Warren and William Brennan.

95 United States v. Darby, 312 U.S. 100, 124 (1941).

The result was that Congress was freer than it had been before to regulate for a variety of reasons, as long as even a tenuous connection to commerce or effects on commerce could be claimed. Without what amounted to foundational change, much of the social and economic history of the nation since then would be different.

Civil rights is an interesting case study under this analysis. Perhaps the extremely naïve will believe that a sincere concern about the flow of traffic on the nation's freeways, or the integrity of the hotel and restaurant industries motivated the Civil Rights Act of 1964.[96] The reality was that the country was being embarrassed internationally by its color line and racist treatment of people of color. And it was a problem caused, in significant part, by cultural practices in both the public and private sector. The Constitutional guarantees of equal protection had been rendered useless eighty years earlier in the private sector by the 1881 Court's literalist understanding of Equal Protection Clause's prohibition of discriminatory state action,[97] and there was nothing left with which to do the right thing other than to manipulate the Constitution through the Commerce Clause. It is not very likely that the Clause was intended to do anything other than "fix economic problems," and even that phrase may be taking it too far considering what Justice Thomas terms the mercantilist roots of the Clause.[98] Nonetheless the manipulation took place and the theoretical underpinnings for it came straight out of the New Deal. Certainly the Clause had been used for social legislation before—lottery cards,[99] prostitution,[100] and the like—but in each of the earlier cases, the object of social policy was actually crossing state borders as commerce, the quintessential Commerce Clause case. As the Clause did not include an intent requirement in its authorization of the power, Congress was able to use the substantial effects doctrine to make social policy simply by the fact that the activity, in this case an activity which was evil at the time and by today's standards, affected interstate travel and hence interstate commerce. So segregation in public restaurants and accommodations was said to substantially affect interstate travel and on this basis, in addition to the interstate products that were used to run such businesses, Congress's assertion of authority was ap-

96 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (suggesting that racial discrimination placed a heavy burden on interstate commerce).

97 The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment.").

98 United States v. Lopez, 514 U.S. 549, 591–92 (1995) (Thomas, J., concurring).

99 Champion v. Ames (*Lottery Case*), 188 U.S. 321, 343–44 (1903).

100 Hoke v. United States, 227 U.S. 308, 317 (1913).

proved by the Court. Yet the hotel segregation practiced at *Heart of Atlanta Motel*[101] or the "barbecue" segregation of Ollie's Barbecue[102] both occurred within the states of Georgia and Alabama respectively.[103] A Court bound by a limiting principle that prohibited congressional regulation of wholly intrastate activities that did not have a close and substantial relation to interstate commerce, would not have found the Civil Rights Act of 1964 constitutional.[104] Similar results would occur were the Court bound to a limiting principle requiring a strict economic purpose. Congress's word that the Act was a rational assertion of power would suffice for the 1964 Warren Court.[105] And certainly the evidence available in the legislative history of the Act suggested that segregation did have economic effects. Yet, Justice Cardozo's warning thirty years earlier in *Schechter Poultry*[106] that everything has an economic effect to some degree, if heeded in 1964, would have demanded a limiting principle requiring that the Act be struck down whether or not such limits would have a clear constitutional basis.

In reality the Act was a needed solution to a wrenching social problem that was not going to be fixed any other way. The Commerce Clause attributes of the Civil Rights Act was also a step further than New Deal laws which were at least legitimately about economic policy. Any pretense of economics as a prime motivator in the Civil Rights legislation is fantasy. It was simply about a budding social movement and the need to restore and assert American prestige and moral authority at home and abroad.[107]

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101 379 U.S. at 243 ("Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.").

102 Katzenbach v. McClung, 379 U.S. 294, 296–97 (1964) (detailing the segregation at a southern barbeque restaurant).

103 The Court in both cases attempted to buttress the substantial effects reasoning with additional rationales. The channels of trade rationale in the case of motel segregation, addressed the individual African Americans being denied service while traveling the interstate freeways. The Court in the *Katzenbach* decision argued that Congress's civil rights legislation was really about regulating goods being used in the restaurant in question.

104 Congress was not attempting to regulate the actual flow of commerce across state lines as in *Hoke*, 227 U.S. at 317, or *Champion*, 188 U.S. at 323, or regulate activities necessary for the facilitation of specific commerce as in the *Shreveport Rate Case*, 234 U.S. 342, 345 (1914), or Swift & Co. v. United States, 196 U.S. 375, 391–92 (1905).

105 *Heart of Atlanta Motel,* 379 U.S. at 258.

106 *See* note 74 and accompanying text.

107 Donald H. Regan, *How to Think about the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 602 (1995) ("An argument I have not even mentioned is that Congress was justified in passing the Civil Rights Act of 1964 because race discrimination in the South was an embarrassment in our international relations." (internal footnote omitted)).

It is likely that even if the *Civil Rights Cases*[108] of the nineteenth century had not made the Fourteenth Amendment useless to attack private discrimination and was available in the 1960s, resort to the Commerce Clause would have been unnecessary. But there likely would have been a call for a limiting principle to rein in Congress from interfering with private relationships through the Amendment's state action language, a scenario that could have sent Congress back to the drawing board from which they would likely have arrived at a Commerce Clause solution to private discrimination anyway. Because societies do not choose their history, the New Deal Commerce Clause was available to the Congress during the nation's Civil Rights Movement. Even though the civil rights legislation had the social policy legislation that was approved by the pre-New Deal Court in the morality cases (within the context of regulating undesirable items of interstate commerce),[109] Congress set about to regulate what it characterized as an impediment to interstate commerce (racial segregation), which was at best fortuitous since eradication of segregation absent state action was the true motive.[110] The pre-New Deal morality cases were not precedent for this scope and but for the substantial effects doctrine of the New Deal Commerce Clause, the effort would have been unsuccessful.[111]

The Great Depression and the New Deal were the stimuli for a new constitutional approach that led to changes in government that produced legislative outcomes removed temporally and by scope from the issues of the Great Depression. Civil rights are such an example. A foundational shift of constitutional thinking was required and to do that constitutional theory had to let go of the idea that the Constitution was a collection of single truths and that the role of the

108 109 U.S. 3 (1883).

