

**ONE NATION OR ONE MARKET?  
LIBERALS, CONSERVATIVES, AND THE MISUNDERSTANDING OF  
*H.P. HOOD & SONS V. DU MOND***

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## I. INTRODUCTION

I suppose the problems of interstate commerce are and will remain the most troublesome ones the Court has to deal with. And, as you see, it is one that divides it repeatedly and deeply. It is not surprising that our decisions are often misunderstood and misinterpreted.

Justice Robert H. Jackson<sup>1</sup>

Since the early nineteenth century, the Supreme Court has invalidated economically protectionist state and local laws on the theory that such laws invade Congress's plenary authority to regulate interstate commerce, even in the absence of actually conflicting federal legislation.<sup>2</sup> This judicial vouchsafing of Congress's potential exercise of its "dormant" Commerce Clause power has often been justified as vindicating the Framers' vision of national unity. However, the Court has not been entirely clear about the nature of the unity the Framers envisioned.<sup>3</sup> Often, the Court speaks of encouraging political unity by suppressing fractious economic rivalries among the States. But on occasion, another vision of unity emerges: a laissez-faire-tinged vision of an efficient national market for goods and services.

While the political justification has its roots in historical documents from the framing of the Commerce Clause, support for the economic justification is harder to come by. Perhaps the most important judicial precedent thought to support the market efficiency rationale in the anti-discrimination prong of dormant Commerce Clause doctrine is Justice Robert H. Jackson's majority opinion in *H.P. Hood & Sons v. Du Mond*.<sup>4</sup> In *Hood*, Jackson wrote a veritable

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1 Letter from Robert H. Jackson to Donald Bain (Apr. 15, 1949) (on file with the Library of Congress, Collection of the Personal Papers of Robert H. Jackson, Box 153, Folder 5). The copy of the letter in Jackson's papers is unsigned, so it is unclear whether it was ever sent.

2 See *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824) (holding the acts of the Legislature of New York that granted exclusive navigation of all state waters to two men were repugnant to the authority of Congress to regulate commerce under the Constitution).

3 Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 219-20 ("The widespread endorsement of a judicially enforceable rule that state and local governments may not discriminate against interstate commerce appears . . . to arise from the widespread perception that this rule is a very good idea. Though almost everyone seems to agree that the nondiscrimination principle serves an important purpose, there is some disagreement about precisely what that purpose is.")

4 336 U.S. 525 (1949).

paean to “free trade” on his way to striking down a protectionist New York dairy licensing law.<sup>5</sup>

Jackson’s opinion was instantly criticized as the restoration of laissez-faire economic theory to constitutional law and has continued to be criticized on that same basis. But this standard reading of *Hood* presents certain difficulties. Chief among them is the improbability that Jackson, a legal icon of the New Deal’s successful assertion of federal commercial regulatory power, would author an opinion celebrating laissez-faire economic principles. Yet that is what some of Jackson’s New Deal contemporaries alleged. And there is another puzzle: recent conservative jurists who one might otherwise associate with pro-business, anti-regulation policy preferences have been among the loudest critics of this purported laissez-faire streak in dormant Commerce Clause anti-discrimination doctrine.

Inspired by these puzzles and by intriguing developments in dormant Commerce Clause doctrine under the Roberts Court, this Article argues that the conventional reading of *Hood* as the case that (re-)constitutionalized market efficiency by means of dormant Commerce Clause anti-discrimination analysis is an example of history being written by the losers. In this instance, the losers include Justice Hugo Black, who was more distrustful of judicial review over economic regulation than Jackson and seems to have misunderstood *Hood* to be the second coming of *Lochner*. The losers also include modern conservatives like the late-Chief Justice (and former Jackson clerk) William Rehnquist, and the current Chief Justice (and former Rehnquist clerk) John Roberts; these figures have misinterpreted *Hood* and other dormant Commerce Clause anti-discrimination precedent as being motivated by discredited laissez-faire principles, a guilt-by-association rhetorical move that serves their larger project of dismantling the jurisprudential limits on state power that were erected in the New Deal era.

This argument is developed in two steps. Part II provides some background on dormant Commerce Clause doctrine and its justifications, and presents the conventional reading of *Hood* as a constitutional endorsement of the market efficiency rationale. In this Part, I also present the criticisms made by the liberal Justice Black and the conservative Chief Justice Rehnquist, both of whom have asserted that dormant Commerce Clause anti-discrimination analysis after *Hood* is a laissez-faire enterprise. With this background in mind, Part

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<sup>5</sup> *Id.* at 539.

III urges a re-reading of *Hood*. This re-reading begins with a re-examination of Jackson's views as expressed in speeches, articles, and in *Hood* itself, to demonstrate how unlikely it is that Jackson would have intended *Hood* to be an endorsement of laissez-faire principles. From there I offer two related meanings for *Hood* that differ from the conventional narrative. First, *Hood* represented a crucial break with dormant Commerce Clause doctrine precedent that had effectively tolerated a certain degree of protectionist regulation in cases involving matters of peculiarly local concern—a development that infuriated the populist Black and seemed to him to revive the specter of economic substantive due process. Second, by making this break, *Hood* harmonized dormant Commerce Clause doctrine with the re-ordering of federalism achieved through the contentious New Deal Commerce Clause cases, a doctrinal revision that would continue to needle latter-day conservatives who, to this day, remain intent on instituting a “New Federalism.”

## II. THE CONVENTIONAL READING OF *HOOD* AND THE DORMANT COMMERCE CLAUSE ANTI-DISCRIMINATION DOCTRINE

### A. *An Overview of Dormant Commerce Clause Doctrine and Justifications*

The dormant Commerce Clause doctrine is a judge-made corollary to Article I's positive grant of authority to Congress to regulate interstate commerce.<sup>6</sup> Under this doctrine, States are restrained from actions adjudged to infringe on Congress's potential exercise of its Commerce Clause power—that is, States are barred from certain kinds of actions interfering with interstate commerce even in the absence of federal laws regulating that area of commerce. Under modern dormant Commerce Clause jurisprudence, state and local laws may be found to improperly infringe on Congress's Commerce Clause power in two ways. First, state laws may result in protectionist discrimination that favors in-state economic interests over out-of-state economic interests.<sup>7</sup> Laws of this type are subject to what the Court has described as a virtual per se rule of invalidity.<sup>8</sup> Second, state laws that impose incidental burdens on interstate commerce will be up-

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<sup>6</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .”).

<sup>7</sup> *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1793 (2007) (citing *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)).

<sup>8</sup> *Id.*

held “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits”—a significantly more deferential standard than that applied to discriminatory laws.<sup>9</sup>

Of these two categories, the desire to curb protectionism has been most central to the emergence and development of the doctrine,<sup>10</sup> and commentators have identified broadly two kinds of justifications for striking down such laws. The first type is political: protectionist laws lead to interstate rivalry and retaliation that may undermine the nation’s cohesion.<sup>11</sup> This argument is often supported with historical

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<sup>9</sup> *Id.* at 1797 (alteration in original) (internal quotation marks omitted) (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 525–26 (1989)). Despite being more deferential, this standard has elicited plenty of criticism. Arguably, it is this prong of dormant Commerce Clause doctrine which ought to raise the most suspicions about the Court’s constitutionalization of market economic theory, as it expressly weighs concededly legitimate state interests such as public health and safety against the burden that such measures place on the efficient operation of interstate markets. For additional criticism of this standard, see John M. Baker and Mehmet K. Konar-Steenberg, “*Drawn from Local Knowledge . . . and Conformed to Local Wants*”: *Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 *LOY. U. CHI. L.J.* 1, 42 n.189 (2006).