109 *See, e.g.*, *Hoke*, 227 U.S. at 317; *Champion*, 188 U.S. at 323.

110 *Heart of Atlanta Motel*, 379 U.S. at 257.

111 The crisis of the Depression likely created the pressure necessary to push the constitutional principle, at least in the area of the Commerce Clause, in a new direction. Lesser crises sustained the New Deal innovation. Perhaps one reason why there was no crisis atmosphere surrounding the civil rights emergency in this country on the order of the Great Depression was that, though the victims of public and private sector racism might feel otherwise (and they do), the crisis of race in this country did not reach the level of emergency outside of minority communities faced by the nation during the Great Depression in terms of numbers affected. Outside of African Americans and other non-whites receiving civil treatment for the first time from private institutions and businesses, those institutions and businesses, and the hardcore racists who were rankled by the changes, most white Americans did not *feel* the change directly, observing it mostly in media and in their environments. Though the social changes that flowed from the civil rights era were profound, few were in pain before the changes other than non-white Americans.

courts was to find those single truths. In fact, the Constitution became a collection of multiple truths and it was up to the political process to use the truths that best addressed the crisis of a given moment. In essence, with the Tenth Amendment rendered as a truism, it was up to Congress to certify the rationality of its legislation and create its own limiting principles.

V. RE-EMERGENCE OF FEDERALISM IN THE COMMERCE CLAUSE JURISPRUDENCE—LIMITATION THEORIES

A. National League of Cities *and Its Brief Reign*

By the mid-1970s, a mini-skirmish over federalism and Congress's commercial jurisdiction was taking place ("mini" in comparison to the 1930s). Under the Fair Labor Standards Act ("FLSA"), Congress, using its commercial power, had taken to passing legislation regulating not only matters within state jurisdiction under the close and substantial effects doctrine, but was using essentially the same rationale to regulate the states themselves in their labor practices toward their own workforce of state government workers. In *National League of Cities v. Usery*,[112] the Supreme Court squarely faced the question of whether cities were subject to congressional regulation, and the Court said "no" on federalism grounds. Writing for the Court, then Associate Justice William Rehnquist essentially called the law a step too far. According to Rehnquist, the FLSA displaced state authority in areas of traditional government authority essentially substituting its judgment for that of the states in matters encompassing their own affairs, in this case the employment of their own work force.[113] The appellants challenging the legislation did not challenge the breadth of congressional authority, nor did the decision restrict Congress from regulating state policies—under the theory developed by the Court during the second New Deal, Congress would have authority to regulate those activities that were closely and substantially related or affected interstate commerce. But *National League* did draw the line at traditional governmental functions. Taking a structural interpretive approach, Rehnquist's opinion stated:

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112 426 U.S. 833 (1976).

113 Several years later, Justice Marshall articulated what has come to be accepted as a complete test for government intrusion raised in *National League*. The standard from *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.* considers whether Congress is regulating states as states, addresses matters that are indisputably attributes of state sovereignty, and analyzes whether the regulation interferes with traditional state functions. 452 U.S. 264, 287–88 (1981).

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[114]

Without limiting the breadth of congressional authority (which would require overruling the previous forty years of Commerce Clause jurisprudence), Justice Rehnquist inserted the Tenth Amendment into the debate by quoting from *Fry v. United States*:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States v. Darby*, it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[115]

Chief Justice Rehnquist might well have added the remainder of that footnote in the case, which found in favor of Congress's authority to stabilize price and wage levels by setting wage ceilings applicable to both private and state sectors:

> Despite the extravagant claims on this score made by some *amici*, we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty.[116]

The decision from the previous term, in approving the federal regulation, noted the minimal intrusiveness of the FLSA in that case as well as in an earlier challenge in *Maryland v. Wirtz*.[117] *Fry* involved a temporary measure enacted in response to a national inflation emergency and *Wirtz* involved a minimum wage law that Justice Harlan characterized as simply regulating wages, and not policies in the state employment sectors (hospitals, education, institutions) affected.[118] Justice Marshall writing for the Court in *Fry* saw similarities between the two cases and saw both uses of the wage legislation as minimally invasive.[119] The law challenged in *National League* was a "permanent" minimum wage law, more akin to *Wirtz* than *Fry*.

However, the Court in *National League* overruled the *Wirtz* opinion while leaving *Fry* intact. In Justice Rehnquist's judgment, whereas a temporary emergency measure may be justifiable even from a structural standpoint ("The limits imposed upon the commerce power

114 *Nat'l League*, 426 U.S. at 845.
115 Fry v. United States, 421 U.S. 542, 547 n.7 (1975).
116 *Id.*
117 392 U.S. 183 (1968).
118 *Id.* at 186–87.
119 *Fry*, 421 U.S. at 548.

when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency."[120]), a more permanent measure like the one in *Wirtz* or in *National League*, setting wages in employment sectors that included state employees, would not be. Justice Harlan's analysis in the Court's opinion in *Wirtz* of the similar law, though limited to certain enterprises (an earlier version of the FLSA provision reviewed in *National League*) was essentially that it was only wage regulation.[121] Justice Rehnquist preferred to examine the degree by which wages might affect policies in traditional state functions, while acknowledging that "many of the actual effects under the proposed amendments remain a matter of some dispute among the parties . . . ."[122] The resultant examination was as speculative in the direction of intrusiveness as Harlan's was in the direction of non-intrusiveness. Neither decision focused on the scope of applicability, the law in *Wirtz* being of a more narrow application than the one in *National League*. Both opinions focused on the temporal nature of the wage law—the fact that both cases dealt with permanent mandatory minimum wage laws—and not the scope or relative intrusiveness of the wage law. The two justices simply came to different conclusions about the intrusiveness of permanent wage standards, and *Wirtz* was overruled.[123]

Missing from *National League* was a principled description of intrusiveness. Intrusiveness, itself an interesting proxy for a Tenth Amendment structural argument, is a matter of degree, and in Rehnquist's judgment the FLSA was beyond the degree, while a temporary wage freeze addressed in *Fry* was not. Subjectivity is no stranger to Supreme Court jurisprudence, and it was being used here to attempt to put brakes on the Commerce Clause jurisprudence begun in the second term of Franklin D. Roosevelt and by the post-1937 Court. Unable or unwilling to attack the real basis for Commerce Clause expansiveness, the effects doctrine, Rehnquist's use and interpretation of federalist principles is external to the Clause itself. Where the earlier cases were based on a jurisprudence of federal limits coming directly from the language of the Commerce Clause, the cases coming after and during the Second New Deal established wide latitude for congressional action under the Clause. In this attempt to break the momentum of the Second New Deal cases, Justice Rehnquist chose not to confront the holdings in those cases directly

120 Nat'l League of Cities v. Usery, 426 U.S. 833, 853 (1976).

121 Maryland v. Wirtz, 393 U.S. 183, 193 (1968).

122 *Nat'l League*, 426 U.S. at 849–50.

123 *Id.* at 840.

by overrule (though implicit overrule may have been an option). Instead, the opinion represents the beginning of the subjective approach to the Tenth Amendment purporting to describe what the Amendment says about the relation between federal and state authority.

Any other approach would require overruling the rationale of forty years of jurisprudence based on the substantial effects doctrine. The result: subjectivity as analysis in an opinion about federal intrusiveness into state matters and the meaning of the Tenth Amendment. As Justice Brennan put it in his dissent:

> My Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent. An abstraction having such profoundly pernicious consequences is not made less so by characterizing the 1974 amendments as legislation directed against the "States *qua* States." Of course, regulations that this Court can say are not regulations of "commerce" cannot stand, *Santa Cruz Fruit Packing Co. v. NLRB,* 303 U.S. 453, 466 (1938), and, in this sense "[t]he Court has ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'" *Maryland v. Wirtz,* 392 U.S. 183, 196 (1968).[124]

Brennan would refocus the debate on what is and is not "commerce" (and presumably what does and does not have a close and substantial effect on commerce) as a means of reining in the federal government's use of the Commerce Power. Yet, as his dissent suggests, going beyond the boundaries of the Clause itself invites subjective assessment of the meaning and scope of the Tenth Amendment in pursuit of a single vision of federalism. This is not how the earlier opinions of the Court addressed the federalism question.

This is not to say that an unrestrained Commerce Clause is not a cause of concern. Even for liberals like Justice Marshall, the author of the *Fry* opinion, there was concern over the Clause's power to overwhelm state authority under the commercial power.[125] Brennan's answer to Marshall's concern would be to find limits in the definition of "commerce" (internal to the Clause) and any external controls would be based on political restraints and not the subjectivity of judicial decision making.

B. Alternative Federalism and the Political Process

And at least with regard to political restraints, Brennan's dissent became the law when the Court after nearly a decade of attempting

124 *Id.* at 860 (Brennan, J., dissenting) (internal citations omitted).

125 *Fry*, 421 U.S. at 547 n.7.

to define traditional government functions of a state overruled *National League* in *Garcia v. San Antonio Metropolitan Transit Authority*.[126] The majority opinion authored by Justice Blackmun, whose concurrence in *National League* was the fifth vote in the case's majority, lamenting the inability of the Court in eight years to come up with a standard defining "traditional government functions," proven to be the most difficult of the three-prong standard for determining federal regulatory intrusiveness,[127] that was not in some manner subjective, conceded the futility of the exercise and relegated the matters of federalism to the political sphere. An undercurrent of reasoning would no doubt be the fact that the traditional government function test is a subjective test, the purpose of which is to achieve a result, protection of state sovereignty under the Constitution, which is in and of itself a subjective exercise:

> With rare exceptions . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. . . . In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.[128]

Justice Blackmun depicted the line of cases addressing state exemption from federal taxes as a cautionary note in that line's attempt to develop a limiting principle based upon a principled distinction between governmental and proprietary activities, the latter being taxable. The Court's decision to drop the distinction after a several decade unsuccessful attempt to develop consistency in the field[129] was considered no less futile than the attempt to develop a standard for defining traditional government function, the regulation of which under *National League* would contravene the Tenth Amendment's federalism principle. The *National League* line, according to Blackmun, had produced throughout the Circuits irreconcilable outcomes in trying to apply the traditional state functions test.[130] The use of history to attempt to define traditional functions of states had proven inaccurate, unresponsive to the development of state government over time, forcing courts to determine, essentially by fiat, where to draw the *National League* line.[131]

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126 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

127 *Id.* at 550.

128 *Id.*

129 *Id.* at 542–47.

130 *Id.* at 538–39. Justice Blackmun details the lower court's confusion with lengthy citations to appellate and district court cases and alludes to the Court's own difficulty in defining what is and is not a traditional state function.

131 *Id.* at 544.

Lamenting the whole process, with the state/federal tax cases as evidence, as well as the apparent unworkability of the *National League* test, Justice Blackmun sought an alternative federalism principle. In resorting to the political process, Blackmun stated:

> We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty.[132]

Justice Blackmun's view of the congressional power under the Commerce Clause is a broad view around which states may determine their power, and not the other way around. Federal power as defined does not give way to "predetermined notions" of sovereign state power,[133] and the source for the state's "residuary and inviolable sovereignty"[134] is in the prescription for federal power within constitutional scheme. Perhaps because of this scheme, which is the reason given in the opinion, or perhaps because of the unworkability short of fiat of the *National League* test, Justice Blackmun finds "safe harbor" in the political process to determine and enforce limits on Congress—a limiting principle which he says is supported by constitutionally designed state checks and influence on federal power.[135]

Passing federalism to the political process does not solve the subjectivity problem but it does, as Blackmun reasoned, take judicial subjectivity out of the mix, placing that decision with democratically elected representatives, an attempt to address the so-called dilemma of the "antidemocratic" features of judicial review at least for this issue.[136]

The two major dissents by Justices Powell and O'Connor raised the need for constraints on the Commerce Power and criticism of the relegation of the federalist meaning of the Tenth Amendment to the political sphere.[137] However neither dissent addressed the central concern of Justice Blackmun—that to attempt to develop an objective

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132 *Id.* at 548.

133 *Id.* at 550.

134 *Id.* (quoting THE FEDERALIST NO. 39, at 285 (James Madison) (Benjamin Fletcher Wright ed., 1961)).