<sup>10</sup> Thus did Justice Wiley Rutledge once describe interstate commercial rivalry as the “proximate cause of our national existence,” arguing that the Philadelphia Constitutional Convention resulted from the failure of the Articles of Confederation to address this problem. *E.E.O.C. v. Wyoming*, 460 U.S. 226, 245 (1983) (Stevens, J., concurring) (quoting WILEY RUTLEDGE, *A DECLARATION OF LEGAL FAITH* 25–26 (1947)).

<sup>11</sup> Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 *MICH. L. REV.* 1091, 1112–16 (1986). For a more recent scholarly argument supporting the political justification, see Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 *WM. & MARY L. REV.* 417 (2008).

A variation on the standard political rationale is the process-based justification: economic protectionism is the product of political processes and structures that favor local interests to the detriment of out-of-state (or out-of-town) interests. See, e.g., *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 184–85 n.2 (1938) (“[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.”). Professor Williams argues that the process-based justification developed by Justice Stone in the 1938 *Barnwell* case “rescued the Dormant Commerce Clause from the doctrinal oblivion implied by [the New Deal era’s] commitment to judicial restraint and deference to the political process.” Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 *UCLA L. REV.* 1847, 1905 (2007). Although process-based reasoning was conceptually an important development of this period and has cropped up from time to time since then, it is less clear that this development was essential to the continued viability of dormant Commerce Clause doctrine. For example, process-based reasoning played no visible role in the marquee dormant Commerce Clause opinion that is the focus of this Article—Justice Jackson’s decidedly non-deferential opinion striking down New York dairy laws in *Hood*. In any case, for purposes of this discussion, I will treat process-based justifications as a subset of political justifications because in both instances the underlying concern is arguably the same: erosion of political unity by means of economic favoritism at the expense of politically disadvantaged groups.

evidence. For example, James Madison wrote to George Washington in 1787 fretting about the absence of a “negative” on the power of the States to regulate interstate commerce and the “rival and spiteful measures” that States inflicted upon each other as a consequence.<sup>12</sup> This rationale and its historic roots are also recognized in a number of Supreme Court opinions, such as Justice Kennedy’s observation in *C & A Carbone, Inc. v. Town of Clarkstown* that the “central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”<sup>13</sup>

A second justification sometimes floated to explain the Court’s dormant Commerce Clause doctrine is that the Framers intended to encode a preference for national economic efficiency over state regulatory power into the Constitution, even if that preference was not explicitly stated there.<sup>14</sup> In contrast to the political justification, the sources of this economic justification are more difficult to locate. One commentator has suggested that this rationale is at least implicit in the Supreme Court’s 1875 decision in *Welton v. Missouri*.<sup>15</sup> In *Welton*, the Court struck down a Missouri law that required itinerant salespeople to obtain peddlers’ licenses if they sold goods made outside Missouri but not if they sold goods made exclusively in Missouri. The Court concluded that Congress’s inaction in regulating this area “is equivalent to a declaration that inter-State commerce shall be free and untrammelled,”<sup>16</sup> an outcome that has recently been suggested reflects “the ascendancy of laissez faire capitalism” in this period and the re-grounding of the dormant Commerce Clause doctrine on the

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12 Letter from James Madison to George Washington (Apr. 16, 1787), *quoted in* Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 627 (1999).

13 511 U.S. 383, 390 (1994); *see also* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (observing that the Commerce Clause reflects a central concern of the Framers to resolve “economic Balkanization” that plagued the Union under the Articles of Confederation).

14 For a discussion of the economic justification theory, *see* Heinzerling, *supra* note 3, at 234–51; *see also* Jim Chen, *Filburn’s Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 265 (1997) (arguing that although the Court frequently disdains economic justifications for legal decision-making, the dormant Commerce Clause emphasizes economic substance over legal form).

15 91 U.S. 275 (1875); *see also* Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 161 (2005) (discussing the historical progression of the theoretical underpinnings of dormant Commerce Clause doctrine).

16 *Welton*, 91 U.S. at 282.

notion that congressional silence equates with a congressional will to “leave that matter to the unrestricted influence of the market.”<sup>17</sup>

But while *Welton* may have been an evolution in dormant Commerce Clause doctrine justification, it is less clear that the Court intended to start a laissez-faire revolution. For the *Welton* Court was plainly cognizant of the historic political concerns that motivated the dormant Commerce Clause doctrine:

The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.<sup>18</sup>

Granted, the Court’s treatment of congressional silence seemed to assume that a non-regulated “state of nature” served as the constitutional baseline. The Court did not, for example, conclude that state laws such as Missouri’s should be allowed to stand until Congress affirmatively acted to preempt such laws. Instead, it seems to have assumed that the Constitution envisioned an *ex ante* market free of governmental regulation, although even here this could very well be because such a view would best secure the political objectives identified elsewhere in the Court’s opinion.

But even assuming for a moment that the *Welton* Court viewed economic efficiency as a constitutional good unto itself, the fact remains that *Welton* predates by several decades the more overt constitutionalization of laissez-faire economics under the Due Process Clause of the Fourteenth Amendment in *Lochner*.<sup>19</sup> That move, of course, was later repudiated by the Court as the economic and political realities of the Great Depression and the New Deal era finally took

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17 Williams, *supra* note 15, at 161.

18 *Welton*, 91 U.S. at 281.

19 *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the Due Process Clause of the Fourteenth Amendment encompassed a freedom of contract which States could regulate only for police power purposes and subject to the Court’s searching scrutiny). Justice Holmes’s dissent famously criticized the case for constitutionalizing laissez-faire economics. *Id.* at 75 (Holmes, J., dissenting) (“[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”). For arguments stating that the actual significance of “the *Lochner* era” has been overstated, see Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95, 100–02 (1999), and the sources cited therein.

hold through the 1930s.<sup>20</sup> Thus, if one were looking for a convincing judicial source for a market efficiency justification for dormant Commerce Clause anti-discrimination doctrine, one would probably do well to locate such authority in a case that post-dates the demise of *Lochner*.

### B. *The Case for Hood as a Market Efficiency Precedent*

A very popular candidate for this role is Justice Jackson's 1949 opinion in *H.P. Hood & Sons, Inc. v. Du Mond*,<sup>21</sup> a landmark dormant Commerce Clause case which, for all of its popularity in constitutional law casebooks, almost never made it out of state court.

In 1946, New York Commissioner of Agriculture C. Chester Du Mond denied H.P. Hood & Sons, Inc., permission to expand its dairy operations by building a new milk receiving plant at Greenwich, New York.<sup>22</sup> Hood already operated two plants nearby—one ten miles away in Salem and another twelve miles away in Eagle Bridge.<sup>23</sup> Both of these plants collected milk from New York farmers for distribution in Boston, and the new Greenwich plant would have done the same.<sup>24</sup> Hood hoped that the new plant would allow it to take on twenty to thirty additional producers and help ease demands on the other two plants during peak season.<sup>25</sup> At the time, New York law provided that the Commissioner was to issue such licenses only if he was satisfied that the license would not lead to destructive competition and was in the public interest.<sup>26</sup> The Commissioner found that Hood's competitors in the Greenwich area already had excess capacity, and that the opening of an additional plant would result in destructive competition, milk shortages in underserved areas, and no public benefit.<sup>27</sup> Accordingly, the Commissioner denied Hood's application.

20 See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("What is this freedom [of contract]? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."). For a discussion of the legal, philosophical, and political pressures weighing against *Lochner* in this period, see generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 621–22 (3d ed. 2006).