135 *Id.* at 550–54.

136 William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695–96 (1976).

137 In his dissent, Justice Powell stated, "We noted recently "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the States. *Garcia*, 469 U.S. at 565 (Powell, J., dissenting) (internal footnote omitted).

test for traditional state function is a futile exercise—other than to acknowledge that the task was hard.[138]

C. Federalism Revival—The Commandeering Cases

The traditional government function test was the first of three theories used to achieve the result of curtailing Congress's post-1937 commercial regulatory power. Though a version of the test was able to re-establish itself in the line of cases beginning with *New York v. United States*[139] and *Printz v. United States*[140] as the "commandeering" theory, which was limited to disapproving congressional attempts to require state enforcement of federal policies,[141] the next attempt at a general limitation on the Commerce power re-focused on limiting congressional authority in the private sphere via the regulation of economic activities.

D. United States v. Lopez[142]

Congressional passage of the Gun-Free School Zones Act of 1990 ("The Act") without specific findings tying its Commerce Clause authority to the specific problem it sought to address in the legislation essentially opened the door for the Court to place the first limits on the use of the commercial power in the private sector in more than a half century.[143] The Act made it a federal crime for any individual to knowingly carry a gun within a school zone. The basis for the legislation was the Commerce Clause though the Act did not include a jurisdictional statement limiting enforcement to possession of guns that had traveled in interstate commerce, and, more importantly, it did

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138 Justice O'Connor noted in dissent, "It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by *National League of Cities*. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance. That the Court shuns the task today by appealing to the 'essence of federalism' can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government." *Id.* at 588–89 (O'Connor, J., dissenting).

139 211 U.S. 31 (1908).

140 521 U.S. 898 (1997).

141 *Printz* addressed a federal mandate to administer firearm background checks under the Brady Bill. *New York* involved a federal mandate that states take title to hazardous wastes, and all of the liability associated with that waste, for failure to provide disposal sites for the waste. Both cases were seen by the Court as examples of extreme federal involvement in state affairs.

142 514 U.S. 549 (1995).

143 *Id.* at 552.

not include finding that such possession would have a substantial effect on interstate commerce.[144]

1. Economic Activities

Those infirmities were of no consequence to the Court's decision in *United States v. Lopez*. Chief Justice Rehnquist writing for the Court focused attention on the nature of the regulated activity—gun possession—which the opinion accurately characterized as a non-economic activity. Assuming, as the Court did without serious challenge, that gun possession, in the aggregate, would have a substantial effect on interstate commerce as the government argued before the Court, this particular regulated activity stood out among activities regulated in the past by its non-economic nature.[145] Each regulated activity approved by the Court since the New Deal revolution in Commerce Clause jurisprudence had involved an economic transaction.[146] Mere gun possession, however substantial the effects on interstate commerce, did not fit into the company of past decisions and past congressional Commerce Clause legislation that went before the Court. The holding was that the law went beyond Congress's authority and was unconstitutional.[147]

The Court relied upon the apparent need to maintain a balance between state and national authority. However in pursuit of this federalist end to identify a limiting principle, the Court failed to lay down a principled theory to achieve that goal—the economic transactions rationale for overturning the regulation had neither been a principle of Commerce Clause jurisprudence prior to the opinion to the point of inconsistency with those decisions according to Justice Souter,[148] nor had any of the cases, as Justice Breyer pointed out in dissent,[149] focused on the matter as a relevant fact. The Court failed to establish a doctrinal connection between an activity's status as economic and the majority's dual sovereignty thesis or the specific precision that places the federalist line at the point between economic and

144 *Id.* at 562.

145 *Id.* at 559–60.

146 In his dissent Justice Breyer argued that the *Wickard v. Filburn* homegrown wheat scenario did not feature a commercial transaction inasmuch as the activity regulated was private use of an agricultural crop. However, each private use could be described plausibly as economic by virtue of the fact that it diverted resort to the purchase of market supplies. *Id.* at 628 (Breyer, J., dissenting).

147 *Id.* at 551.

148 *Id.* at 608 (Souter, J., dissenting).

149 *Id.* at 628 (Breyer, J., dissenting).

non-economic activities (while acknowledging the inherent imprecision of the whole process).[150] In addressing the issue in this manner, to find federalist balance, the Court departed from the deference to Congress that had been accorded for decades since the *Jones and Laughlin Steel* case in 1937.[151] While acknowledging the past practice of the Court to review congressional assertions of Commerce Clause authority under the rational basis standard,[152] the Court took a step in the other direction which amounted to a somewhat significant, though not complete overhaul of Court practice in reviewing Commerce Clause cases.

The Court's view with regard to an appropriate role for commercial regulation was expressed in the Chief Justice's counter to Justice Breyer's dissent, which focused on the effects of gun possession on commerce and not the nature of the regulated activity. According to the opinion, Justice Breyer was "unable to identify any activity that the States may regulate but Congress may not."[153] This seems to be the metric by which the majority would have the Court assess constitutional theory from that case on—whether or not a theory leaves a space of exclusivity for state regulation. As will be demonstrated, this standard is the doctrinal basis for the limiting principle on display in Commerce cases on through *National Federation*.[154]

Quoting from *Maryland v. Wirtz*, Justice Souter pointed out in his dissent that "[t]here is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other."[155] The dual sovereignty debate notwithstanding, what is significant about the economic transactions rationale is that it was new in 1995 and unattached to any principle related to federalism and apparently based on nothing other than the fact that it worked to achieve a specific goal—to create the rhetorical space of state regulatory exclusivity. The rationale was also the creation of the Court at this stage of the litigation, as the parties had not raised the issue before the Fifth Circuit whose opinion had focused on the lack of adequate legislative findings supporting the position that gun possession within a school zone affects interstate com-

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150 *See infra* discussion at Part V.D.2.

151 301 U.S. 1 (1937).

152 United States v. Lopez, 514 U.S. 549, 557 (1995).

153 *Id.* at 564.