21 *Hood*, 336 U.S. 525 (1949).

22 *In re H.P. Hood & Sons, Inc.*, 66 N.Y.S.2d 732, 733 (N.Y. App. Div. 1946) (per curiam).

23 *H.P. Hood & Sons, Inc. v. Du Mond*, 78 N.E.2d 476, 477 (N.Y. 1948).

24 *Id.*

25 *Id.*

26 *Hood*, 66 N.Y.S.2d at 733.

27 *Hood*, 336 U.S. 525, 528–29 (1949). The Commissioner's finding that the new plant would result in destructive competition was significant to the New York Court of Appeals



Hood challenged this determination before the New York Supreme Court, Appellate Division, on the grounds that the Commissioner's findings were not supported by the record.<sup>28</sup> Hood also apparently argued in its brief that the denial of the permit violated the dormant Commerce Clause doctrine, but the Appellate Division's tersely worded opinion upholding the Commissioner's decision made no mention of the constitutional issue, and, remarkably, Hood did not include the issue in the company's Petition for Review to the New York Court of Appeals.<sup>29</sup>

Had New York's highest court chosen to review the case only on the question actually presented for review—the sufficiency of the Commissioner's findings—a case entitled *H.P. Hood & Sons, Inc. v. Du Mond* might never have made it into the United States Reports and numerous constitutional law casebooks. But that is not what happened. In what was perhaps a sporting gesture to a losing plaintiff, New York's high court found that because the constitutional issue was argued in Hood's brief below, it was “available to appellant in this court” despite not being identified as an issue on appeal in the Petition for Review.<sup>30</sup> Addressing this constitutional issue, the court reasoned that the State's legitimate interest in curbing destructive competition outweighed the purported negative impacts on interstate commerce.<sup>31</sup>

The United States Supreme Court reversed, ruling that the denial of the license impermissibly discriminated against interstate commerce. The Court's reasoning is discussed in greater detail in Part II; for now, it is enough to simply extract these classic lines from Jackson's majority opinion:

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because the Supreme Court had previously upheld New York's system of milk price controls—which was justified in part by the need to curb unfair and destructive trade practices—against a *Lochner*-type due process challenge. See *Hood*, 78 N.E.2d at 478–79 (“The commissioner, however, found that . . . petitioner's proposed new branch would have a tendency to draw customers and milk away from local markets, and set up undesirable competition between petitioner and other dealers. That was the kind of local milk situation with which the State is authorized to deal . . .” (citing *Nebbia v. New York*, 291 U.S. 502 (1934))). See discussion *infra* Part II of *Nebbia*.

<sup>28</sup> *Hood*, 66 N.Y.S.2d at 733.

<sup>29</sup> *Hood*, 78 N.E.2d at 477.

<sup>30</sup> *Id.* The court cited *Jongbloed v. Erie Railroad Co.*, 72 N.E.2d 627 (N.Y. 1947) (per curiam), in support of this conclusion. The *Jongbloed* opinion, in turn, is exactly two sentences long: “Motion to dismiss appeal denied, with \$10 costs. While no constitutional question was urged at the trial term, it is sufficient for our jurisdictional purposes that, as here, a substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision.” *Jongbloed*, 72 N.E.2d at 628.

<sup>31</sup> *Hood*, 78 N.E.2d at 478–79.

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.<sup>32</sup>

Commentators like to cite this passage in *Hood* to show that the Court treats economic efficiency as an independent justification for dormant Commerce Clause doctrine,<sup>33</sup> or at least that the “conventional theory” does.<sup>34</sup> And some of Jackson’s colleagues on the Court seem to have taken it that way as well. Certainly Jackson’s fellow New Dealer Hugo Black encouraged such an interpretation in his harshly worded dissent.<sup>35</sup> Joined by Justice Murphy, Black argued that the *Hood* majority’s approach reflected a judicial philosophy obsessed with economic theory, which he derided with an abundant use of quotation marks:

Some people believe in this philosophy because of fear that judicial toleration of any state regulations of local phases of commerce will bring about what they call “Balkanization” of trade in the United States—trade barriers so high between the states that the stream of interstate commerce cannot flow over them. Other people believe in this philosophy

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<sup>32</sup> *Hood*, 336 U.S. at 539.

<sup>33</sup> *E.g.*, CHEMERINSKY, *supra* note 20, at 422 (“[T]here is an economic justification for the dormant commerce clause: The economy is better off if state and local laws impeding interstate commerce are invalidated. Certainly this is reflected in the views of Justice Jackson quoted above.”). This quote also appears in many law school case books, several of which explicitly link it to an economic efficiency theory of dormant Commerce Clause jurisprudence. *See, e.g.*, NORMAN REDLICH ET AL., *CONSTITUTIONAL LAW* 207 (4th ed. 2002) (“Although the political rationale behind the dormant Commerce Clause has been dominant, the Court has also sometimes subscribed to an economic rationale. As Justice Jackson wrote . . . .”); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 297 (3d ed. 1996) (“Justice Jackson’s description of the political and economic benefits of free trade reflects the preconstitutional history of interstate commercial rivalries and the modern economic theory of free trade.”); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 235 (14th ed. 2001) (“As Justice Jackson’s opinion in *H.P. Hood & Sons v. Du Mond* elaborated, the dormant commerce clause thus advances national ‘prosperity’ as well as ‘solidarity’: . . .”).

<sup>34</sup> *See, e.g.*, Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 *TEX. L. REV.* 71, 78 n.30 (1980) (citing *Hood* for the proposition that “[t]he conventional theory assumes that the commerce clause embodies a free trade value and thereby implicitly restrains state regulation”). It should be noted that having cited *Hood* for this proposition, Anson and Schenkkan went on to declare that “[t]he assumption that the commerce clause embodies a free trade value is erroneous.” *Id.* at 78 n.31 (citation omitted).

<sup>35</sup> *Hood*, 336 U.S. at 545–64 (Black, J., dissenting).

because of an instinctive hostility to any governmental regulation of “free enterprise”; this group prefers a *laissez faire* economy. To them the spectre of “Bureaucracy” is more frightening than “Balkanization.”<sup>36</sup>

Black’s parting shot was to compare the majority’s opinion to the now-reviled economic substantive due process theories of the *Lochner* era:

The judicially directed march of the due process philosophy as an emancipator of business from regulation appeared arrested a few years ago. That appearance was illusory. That philosophy continues its march. The due process clause and commerce clause have been used like Siamese twins in a never-ending stream of challenges to government regulation.<sup>37</sup>

There is some indirect evidence that Black’s spin on Jackson’s opinion may have persuaded other members of the Court to change their views about the case. Papers reflecting the Court’s internal deliberations show that seven Justices—Burton, Rutledge, Jackson, Murphy, Douglas, Frankfurter, and Reed—voted to grant certiorari in *Hood*, with only Black and Chief Justice Vinson opposed.<sup>38</sup> After the argument, but before the opinion was drafted, all but three—Frankfurter, Black, and Vinson—appeared to have voted to reverse and invalidate the Commissioner’s actions.<sup>39</sup> Yet by the time that Jackson had written the Court’s opinion, two Justices—Murphy and Rutledge—had defected and joined Black and Frankfurter, respectively, in their dissents. Jackson’s eventual majority opinion was able to garner only five votes—and only then because Vinson—who had opposed certiorari—signed on. Although hardly conclusive evidence, these shifts and realignments are intriguing and may suggest that Jackson’s draft opinion was received with a certain amount of skittishness once Black had loudly proclaimed it to be *Lochner* redux.<sup>40</sup>

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<sup>36</sup> *Id.* at 554 (footnotes omitted).