154 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

155 *Lopez*, 514 U.S. at 610 (Souter, J., dissenting) (quoting Maryland v. Wirtz, 392 U.S. 183, 195 (1968)).

merce.[156] And even if one could make out a relation between economic activities (as opposed to any activity) and the federalism principle articulated in the majority opinion, the opinion failed to articulate a principled placement of the federalist line, mandated by federalism principles, between federal and state authority—i.e., the space of state regulatory exclusivity. This was underscored by Chief Justice Rehnquist's acknowledgement that "[t]hese are not precise formulations, and in the nature of things they cannot be."[157]

2. *The Meaning of Legal Uncertainty*

This imprecision is compounded by the fact the Court also acknowledged that any distinction between what is commercial and non-commercial will engender "legal uncertainty."[158] The net result of the opinion was to justify a non-deferential approach to congressional action under the Commerce Clause where three areas of extreme subjectivity (the selection of the criteria "economic transaction," the identification of what is an economic transaction, and the division of authority between state and national) will be decided by a nine-member judicial body. It is at this point that the reasoning breaks down in a way that reveals the motive of the majority. While it may be appropriate for members of the Court to desire some sort of rational structure that takes into consideration legitimate and generally agreed-on federalist concerns, what the majority is admittedly willing to sacrifice in that quest is more than slightly significant:

> Admittedly, a determination whether an intrastate activity is commercial or non-commercial may in some cases result in legal uncertainty. But so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty."[159]

Those outer limits have yet to be described in any way other than rhetorical. The majority here can only promise legal uncertainty while suggesting an almost organic judicial role in sorting through the legal uncertainty. This may be an inevitability in any system where judicial review of legislative and executive acts is accepted, but the judicial embrace of legal uncertainty is particularly surprising

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156 United States v. Lopez, 2 F.3d 1342, 1367 (5th Cir. 1993).
157 *Lopez*, 514 U.S. at 567.
158 *Id.* at 566.
159 *Id.* (internal citation omitted).

where philosophies are held deriding the use of judicial review to supplant legislative policy choices.

This embrace is shared by the concurrence of Justices Kennedy and O'Connor. While acknowledging the centrality of Congress's discretion in such matters and that James Madison's statement that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due" referred to the political branches,[160] Kennedy joined the holding because "the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."[161] This broadside against Congress is without any apparent basis other than the fact that Congress came up with an idea about federalism different from the five in the majority, but apparently satisfactory to four members of the Court.[162] To Kennedy and the others making up the majority on the case the solution to an apparent lack of seriousness and deliberation by the political branch is to replace it with subjective judgments of the judiciary:

> Of the various structural elements in this Constitution . . . only concerning [federalism] does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers.[163]

These rationalizations in both the opinion of the Court and the concurrence evidence a mistrust of Congress that Kennedy saw fit to articulate as an indelible character trait of legislative bodies. And so it may be and certainly this distrust has been a core skepticism of the constitutional system since *Marbury v. Madison*.[164] But federalism is not like other constitutional concepts. As Kennedy acknowledges, it is an undefined dimension of the constitutional structure.[165] And as then-Justice Rehnquist noted in an article in the Texas Law Review in 1975, such general provisions allow for a more open interpretive latitude than more definitive provisions of the Constitution.[166] Though he was speaking in favor of applying a living constitution approach

160 *Id.* at 577 (Kennedy, J., concurring) ("Whatever the judicial role it is axiomatic that Congress does have substantial discretion and control over the federal balance.") (quoting THE FEDERALIST NO. 26, 295 (James Madison) (Clinton Rossiter ed., 1961)).

161 *Id.* at 578.

162 The dissenting justices were: Ginsburg, Souter, Stevens, and Breyer.

163 *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

164 5 U.S. 137 (1803).

165 *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

166 Rehnquist, *supra* note 136, at 694.

only to those provisions amenable to such treatment, and not for a wholesale concession to the legislative branch, what can be more amenable to Rehnquist's prescription than the structural principle of federalism, and maybe even the Tenth Amendment (which may or may not be a delivery device for federalism principles) which "states but a truism that all is retained which has not been surrendered?"[167]

*E. Post-*Lopez

Immediately following (in legislative terms) the congressional gun law, Congress passed the Violence Against Women Act ("VAWA") which covered several issues addressing women's safety and provided a federal right of action against perpetrators of violence against women.[168] Congress may have been under the impression that the Supreme Court had not spoken clearly on the constitutional requirement of an economic activity as a condition to congressional assertion of authority, but Congress did establish what it regarded as the law's commercial bona fides by providing extensive findings on the economic impact of gender violence on the national economy, something it did not do when it passed the Gun-Free School Zones Act.[169] Perhaps hoping that the sheer weight of evidence that gender violence in the aggregate affected the economy might sway the court, or perhaps hoping that one or two of the Lopez majority might decide, due to the emotional nature of the subject, to abandon the economic activity rationale, Congress had passed legislation regulating an activity, violence against women, that featured even less of a claim as an economic activity than the possession of a gun purchased in the firearms market. In the case of *United States v. Morrison*[170] the Court confirmed its reliance on the economic activity rationale—somewhat:

> [w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of the intrastate activity only where that activity is economic in nature.[171]

Yet the Court majority rejected Congress's attempt to get a reconsideration of the economic activity rationale. To Justice Souter, the rationale simply supplanted the traditional Commerce Clause defer-

167 United States v. Darby, 312 U.S. 100, 124 (1941).
168 42 U.S.C. § 13931 (1994).
169 *Lopez*, 514 U.S. at 562.
170 529 U.S. 598 (2000).
171 *Id.* at 613.

ence via "rational basis scrutiny [of legislation] with a new criterion of review."[172]

Justice Souter states that the majority's economic rationale has the effect of excluding particular subjects "on the basis of characteristics other than their commercial effects."[173] On this point Justice Souter emphasizes the degree of the departure, not necessarily simply from Commerce Clause jurisprudence, but from Necessary and Proper Clause jurisprudence, which authorizes the assertion of implicit powers to fulfill the mandate of the enumerated powers.[174] The majority might answer this charge by reiterating the importance of federalism and the notions of dual sovereignty (notions which remain underdefined) while the meaning (even if not its limitations) of the Necessary and Proper Clause are clear and applicable to the whole panoply of assertions of federal authority through legislation.

That *Lopez* and *Morrison* dealt with an abstraction—the nature of the activity being regulated and not the definition of commerce or the fact that an activity, either singly or in the aggregate can affect interstate commerce—was borne out in *Gonzalez v. Raich*,[175] a case turning not on the commercial identity of the growth, possession, and use of medical marijuana under the California law making such use legal under state law. A majority headed by Justice John Paul Stevens and consisting of the Court's liberal wing (with a surprising cameo appearance on this side of the philosophical horizon by Justice Scalia), approved Congress's regulation of the possession and use of marijuana, calling the activity "quintessentially economic,"[176] inasmuch as homegrown marijuana could find its way on to the national illegal market, the rationale followed in *Wickard*. While the conservative minority stressed in dissents the difference between a commercial wheat farmer and a medical user and grower of marijuana,[177] the key rationale producing his vote which established the 5-4 majority was Justice Scalia's articulation in concurrence, of a rationale (lightly addressed in the majority) for congressional commercial regulation. To Justice Scalia, Congress could regulate non-commercial activities if

172 *Id.* at 637 (Souter, J., dissenting).
173 *Id.* at 639.
174 *Id.* at 637.
175 545 U.S. 1 (2005).
176 *Id.* at 25.
177 *Id.* at 36 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

such regulation was necessary to a broader scheme of commercial regulation.[178]

Justice Scalia, voting in the *Lopez* majority, argued that the opinion acknowledged that even the activity in that case could be regulated by Congress as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[179] Scalia, tracing the roots of this principle as far back as the *Shreveport Rate Case*[180] and *Jones & Laughlin Steel*[181] noted that the regulatory scheme would have to be dedicated toward an economic activity that presumably would be affecting interstate commerce. As authority sourced from the Necessary and Proper Clause, it would, according to Scalia, be subject to the principled statements of limitation offered by Chief Justice Marshall in *McCulloch v. Maryland*[182] (measures must be "appropriate and plainly adopted, not prohibited, and consistent with the letter and spirit of the constitution").[183] Justice Scalia, who joined, but did not write in support of either the *Lopez* and *Morrison* majorities, cited his opinion in *Printz v. United States*,[184] and Justice O'Connor's majority opinion in *New York v. United States*[185] as examples of how the Commerce Clause can be controlled without destroying the "regulatory scheme" rationale. It is important to note that the two cases were the commandeering cases discussed earlier where Congress sought to regulate commerce by requiring supportive state action (regulation in *New York*, administrative tasks in *Printz*).[186]

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178 *Id.* at 37 ("Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." (internal citation omitted)).

179 *Id.* at 36 (Scalia, J., concurring) (internal citation and quotation marks omitted).

180 Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

181 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

182 17 U.S. 316 (1819).

183 Gonzales v. Raich, 545 U.S. 1, 39 (citing McCulloch v. Maryland, 17 U.S. 316, 421–22 (1819)).

184 521 U.S. 898 (1997).

185 505 U.S. 144 (1992).

186 Justice Scalia can, and has spoken for himself in *National Federation* in addressing his view of the breadth of Congressional Commerce Clause authority. *See* discussion of the joint dissent *infra* Part I. However, in writing in support of the *Raich* majority's decision in favor of broader, rather than the narrow *Lopez/Morrison* style of Congressional authority, the fact that he cited as an example of the Court's federalist supervisory role over Congress the *New York* and *Printz* cases is significant for analyzing Scalia's position then, and what possibly could have been his position in *National Federation.* The federal mandate to administer firearm background checks under the Brady Bill in *Printz*, and the mandate to the states to take title to hazardous wastes, and all of the liability associated with that waste, in exchange for providing disposal sites for the waste in *New York* were examples of extreme federal involvement in state affairs. Whether those mandates crossed the consti-

Scalia's concurrence on this point, in response to criticism from Justice O'Connor's dissent, might also have noted that the "regulatory scheme" rationale has its own textual limitation—regulated activity would have to be "essential" to a larger regulatory scheme. Though the invitation to parse out meaning in the term "essential" is but another step in the parade of subjective concepts that characterize Commerce Clause and Tenth Amendment jurisprudence, it is a subjectivism that can perhaps be reconciled with leaving the means of decision to Congress. Because essential is a subjective term, Congress can decide, rationally, what it considers essential.

Chief Justice Rehnquist's "economic activities" standard, however, claims precision (which is acknowledged not to be quite so precise) of limits on congressional authority.[187] The term describes a category of activities, and is limiting only to the extent that an activity does not fit within the category. But that choice is itself purely subjective in a way that "essential" is not. Requiring legislative regulation to be essential to a larger regulatory scheme merely admonishes Congress to exercise discretion in keeping with the language of the Clause itself—to pick only those activities that can be shown (presumably by quantitative means) to be essential. The choice to require that activities regulated be economic is far more subjective and hence more of an encroachment on congressional authority not authorized by the Clause. It commands Congress to pick from a defined set of activities—those that are economic—and none other. It's a choice defined not by a characteristic of the Clause but by an attempt to impose limits based on a criteria not related to the Clause.

VI. NON-ACTIVITIES AND CHARACTERIZATIONS AS A LIMITING PRINCIPLE

For all of the complexity of the Individual Mandate portion of the Patient Protection and Affordable Care Act, the main issue before the Supreme Court is basic—does Congress have the authority to mandate that individuals acquire insurance? There really is not much more than that to what has been called the greatest challenge be-

tutional line is the subject of much discussion. Nonetheless, dictating legislation (*New York*) and commandeering service personnel (*Printz*) is a far cry from regulating intrastate activities that may be essential to a larger regulatory scheme. To many commentators and observers, that concurrence indicated that Justice Scalia might have been willing to open Congressional options as far as, yet not beyond, the extreme examples of *Printz* and *New York*. This turned out not to be the case in the Affordable Care Act litigation.

187 United States v. Lopez, 514 U.S. 549, 566 (1995).

tween Congress and the Court since the New Deal.[188] This simplicity mirrors the simplicity of the constitutional cases before the Court in the 1930s—may Congress regulate wages in various sectors, may Congress regulate production. The answer to those questions was in the constitutional analysis and not in the details of the programs. Nonetheless a brief overview of the individual mandate is in order for context.