<sup>37</sup> *Id.* at 562.

<sup>38</sup> Memorandum Recommending Grant of Certiorari (undated) (on file with the Library of Congress, Collection of the Personal Papers of Robert H. Jackson, Box 153, Folder 4). A handwritten note on the back of that memorandum indicates that all but Black and Vinson voted to grant certiorari.

<sup>39</sup> Memorandum Documenting Votes at Conference (undated) (on file with the Library of Congress, Collection of the Personal Papers of Robert H. Jackson, Box 153, Folder 4). Although this record is somewhat unclear, Vinson appears to have sat out this vote.

<sup>40</sup> Black’s draft dissent was sometimes even more pointed than the published dissent. For example, Black’s draft explicitly linked Jackson’s opinion to *Hammer v. Dagenhart*, 247 U.S. 251 (1918), one of the pre-New Deal era’s more infamous affirmative Commerce Clause opinions in which the Supreme Court struck down a federal law prohibiting interstate shipment of goods produced by children under age fourteen on Tenth Amendment grounds. Black wrote, “[T]he constitutional philosophy on which today’s opinion rests

In any case, Jackson's ode to "free access" and "free competition" has endured, having now been cited approvingly in numerous Supreme Court opinions.<sup>41</sup> Among these is another dormant Commerce Clause milk case, *West Lynn Creamery, Inc. v. Healy*.<sup>42</sup> There, the Court struck down a Massachusetts program that required all milk dealers doing business in Massachusetts to pay into a fund that was used to subsidize only Massachusetts dairy interests.<sup>43</sup> The Court found that this tax-and-subsidy combination operated like a tariff to "artificially encourag[e] in-state production even when the same goods could be produced at lower cost in other States," and as such violated the dormant Commerce Clause doctrine.<sup>44</sup> The Court linked

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points ominously towards the day when this Court will once again assert such a broad judicial control over commerce as to restrict the constitutional power of Congress itself. See *Hammer v. Dagenhart*, 247 U.S. 251." Hugo Black, Draft Dissent to *Hood* 18 (undated) (on file with the Library of Congress, Collection of the Personal Papers of Hugo Black, Box 300, Folder 92). The published dissent omits this passage.

Black also wrote in this draft that "the plain fact is that today's decision goes far toward forcing New York to restore the doctrine of *laissez-faire* in this phase of the milk business." *Id.* at 20. And in response to Jackson's observations that the Constitution "does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states," and that "this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences," *Hood*, 336 U.S. at 535, Black warned that "there is danger in relying too heavily upon a constitutional command thought to have come from the Constitution's 'great silences.' For judicial power thus discovered may on careful consideration turn out to be only an echo from the 'great silences'—an echo of the interpreter's own predilections." Hugo Black, Draft Dissent to *Hood* 18 (undated) (on file with the Library of Congress, Collection of the Personal Papers of Hugo Black, Box 300, Folder 92). Again, Black's published dissent omits these passages.

41 *E.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 596 (1997) (Scalia, J., dissenting) (quoting Justice Jackson's "every farmer" language for the proposition that "the purpose of [the Supreme Court's] negative Commerce Clause jurisprudence is to create a national market"); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299–300 (1997) (quoting Justice Jackson's "every farmer" language for the proposition that the dormant Commerce Clause's fundamental objective is to preserve a national market for competition); *Dennis v. Higgins*, 498 U.S. 439, 449–50 (1991) (quoting Justice Jackson's "every farmer" language for the proposition that the Commerce Clause was intended to benefit those who are engaged in interstate commerce); *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) (citing *Hood* for the proposition that a state's decision to "hoard" products denies a consumer the protection of the free market); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (citing *Hood* for the proposition that the Framers intended the nation to be a common market, a "free-trade unit"); *Alenberg Cotton Co. v. Pittman*, 419 U.S. 20, 31–32 (1974) (quoting Justice Jackson's "every farmer" language as "expressing the philosophy of the Commerce Clause").

42 512 U.S. 186 (1994).

43 *Id.* at 193.

44 *Id.*

this “classic economic argument for free trade”<sup>45</sup> to *Hood*—in fact, Justice Stevens quoted Jackson’s “every farmer and every craftsman” passage in its entirety as a kind of grand finale to his majority opinion.<sup>46</sup>

Justice Stevens’s opinion, including its reliance on *Hood*, seems to have inspired in Chief Justice Rehnquist some of the same sentiments stirred in Black nearly fifty years earlier. Dissenting in *West Lynn Creamery*, Rehnquist wrote:

The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of federalism which have long animated our constitutional jurisprudence.<sup>47</sup>

Rehnquist’s strident, anti-laissez-faire dissent should give us pause. Few would accuse Rehnquist of having been an anti-business/pro-regulation liberal; as Professor Tushnet once quipped, “[o]ne could account for perhaps ninety percent of Chief Justice Rehnquist’s bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party.”<sup>48</sup> Yet here Rehnquist loudly staked out an anti-laissez-faire position and came to the defense of a taxation and subsidy scheme to protect dairy farmers in the Kennedys’ backyard. And this is not the only curiosity. Consider that Jackson, whose seeming praise of the free market in *Hood* served (and continues to serve) as the inspiration for judges to strike down state commercial regulations, was legal advisor to the New Deal when it was engaged in a death match with anti-regulationists. Such a figure hardly seems a likely standard-bearer for a *Lochner* revival. Yet such was Black’s accusation, and it is the criticism repeated by Rehnquist decades later.

So what exactly is going on here? Why did a New Dealer like Jackson seem to champion a market efficiency theory of the dormant Commerce Clause doctrine? And why was a conservative like Rehnquist inspired to align himself with the anti-laissez-faire criticisms of an economic liberal like Black?

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45 Heinzerling, *supra* note 3, at 234.

46 *West Lynn Creamery*, 512 U.S. at 206–07.

47 *Id.* at 217 (Rehnquist, C.J., dissenting).

48 Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990).

### III. HOOD, RE-EXAMINED

This Part proposes to solve the puzzles identified above by re-reading *Hood* in a way that more thoughtfully fixes the role of this case in the development of dormant Commerce Clause doctrine and federalism. As a preface to this re-reading, it will be helpful to re-examine Jackson's views on the subject of economic policy, as expressed in speeches, articles, and in *Hood* itself. From there, this Part places *Hood* in legal and historical context to identify two key doctrinal developments that are ignored by the conventional depiction of this case. This Part concludes by arguing that Black's and Rehnquist's laissez-faire accusations are best understood as overblown, rhetorical reactions triggered by these two developments.

#### A. *Re-examining Jackson's Views*

##### 1. *Jackson's Distaste for Laissez-Faire Economic Theory*

Even a cursory examination of Jackson's legacy should dispel the notion that he wanted to use Commerce Clause jurisprudence to (re-)constitutionalize laissez-faire economic philosophy. Rather, Jackson viewed the Commerce Clause in New Deal terms—as the flashpoint in a struggle over the relative power of Congress and the States with profound economic and political consequences for the nation. Thus, in 1940, Jackson wrote that the Commerce Clause “has been the focus of many of the most important conflicts between federal power and states' rights,” and complained that it “forms the warp into which theoreticians have woven strange designs of laissez faire.”<sup>49</sup>

It is certainly true that Jackson was not hostile to business; rather, he viewed free market prosperity generally as a good that could be guaranteed only by a strong central government empowered to step in and protect the market from itself when necessary—hardly the classical laissez-faire perspective. Indeed, if *Hood* was intended to constitutionalize *Lochner*-esque laissez-faire, as critics from Black to Rehnquist have implied, it was very poorly drafted to accomplish that purpose. For throughout the opinion, Jackson speaks warmly of subjecting the economy to the unquestioned and salutary regulatory power of the federal government, including the power to erect barriers to interstate and foreign trade:

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<sup>49</sup> Robert H. Jackson, *The Supreme Court and Interstate Barriers*, 207 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 70 (1940).

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.<sup>50</sup>

....

... We have no doubt that Congress in the national interest could prohibit or curtail shipments of milk in interstate commerce, unless and until local demands are met. Nor do we know of any reason why Congress may not, if it deems it in the national interest, authorize the states to place similar restraints on movement of articles of commerce. . . . It is, of course, a quite different thing if Congress through its agents finds [sic] such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.<sup>51</sup>

Thus, Jackson's vision of "free trade" is not trade free of regulation. It is trade free from destructive local protectionism, monopolism, and other market failures—goals obtainable by concentrating regulatory authority in the hands of the federal government, a key project of the New Deal.

## 2. Jackson's Belief in a Unified Political/Economic Justification

On the more specific subject of dormant Commerce Clause doctrine, a review of Jackson's writing before *Hood* and in the *Hood* opinion itself confirms that Jackson regarded the prosperity engendered by a single national market as a happy byproduct of the political unity function of the dormant Commerce Clause doctrine, rather than as an independent justification for it. In 1939, while serving as Franklin D. Roosevelt's Solicitor General, and thus as emissary of the New Deal regime, Jackson gave an address in which he declared:

It has been the American commercial ideal that each workman, each farmer, each producer should be stimulated by the knowledge that he might seek the whole Nation as his market and stand equal with all competitors. Each American home should know the whole Nation as its treasure house from which its needs might be freely supplied. That ideal we cannot sacrifice to a self-defeating local selfishness.<sup>52</sup>

The similarities between this passage and Jackson's ode to free trade ten years later in *Hood* are obvious. What is more interesting perhaps for our purposes is the context in which they were made: Jackson's

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<sup>50</sup> *Hood*, 336 U.S. 525, 537–38 (1949).

<sup>51</sup> *Id.* at 542–43.

<sup>52</sup> Robert H. Jackson, U.S. Solicitor Gen., Trade Barriers—A Threat to National Unity, Address at the National Conference on Interstate Trade Barriers 11 (Apr. 6, 1939), available at <http://www.roberthjackson.org/documents/040639/>.

address was delivered at an event called the “National Conference on Interstate Trade Barriers,” and was entitled, “Trade Barriers—A Threat to National Unity.”<sup>53</sup> As that title suggests, Jackson’s thesis was that the most dangerous aspect of state and local economic protectionism was the potential for political discord among the states—not the market inefficiencies that such measures can generate. Indeed, in the next few lines from the address, Jackson declared:

But *over and above* even the requirements of both our law and our prosperity are other values which we can not sacrifice. Our security and our culture rest upon our sense of unity as one Nation with one destiny. It is no accident that the people of the several States are able to consider their differences of interest and viewpoint in peace and good will. Our philosophy of local concession to the general good, expressed in the federation of local sovereignties *in a single union*, promises a culture of peace and good will that is the hope of the world. Federation is the only technique by which large and common interests of widely separated people may be unified without the extinction of local initiative and local self-government. Transfer to a central authority of the power to decide the rule by which commerce shall move among the parts is fundamental *to the success of federation*.<sup>54</sup>

Just as this address placed economic considerations in a position subservient to political ones, so too does the *Hood* opinion. The opinion first praised “[t]he material success that has come to inhabitants of the states which make up this federal free trade unit [as] the most impressive in the history of commerce.”<sup>55</sup> But instead of stopping there, Jackson immediately turned to the political implications of that material success, writing that “the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.”<sup>56</sup> At this stage, Jackson explicitly invoked the dormant Commerce Clause doctrine’s historical political justifications:

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53 *Id.*

54 *Id.*

55 *Hood*, 336 U.S. at 538. In a draft of the *Hood* opinion, Jackson considered using the “federal economic unit” in place of “federal free trade unit.” Robert H. Jackson, Draft Opinion to *Hood* 15 (undated) (on file with the Library of Congress, Collection of the Personal Papers of Robert H. Jackson, Box 153, Folder 5). What seems most significant about these revisions is the consistent emphasis in both alternatives on the “federal” character of the economic entity, reinforcing the notion that the market is not “free” in the classical *laissez-faire* sense but rather “free” in the Progressive or New Deal sense of being preserved by governmental regulation. For a more current discussion of the constitutional dimensions of the American “common market,” see Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409 (2008).

56 *Hood*, 336 U.S. at 538.



We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!<sup>57</sup>

Thus, to the extent that Jackson saw an economic efficiency argument behind dormant Commerce Clause doctrine, it was as a means to accomplish the larger objective of national political unity, rather than as a laissez-faire philosophical end in itself.

### B. Re-examining Hood's Doctrinal Contributions

Before we can finally answer Jackson's accusers, we have one more task: to identify the two closely related doctrinal developments rendered by *Hood* in the area of dormant Commerce Clause doctrine and federalism.

Although this aspect of the case receives little attention now, *Hood* was criticized at the time for departing from a venerable line of dormant Commerce Clause cases, extending back to 1851's *Cooley v. Board of Wardens*,<sup>58</sup> which made conceptual allowances in dormant Commerce Clause doctrine for peculiarly local matters. In *Cooley*, the Supreme Court upheld a Pennsylvania law that required large ships leaving the Port of Philadelphia to either use local pilots or pay a fine used to support "distressed and decayed pilots."<sup>59</sup> Although in modern terms the law might be suspect because it favored local economic interests, the Court upheld it against a Commerce Clause attack as a proper exercise of local expertise over a matter of purely local concern; in so doing, the Court purported to draw a distinction between matters best regulated under a uniform national approach and those that could be safely and better left to local judgments based on local knowledge of the problem.<sup>60</sup>

In time, *Cooley*'s national/local terminology was eclipsed by other judicial formulations of the dormant Commerce Clause doctrine, but the idea that some matters are best left to the locals was never fully displaced,<sup>61</sup> so that even into the New Deal it was still cropping up in

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57 *Id.* at 538–39.

58 53 U.S. 299 (1851).

59 *Id.* at 313.

60 *Id.* at 320.

61 See BORIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.03 (1999) (citing and discussing cases that followed after *Cooley*).

dormant Commerce Clause cases.<sup>62</sup> During this period, the Court was shifting its dormant Commerce Clause jurisprudence to a balancing model, but *Cooley* continued to lurk in the background. Thus, when the *Hood* dispute reached the New York Court of Appeals in 1948, that court was able to quote contemporaneous Supreme Court precedent to conclude that New York's law was "within the 'residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.'"<sup>63</sup>

Now consider the federalism implications of this lingering "Cooleyism" in the immediate aftermath of the brutal New Deal battles over the scope of Congress's power under the Commerce Clause. The recurring argument that New Deal opponents had made in these cases was that certain subjects of regulation were reserved to the States and therefore outside of Congress's Commerce power. For example, in *Carter Coal* the Court struck down a federal coal pricing and labor law based in part on the "local character" of coal mining:

Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products.

....