A. *The Individual Mandate*

The Patient Protection and Affordable Care Act is a complex bill covering a number of medical, economic, and policy issues. As this Article is about the proper administration of the Commerce Clause in the federal courts and in Congress, an exhaustive description or analysis of the legislation will not be attempted here. However, some background information on the Individual Mandate portion of the legislation will be useful for discussion.

Among the many purposes behind the Act is to increase the accessibility of health care to Americans. The United States argued before the Court that the economic issue faced in the health care system is the problem of cost-shifting.[189] Persons without insurance or without other government coverage such as Medicare or Medicaid will eventually need to consume health care and will be provided that care under state and federal laws, whether or not able to pay for that care.[190] This cost is passed on to insurance policy holders in the form of higher rates, creating a "free-rider" problem for those that carry insurance.[191]

Another problem in the present health care environment is the practice among insurance providers of not covering pre-existing conditions. This practice makes it nearly, if not absolutely impossible, for some in need of insurance to get coverage.[192]

The Individual Mandate requires that all Americans purchase insurance if not already covered by some other government program. This requirement has the economic effect of subsidizing the uninsur-

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188 Considering, as this Article has noted, that Congress applied a rational basis standard in reviewing Congressional legislation in Commerce Clause cases, no doubt the main engine for economic regulation in Congress's powers, previous cases in which Congressional power has been stepped back beginning with *Lopez* were not the massive sort of legislative reform anticipated by the Affordable Care Act.

189 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585 (2012).

190 *Id.*

191 *Id.* at 6 (Ginsburg, J., concurring).

192 *Id.* at 16.

able pre-existing condition market participants, and to eliminate the cost-shifting caused by Americans who otherwise would decline to purchase insurance.[193]

The opinion of Chief Justice Roberts describes the individual mandate as requiring:

> [M]ost Americans to maintain "minimum essential" health insurance coverage. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.
>
> Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. In 2016, for example, the penalty will be 2.5% of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60% of the cost of ten specified services (*e.g.,* prescription drugs and hospitalization). The Act provides that the penalty will be paid to the Internal Revenue Service ("IRS") with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. And some individuals who are subject to the mandate are nonetheless exempt from the penalty—for example, those with income below a certain threshold and members of Indian tribes.[194]

B. Characterizations as Constitutional Principle

Constitutional outcomes must be obtained through constitutionally principled means. Legislation in an area not included in the *Carolene Products* categories, rationally based on a clear congressional goal, would not be found unconstitutional because the judiciary believes that the degree of due process protection was less than what the Constitution provides. The rules in this area have long since been established—the Court defers to Congress's rational policy goals. If there is a reason to heighten the scrutiny of congressional actions in the

193 *Id.* at 17.

194 *Id.* at 7–8 (internal citations omitted).

due process area, it would be a matter of Congress's own legislative prerogative.

The current trend in Commerce Clause jurisprudence is analogous to the Due Process hypothetical. The "economic activities" rationale stripped Congress of the rational basis scrutiny of its assertion of Commerce Clause authority, which it had enjoyed since 1937. Delving deeper in the process of authority stripping, this time the Court has denied Congress the deference of characterization. Under the individual mandate, Congress requires health insurance, which most Americans will have to purchase. Those that do not have health insurance must obtain insurance. To Congress this is regulating an economic activity.[195] To Chief Justice Roberts and the Joint Dissenters, this amounts to regulating non-activity—something that Congress has never done before and, apparently, for that reason, cannot do.[196] No constitutional principle for recharacterizing the regulation of options in an economic market place is provided by the Court other than the position that it was "unable to identify any activity that the States may regulate but Congress may not"[197] if Congress were free to regulate non-activity.

To be sure, the Chief Justice and the Joint Dissenters may be correct in an absolute sense that the line to preserve the proper federalist balance mandated by the Tenth Amendment, in spite or consistent with Justice Stone's "truism declaration"[198] in *Darby* is at the point where Congress and the Court find themselves in this case. Yet the Court has acknowledged the existence of a zone of uncertainty in this area of structural analysis. This Article has taken the position that past arguments to rein in the New Deal Commerce Clause in previous opinions have not been quite so unassailable even if the economic activities argument was successful. The question in *National Federation* is whether the arguments finding Congress's use of the Commerce Clause and Necessary and Proper Clause are so overwhelmingly without credible challenge that they transcend the zone of uncertainty attendant to federalism matters—and if not, is the Judiciary the correct place to decide such matters?

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195 To Congress, the Individual Mandate "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." 42 U.S.C.A. § 18091(2)(A) (2012).

196 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2651 (2012) (Scalia, Kennedy, Thomas, & Alito, J.J., dissenting).

197 United States v. Lopez, 514 U.S. 549, 564 (1995).

198 United States v. Darby, 312 U.S. 100, 124 (1941).

In the present case, Chief Justice Roberts acknowledges that historical uniqueness is not a basis for finding legislation unconstitutional[199] though it is appropriate to consider the "'implications of the Government's arguments.'"[200]

1. The Assumption: Existence of a Commercial Activity

The Chief Justice's opinion notes that the "power to regulate commerce pre-supposes the existence of commercial activity to be regulated."[201] This observation is certainly plausible and probably fits with most intuitive understandings of the term regulate, especially when one is defining regulation of commerce. However, the Court in the era of the Second New Deal certainly understood that liberalizing the interpretation of the Commerce Clause meant expanding Congress's ability to regulate *the economy*.[202] There may remain a zone of uncertainty as to whether that Court understood the pre-requisite for regulation was the existence of a specific commercial activity to be regulated (as opposed to an economic condition described above in the description of the Individual Mandate).