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and . . . it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control.<sup>64</sup>

Similarly, in *Schechter Poultry*, the Court struck down federal industrial codes for poultry production on the grounds that such activity was predominantly intrastate, had only "indirect" effects on interstate commerce, and therefore "remain[ed] within the domain of state power."<sup>65</sup>

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<sup>62</sup> Indeed, it has continued to do so even after *Hood*. See, e.g., *California v. Zook*, 336 U.S. 725, 728 (1949) ("Absent congressional action, the familiar test is that of uniformity versus locality . . ."). Justice Jackson dissented on preemption grounds. *Id.* at 741-42.

<sup>63</sup> *Hood*, 78 N.E.2d 476, 479 (N.Y. 1948) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1915)).

<sup>64</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 304, 308 (1936).

<sup>65</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (striking down a federal industrial code regulating the sale of poultry).

In this context, the lingering Cooleyism voiced in dormant Commerce Clause cases of this period—i.e., the notion that there persisted a “residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it”<sup>66</sup>—bore an obvious and probably very uncomfortable resemblance to the state sovereignty reasoning that drove the analyses in cases like *Carter Coal* and *Schechter Poultry*. Eventually, of course, the Court’s thinking switched<sup>67</sup> in regard to the affirmative Commerce Clause analysis, so that the Court more uniformly upheld Congress’s broad Commerce Clause power to reach even the most seemingly local, intrastate activities.<sup>68</sup> Perhaps the starkest example of this new thinking was *Wickard v. Filburn*, which famously found that Congress was empowered to regulate wheat grown by a farmer on his own land for his own personal consumption.<sup>69</sup> The author of that opinion—not coincidentally—was Justice Jackson.<sup>70</sup>

In this light, Jackson’s opinion in *Hood* might be understood as his dormant Commerce Clause doctrine sequel to *Wickard*. When Justice Frankfurter urged the Court to remand in order to develop the record on the question of whether New York’s potentially strong local interests in avoiding destructive competition ought to outweigh the relatively slight national interests in this particular milk dispute,<sup>71</sup> Jackson naturally had to decline because such deferential balancing in a protectionism case would have implied that the Constitution still contemplated that States should have a significant say—a “residuum of power”—regarding the need for such measures. That clearly would have been a retreat from the theme sounded in *Wickard*, which in fairly spectacular fashion secured this authority for Congress at the

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66 *Hood*, 78 N.E.2d at 479 (quoting *S. Pac. Co.*, 325 U.S. at 767).

67 Justice Owen Roberts’s “switch in time that saved nine” is popularly portrayed as an example of judicial wavering in the face of popular and political pressure. For a critical reevaluation of this perception of Roberts’s judicial character, see Cushman, *supra* note 19.

68 See generally CHEMERINSKY, *supra* note 20, at 256–59 (citing and discussing cases supportive of a broad Commerce Clause power). For an alternative analysis, see Williams, *supra* note 11 (arguing that the Court has never really been devoted to a “dual federalist” approach in its Commerce Clause jurisprudence).

69 317 U.S. 111 (1942).

70 *Id.* at 113.

71 *Hood*, 336 U.S. 567 (1949) (Frankfurter, J., dissenting) (citing *Cooley* and arguing that “in the absence of federal regulation, it is sometimes—of course not always—of greater importance that local interests be protected than that interstate commerce be not touched”).

exclusion and expense of the States.<sup>72</sup> Thus, in order to make dormant Commerce Clause doctrine thematically consistent with developments in affirmative Commerce Clause law, the old Cooleyist accommodationism had to be rejected and a stricter rule adopted. That is what *Hood* tried to accomplish, by declining to weigh the local interests and by instead treating the law's protectionist nature as virtually outcome determinative.<sup>73</sup> After *Hood*, the "residuum of power" retained by the States to act in protectionist ways was really just that—the mere residue of a once substantial power.<sup>74</sup>

A re-reading of *Hood* thus reveals two closely related meanings: (1) for dormant Commerce Clause doctrine, *Hood* meant that local regulations of a protectionist nature would now be far more susceptible to invalidation because they undermined the Commerce Clause's purpose of establishing political unity through economic unity; (2) for federalism, *Hood* meant that dormant Commerce Clause doctrine would reflect some of the thematic developments in affirmative Commerce Clause jurisprudence of the New Deal that had empowered Congress at the expense of the States.

With this lengthy background in mind, we are better positioned to understand Black's and Rehnquist's accusations.

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72 Professor Williams forcefully argues that the Court has never fully endorsed dual federalism (i.e., the division of federal and state regulatory spheres into neatly defined and symmetrical doctrinal categories) and has developed distinct and asymmetrical doctrines for each sphere. Williams, *supra* note 11. Nevertheless, Jackson's project spanned both categories of doctrine: to secure the constitutional foundations of a single, national market under the firm control of Congress required at least some attention to harmonizing dormant and affirmative Commerce Clause doctrines. Professor Williams observes that, before the New Deal, the Court "deployed the same terminology in reviewing federal and state commercial regulations and taxes, [although] its application of the doctrinal rules and its understanding of the underlying theoretical basis for the rules differed substantially depending upon whether federal or state action was at issue." *Id.* at 1852. The veteran New Deal Commerce Clause warrior in Jackson would likely have been particularly attuned to the potential rhetorical dissonance between *Cooley's* insistence on the constitutional import of localism and the New Deal Commerce Clause jurisprudence's rejection of precisely that value.

73 *Hood*, 336 U.S. at 542 ("[H]ere the challenge is only to a denial of facilities for interstate commerce upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end, as we have shown, always held to be precluded by the Commerce Clause.").

74 Indeed, only once has the Supreme Court upheld a state law that it has found to discriminate against interstate commerce. See *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding prohibition on importation of potentially diseased out-of-state baitfish because no alternative means were available to secure the State's legitimate ecological interests).

C. *Misunderstanding Hood: Black's Objections*

Justice Black's objections to *Hood* are best understood as over-reactions to the first meaning of *Hood* identified above—that localist regulations should no longer find safe harbor in the remnants of *Cooley* still latent in the dormant Commerce Clause doctrine during this period. Black's views on economic policy were left of Jackson's, and he tended to "translate[] his politics into his votes and opinions on the Court."<sup>75</sup> Indeed, during his confirmation, Black said that "there is no charge against the integrity of any prospective judge that with reference to economic predilections after he goes on the bench he will still be the same man that he was before he went there."<sup>76</sup> From this perspective, Black viewed *Hood's* attempted disposal of *Cooley* as a step backwards in the struggle to secure the primacy of government—at any level—over business:

The consequences of the new formula, as I understand it, will not merely leave a large area of local business activities free from state regulation. All local activities that fall within the scope of this new formula will be free from any regulatory control whatever. For it is inconceivable that Congress could pass uniform national legislation capable of adjustment and application to all the local phases of interstate activities that take place in the 48 states. It is equally inconceivable that Congress would attempt to control such diverse local activities through a "swarm of statutes only locally applicable and utterly inconsistent."<sup>77</sup>

Black's fears that *Hood* would result in widespread deregulation may seem overblown today, and perhaps they should have seemed that way to Black given that he had just witnessed the rise of a powerful federal administrative state capable of reaching "all the local phases of interstate commerce."<sup>78</sup> But if we grant that these concerns may have appeared more plausible at the dawn of that administrative state, then we may also see how Black could have viewed *Hood* as something like the second coming of *Lochner*. In both cases, the Court invalidated state commercial regulations, and in both cases the

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<sup>75</sup> Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 240. Hutchinson notes that Jackson was not really different from Black in this regard. *Id.*

<sup>76</sup> 81 CONG. REC. S2828 (Mar. 29, 1937) (statement of Justice Black), *quoted in* Hutchinson, *supra* note 75, at 240.

<sup>77</sup> *Hood*, 336 U.S. at 545–46 (Black, J., dissenting) (citation omitted) (quoting *Kidd v. Pearson*, 128 U.S. 1 (1888)).

<sup>78</sup> *Id.*

Court's explanation linked constitutional doctrine to market economics.<sup>79</sup>

This reaction seems to have been further encouraged by *Hood's* superficial similarities to another case with a very different outcome: *Nebbia v. New York*, in which the Court began to rein in the economic substantive due process analysis of the *Lochner* period.<sup>80</sup> Like *Hood*, *Nebbia* involved a constitutional challenge to New York's regulation of the dairy industry, in this instance a challenge under the Due Process Clause of the Fourteenth Amendment to New York's dairy price control scheme.<sup>81</sup> Unlike *Hood*, the Court upheld the State's dairy regulations, and did so in terms that seriously undermined the continued vitality of *Lochner*-style economic substantive due process.<sup>82</sup> The Court announced that "neither property rights nor contract rights are absolute," and that courts lacked authority to invalidate economic policy of any kind that that "may reasonably be deemed to promote public welfare."<sup>83</sup> Neither of the parties in *Hood* laid much emphasis on *Nebbia* in their briefs.<sup>84</sup> But Black saw a connection between the two cases—both reviewed state action that had been justified in terms of preventing destructive competition:

The legislature believed that while cutthroat competition among purchaser dealers temporarily raises the price of farmers' milk, the end result of the practice in New York had been economic distress for the farmers. After destructive dealer competition had driven financially weak dealers from the contest, the more opulent survivors had pushed pro-

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79 Among Black's papers in the *Hood* case is an intriguing hand-drawn table suggesting that Black was intent on uncovering patterns in the Court's recent treatment of State and local regulation. Hugo H. Black, Table and List of Cases (undated) (on file with the Library of Congress, Collection of the Personal Papers of Hugo H. Black, Box 300, Folder 92). The table reflects eighty-one cases involving challenges to state and local economic regulation decided by the Supreme Court between 1937 and 1946. The table classifies the cases according to subject matter ("tax," "regulation," "foreign," "domestic") and outcome (sixty-three sustained, fourteen invalidated, two sustained in part and invalidated in part, and two with other notations). The handwriting on this document differs from Black's handwritten dissent drafts, so it is possible that it was prepared by a clerk. Its inclusion in the same file as the draft dissents suggests that Black consulted this information while preparing his dissent.

80 291 U.S. 502 (1934).

81 *Id.* at 515.

82 See CHEMERINSKY, *supra* note 20, at 622; see also Cushman, *supra* note 19, at 105–28.

83 *Nebbia*, 291 U.S. at 523–24, 537, quoted in CHEMERINSKY, *supra* note 20, at 622.

84 New York's brief cited *Nebbia* only to establish that New York's dairy laws emerged from a period of destructive competition. See Brief for the Respondent Commissioner at 9–11, *Hood*, 336 U.S. 525 (1948) (No. 92), 1948 WL 47268. The Petitioners (unsurprisingly) did not cite *Nebbia* at all. See Brief for the Petitioner, *Hood*, 336 U.S. 525 (No. 92), 1948 WL 47267.

ducers' prices far below production costs. *Nebbia v. New York* gives a graphic description of the plight of these farmers prior to the enactment of these regulations and makes clear that the chief incentive for the regulations was the promotion of health and the general welfare by financial rehabilitation of the farmers. And despite due-process objections, the *Nebbia* case sustained the state's constitutional power to apply its law to New York dealers in order to promote the health, economic stability and general welfare of the state's people.<sup>85</sup>

Black feared that Jackson's opinion would end-run *Nebbia* and other cases that had rolled back economic substantive due process by substituting dormant Commerce Clause doctrine for economic due process as the constitutional basis for judicial hostility to state economic regulation. Of course, as the discussion above shows, equating Jackson's motives with those animating the adherents of *Lochner* is simply untenable; but by this point in their relationship, Black was hardly disposed to extend to Jackson any benefit of the doubt.<sup>86</sup>

Perhaps this animosity also blinded Black to the other crucial meaning of *Hood*—that continued tolerance of Cooleyist reasoning in dormant Commerce Clause doctrine was inconsistent with, and a threat to, the hard-won gains made in affirmative Commerce Clause doctrine in the New Deal period. In any event, Black's accusations against Jackson's opinion were enough to persuade one fellow Justice to defect to the dissenting side, and as the next section shows, they would resonate years later in the writings of jurists on the other end of the political spectrum intent on rolling back those same New Deal victories.

*D. Misinterpreting Hood: Rehnquist's and Roberts's "Laissez-faire" Objections to Dormant Commerce Clause Anti-Discrimination Doctrine*

While Black's objections to the *Hood* majority opinion flowed principally from a misperceived economic policy disagreement with Jackson, it appears that Chief Justice Rehnquist's objections were principally animated by the second meaning of *Hood* identified above—its place in the tug-of-war over federal and state regulatory power.

One of the most significant legacies of the Rehnquist Court has been to reopen the question of the scope of Congress's Commerce Clause power. Consider that for sixty years after Justice Owen Roberts's "switch in time that saved nine," the Supreme Court did not

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<sup>85</sup> *Hood*, 336 U.S. at 546 (Black, J., dissenting) (citation omitted).

<sup>86</sup> See generally Hutchinson, *supra* note 75.

find a single federal law to have exceeded Congress's Commerce Power.<sup>87</sup> Then, in 1995, Chief Justice Rehnquist authored *United States v. Lopez*, which struck down a federal law criminalizing gun possession within 1,000 feet of a school zone on the theory that such conduct in itself did not substantially affect interstate commerce.<sup>88</sup> This shock<sup>89</sup> was repeated five years later, when Rehnquist authored *United States v. Morrison*, invalidating an unrelated federal law on the same grounds.<sup>90</sup> In this same period, the Rehnquist Court also successfully redesigned and redeployed the Tenth Amendment's limits on Congress in relation to state governments.<sup>91</sup> These developments obviously flowed against the current of the previous six decades of expanding congressional power and shrinking state power.

Of course, affirmative Commerce Clause jurisprudence and dormant Commerce Clause jurisprudence have evolved into quite different doctrinal creatures, and Professor Cushman's warning that "comparisons made at the level of abstraction at which doctrinal categories are utterly ignored are not always the most illuminating" is certainly a

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87 CHEMERINSKY, *supra* note 20, at 264.

88 *United States v. Lopez*, 514 U.S. 549, 551 (1995).

89 Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1645 (2002) (noting that "*Lopez* sent a shock wave through both the judiciary and the academy" and led to a "wave of litigation challenging . . . other federal criminal statutes"); John C. Eastman, *A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*, 2004 CATO SUP. CT. REV. 469, 471 (noting that in light of the sixty-year history of judicial deference to federal regulatory power under the Commerce Clause, *Lopez* came as "something of a shock"); Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069, 1085 (2001) (characterizing *Lopez* as a "shock"); Alex Kreit, *Rights, Rules and Raich*, 108 W. VA. L. REV. 705, 708 (2006) (asserting that the "shock" of *Lopez* was due to the fact that most academics and lower court judges had assumed that congressional power under the Commerce Clause was "limitless"); Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1125 (2001) (describing *Lopez* as a "shock" in the context of a Congress accustomed to legislating). *But see* Chris Marks, Comment, *U.S. Term Limits, Inc. v. Thornton and United States v. Lopez: The Supreme Court Resuscitates the Tenth Amendment*, 68 U. COLO. L. REV. 541, 553 (1997) (asserting *Lopez* did not, by itself, "shock the legal community," but represented a "trend towards capping federal power and breaking down the regulatory state").