2. The Liberty Slippery Slope

Chief Justice Roberts devotes a good deal of time pondering how far Congress could go in mandating individual behavior,[203] referencing Madison's expressed concerns about the potential of the "legislative department" to extend the "sphere of its activity, and drawing all power into its impetuous vortex."[204] While any one of several examples, ranging from mandating a balanced diet to purchasing automobiles as examples of the logical progression of the Government's argument is cause for concern, it is important to understand this discussion within the context of federalism, the traditional area of structural concern within Commerce Clause discussions. And no doubt the opinion addresses federalism as a "structural protection[] of liberty"[205] when it discusses possible overstepping in the individual

199 *NFIB*, 132 S. Ct. at 2586 (2012).
200 *Id.* (quoting *Lopez*, 514 U.S. at 564).
201 *Id.* at 18.
202 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1236–37 (2001).
203 *NFIB*, 132 S. Ct. at 2588–89 (2012).
204 *Id.* at 2623 (citing THE FEDERALIST NO. 48, at 309 (James Madison)).
205 Printz v. United States, 521 U.S. 898, 921 (1997).

liberties area.[206] Yet, as a federalism argument, the Chief Justice's position would logically lead to the conclusion that such a mandate would be appropriate at the state level absent a showing of a violation in the area of due process, which the parties have conceded would not be the case in the present matter.[207]

If any of the examples of over-regulation of the individual were to occur within the states, certainly local electorates would address the matter politically, which several current and former Justices have suggested as the preferable manner of dealing with Commerce Clause/federalism cases.[208]

3. Future Effects

Chief Justice Roberts' opinion notes that congressional legislation predictive of future effects has been approved by the Court, but not legislation predictive of future activity, in this case the use of the health care system.[209] The Government argued that health insurance is not like other products in the sense that it is not purchased for its own sake, but for the purpose of buying health care—health insurance and health care are inherently integrated.[210] The counter to that is that the two are different, involving different transactions entered into at different times from different providers.[211] The opinion states that "[t]he proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government."[212]

The distinctions drawn by the Chief Justice and the Government's inherent integration rationale are perhaps strong arguments for the political solution to federalism issues, at least in this case. The critiques of the inherent integration rationale do not refute the basic

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206 Justice Ginsburg reminds the discussion in her dissent on the Commerce Clause issue that the parties conceded that nothing in the present act offends the Due Process Clause liberty interest. *NFIB*, 132 S. Ct. at 2623 (Ginsburg, J., dissenting in part).

207 This is likely acknowledged in the opinion: "Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *Id.* at 26.

208 Justice Souter, dissenting in *Lopez*, provided a fundamental rationale for the political approach: "the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices." United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting).

209 *NFIB*, 132 S. Ct. at 2589-90.

210 Brief for the United States at 41, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

211 *NFIB*, 132 S. Ct. at 2591.

212 *Id.*

economic argument that health care in this country is financed through insurance. Temporal differences, the fact that two different transactions (the purchase of health insurance and the purchase of health care) are two different transactions, and the fact that the two products come from different providers do not appear to be distinctions of any particular constitutional significance. And whatever weaknesses can be identified in this portion of the Government's argument, the argument would appear to be sustainable under the standard that Congress may regulate matters that are an "integral part of a comprehensive scheme of economic regulation" which the opinion discusses in a separate section on the Necessary and Proper Clause.

4. The Necessary and Proper Clause

In his concurrence in *Raich,* Justice Scalia described the regulatory scheme rationale of the Necessary and Proper Clause/Commerce Clause power broadly.[213] By his description, Congress could regulate intrastate activities, as well as non-economic activities. This is particularly important considering the Government's position that the minimum coverage requirement is necessary to make effective the core reforms of the Act—pre-existing condition coverage.[214] The circumstance in *Raich* making it attractive to the Government's position is the fact that one of the parties challenging the Government was actually not engaging in interstate commerce, but was using homegrown marijuana, a practice allowed under the California law at issue there.[215] The Chief Justice here in *National Federation* distinguishes this case from *Raich* in that the latter "did not involve the exercise of any 'great substantive and independent power' of the sort at issue here. Instead, it concerned only the constitutionality of 'individual *applications* of a concededly valid statutory scheme.'"[216]

Conceivably regulating a national health care market would be constitutional under any interpretation of the Commerce Clause. The distinction between the "individual applications" in *Raich* and the present case is certainly one of degree, perhaps made less so if each of the fifty states adopted a medical marijuana law like California's and in contravention of the Controlled Substances Act ("CSA")

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213 See *supra* discussion Part IV.E.

214 Brief for the United States at 24–25, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

215 Gonzales v. Raich, 545 U.S. 1, 7 (2005).

216 *NFIB*, 132 S. Ct. at 2592–93 (internal citations omitted).

at issue in that case. Under that scenario, the CSA becomes far broader as it addresses far more than "individual applications."

The counterarguments offered do not stand for the proposition that the Chief Justice's opinion is incorrect. Yet these positions, as well as others offered in Justice Ginsburg's dissent, joined by three other Justices do suggest an unsatisfying conclusion to litigation that has been anticipated for years as the final determination in a long period of doctrinal development under the Commerce Clause.

VI. CONCLUSION

The Supreme Court has attempted to establish a principle that would limit congressional authority under the Commerce Clause since it was first put to use as a national regulator of commercial activity. Initially the Court stuck close to the language of the Clause, but had to relinquish the tight rein on Congress as it became apparent that limited interpretations would not support economic reform needed during the Great Depression. However, those earlier interpretations were based closely on the text of the Constitution, perhaps more so than the next period of the Second New Deal, the longest period of doctrinal stability. More recent decisions that have limited Congress's authority have not done so necessarily by renouncing New Deal Commerce decisions, but by undermining the understanding between the Judiciary and Legislative branches on matters of the Commerce Clause and Federalism—Congress would self-police itself within the confines of rational basis standard and would only pass legislation that had a rational relationship to interstate commerce.

It was not a perfect solution to what may be an insoluble problem, but it did place the decision in the hands of the democratic branch. The alternative in the recent cases has purported to be definitive solutions to federalism—perhaps the most indeterminate of the structural principles of the Constitution. Instead the Court has provided standards that do not speak specifically to a principle derivable from the text, and what structural support that can be offered for the new standards do not support the kind of subjective decision making the newer cases have demonstrated.

Even though the Court declined to overturn legislation passed by Congress on the basis of an alternative principle in the Taxing Power, and even though the kind of behavior, whether or not characterized as activity or non-activity or as economic or non-economic, the ultimate result remains that the Court continued to place its judgment of proper federalist limits above that of Congress.