90 529 U.S. 598, 602 (2000).

91 *See* *Printz v. United States*, 521 U.S. 898, 925–26 (1997) (holding that the Tenth Amendment prohibits Congress from "commandeering" state executive authority); *New York v. United States*, 505 U.S. 144, 175–76 (1992) (holding that the Tenth Amendment prohibits Congress from "commandeering" state legislative authority); *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (relying on the Tenth Amendment to adopt as a rule of statutory construction that Congress clearly stated its intention to apply federal law to important state functions).



sensible one.<sup>92</sup> Nevertheless, it does seem that for Rehnquist, at least, the connection between affirmative and dormant Commerce Clause jurisprudence was neither abstract nor opaque: both spoke to the “proper” allocation of federal and state power, a favorite theme of the Rehnquist Court.

In this light, Rehnquist’s dissent in *West Lynn Creamery* may be viewed as his effort to enunciate the counter-*Hood*, just as *Lopez* was in important respects the counter-*Wickard*.<sup>93</sup> In *Hood*, Jackson brought dormant Commerce Clause anti-discrimination doctrine into line with the themes of affirmative Commerce Clause precedent by virtually closing the door on any meaningful consideration of local interests in discrimination cases;<sup>94</sup> in *West Lynn Creamery*, Jackson’s former law clerk sought to discredit the entire doctrine because of that development, which he believed “bod[ed] ill for the values of federalism which have long animated our constitutional jurisprudence.”<sup>95</sup> Thus did Rehnquist match Stevens’s invocation of *Hood*’s “every farmer” quote with another, maybe equally classic quote:

More than half a century ago, Justice Brandeis said in his dissenting opinion in *New State Ice Co. v. Liebmann*:

“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose,

<sup>92</sup> Cushman, *supra* note 19, at 107.

<sup>93</sup> Rehnquist had this to say about *Wickard* in *Lopez*: “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.” 514 U.S. at 560. This characterization of *Wickard* limits that case, for as Justice Breyer argued in his dissent, Rehnquist’s use of categories like “economic activity” and “commercial activity” revived the approach to Commerce Clause jurisprudence that produced cases like *Carter Coal*, with its production versus commerce distinction, and *Schechter Poultry*, with its direct versus indirect effects distinction—an outcome *Wickard* itself warned against:

As a general matter, this approach fails to heed this Court’s earlier warning not to turn “questions of the power of Congress” upon “formula[s]” that would give “controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce.”

*Lopez*, 514 U.S. at 627–28 (Breyer, J., dissenting) (alteration in original) (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)).

<sup>94</sup> In non-discrimination cases, the Court would continue to balance local interests against burdens on interstate commerce. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>95</sup> 515 U.S. at 217 (Rehnquist, C.J., dissenting).

serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>96</sup>

To Rehnquist, the dormant Commerce Clause doctrine’s strict anti-protectionism rules stood in the way of this laboratory-of-democracy value and thus in the way of his legacy-making New Federalism project of reinvigorated state power. To help push dormant Commerce Clause doctrine out of the way, Rehnquist linked the doctrine with its most disreputable justification—“a messianic insistence on a grim sink-or-swim policy of laissez-faire economics”<sup>97</sup>—and downplayed its altogether more defensible justification—national political unity founded on economic cohesion.

Despite these rhetorical moves, Rehnquist was only able to muster a dissent, albeit with Justice Blackmun joining in. In a truly Michener-esque turn, it would fall to Rehnquist’s own former law clerk, Chief Justice John G. Roberts, to successfully re-inject tolerance for local preferences into dormant Commerce Clause anti-discrimination analysis—nearly four decades after Rehnquist’s former boss had tried to banish it. In *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, Roberts carved out a “new” exception in dormant Commerce Clause anti-discrimination doctrine, exempting from strict scrutiny review those state and local laws that economically favor local government enterprises engaged in traditional governmental functions.<sup>98</sup> This is not exactly *Cooley*, but it bears a striking family resemblance.<sup>99</sup> Under *United Haulers*, a state or local government may create local economic preferences that would otherwise be subject to per se invalidation—so long as those preferences are operationalized by means of a public enterprise of some kind. In reaching this result, Roberts took a stab at penning his own enduring dormant Commerce Clause quote, including yet another jab at the phantom of a laissez-faire economic justification for dormant Commerce Clause anti-discrimination:

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<sup>96</sup> *Id.* at 216 (Brandeis, J., dissenting) (citation omitted) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)).

<sup>97</sup> *Id.* at 217 (Rehnquist, C.J., dissenting).

<sup>98</sup> 127 S. Ct. 1786, 1796–97 (2007).

<sup>99</sup> Intriguingly, Roberts expressly relied upon *Cooley* to establish the provenance of dormant Commerce Clause doctrine. *United Haulers*, 127 S. Ct. at 1792 (“Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.” (citing *Cooley v. Bd. Of Wardens*, 53 U.S. (12 How.) 229, 318 (1851))).

[T]reating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government. The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.<sup>100</sup>

It remains to be seen how far this doctrinal pendulum will now swing, but it does seem clear that *United Haulers* has sent it back in the direction of *Cooley* and away from *Hood*.<sup>101</sup>

#### IV. CONCLUSION

On April 6, 1949, Henry S. Manley—Jackson’s former law partner, the self-described draftsman of the law invalidated in *Hood* (“this is a confession and not a boast,” he noted), and the man who successfully argued *Nebbia* on behalf of the State of New York<sup>102</sup>—wrote a letter to Frankfurter and Jackson expressing his disappointment with *Hood*.<sup>103</sup> “As a small farmer of western New York,” Manley wrote, “I am one of the kulaks who feels endangered by the plenary Federal power over agricultural production and distribution revealed in *Wickard v. Filburn* and the limited State power revealed in this latest decision.”<sup>104</sup>

As Manley’s letter suggests, *Hood*’s innovation was not that it revived *Schechter Poultry*, much less *Lochner*. To the contrary, *Hood* was an attempt to finish the New Deal project of securing Congress’s control of the economy by disposing of a potentially dangerous lingering tolerance for localism in dormant Commerce Clause jurisprudence dating back to the venerable *Cooley* case. To Black, this represented an affront to the power of government to regulate business that smacked of *Lochner*; to Rehnquist it frustrated in some measure his project of a “New Federalism” with revitalized state power as its centerpiece. Both responded with the same unfounded criticism, tarring *Hood* and Jackson as “laissez-faire.”

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100 *United Haulers*, 127 S. Ct. at 1796.

101 *See, e.g., Dep’t of Revenue of Ky. v. Davis*, 128 S. Ct. 1801 (2008) (applying the *United Haulers* exception to uphold preferential state income tax exemption for government bonds issued by Kentucky state or local governments).

102 291 U.S. at 510 (“Mr. Henry S. Manley . . . for appellee.”).

103 Letter from Henry S. Manley to Felix Frankfurter & Robert H. Jackson (Apr. 6, 1949) (on file with the Library of Congress, Collection of the Personal Papers of Robert H. Jackson, Box 153, Folder 5).

104 *Id.*

To the extent that commentators and jurists continue to accept these false charges, they perpetuate a misperception that dormant Commerce Clause anti-discrimination doctrine is meant to advance laissez-faire economic policy. They also perpetuate the misunderstanding and misinterpretation of a central precedent in the New Deal reconstruction of our national, federal, economic, and (above all) political union.