COMMERCE CLAUSE NEW FEDERALISM IN THE REHNQUIST AND ROBERTS COURTS: DYNAMICS OF CULTURE WARS CONSTITUTIONALISM, 1964-2012

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DEDICATION

On the home front, my wife, Mary Kay, helped me figure out that an academic career should be in my future after retiring from the Air Force. She's been my biggest supporter, counselor, and editor even though the process has included a move, a new job, homeschooling, and the birth of two children in the interim. Equally patient and supportive have been my kids, Benjamin, Arianna, James, Isaac, Joseph, Abigail, and Levi, all of whom are very pleased that the project is now complete. This work, therefore is dedicated to my family without whose love and support I'd have never succeeded.

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ABSTRACT

Commerce Clause New Federalism in the Rehnquist and Roberts Courts describes how interpretation of the Commerce Clause of the Constitution has evolved since the Constitution was first ratified by the several states. It shows how the clause, which was originally included to facilitate trade between the states by removing barriers to trade, evolved into Congress' primary justification for all kinds of actions that had previously been the domains of the states. The work includes case studies of four controversial cases that occurred when the Chief Justice was William Rehnquist along with a case study of *National Federation of Independent Business v. Sebelius* decided in the court of Chief Justice John Roberts. The work also makes the case that commerce-clause-based legislation was a critical contributor to the current culture wars occurring in America because each piece of legislation becomes a winner take all proposition with national ramifications.

Introduction

Of all the enumerated powers the United States Constitution granted to Congress, perhaps, the most pervasively employed by it is that set out in the Commerce Clause. With the power to regulate interstate commerce, Congress has been able to legislate in such diverse areas as labor, agriculture, civil rights, education, gun control, and drugs, as well as a wide array of criminal activity.[1] The marvelously-serviceable language of the Commerce Clause, set out in Section 8 of Article I of the United States Constitution, certainly does not appear obviously fit for such myriad applications:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .[2]

Before the spring of 1937, Congressional reliance on the Commerce Clause to justify one of its statutes was no guarantee that it would stand up in federal court. However, after the New Deal Supreme Court expanded the scope of the federal commerce power, Congress utilized it unsparingly with virtually no judicial interference for over a half a century.[3] The result was an

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[1] Respectively, the National Labor Relations Act of 1935, the Agricultural Adjustment Act of 1938, the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965, the National Firearms Act of 1934, Federal Firearms Act of 1938 and the Gun Control Act of 1968, the Controlled Substances Act of 1970, and the Comprehensive Crime Control Act of 1990 and Violent Crime Control and Law Enforcement Act of 1994. Howard Gillman, Mark A. Graber, and Keith E. Whittington, *American Constitutionalism. Volume II. Rights and Liberties* (New York and Oxford: Oxford University Press, 2013), 479-736.

[2] U.S. Const. Art. 1, Sect. 8.

[3] The watershed moment, for better or worse, came on April 12, 1937, when a 5-4 majority of the United States Supreme Court, newly enlightened as to the import of the New Deal engineered by President Franklin D. Roosevelt, rendered its decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

ever-enlarging federal legal framework and regulatory infrastructure that, ultimately, reached into nooks and crannies of everyday life the Founders never intended. Labor relations, reproductive decisions, and health care, for example, had once been freely managed by self-responsible individuals, households, neighborhoods, churches, civic groups, and, in exigent cases, by municipal, county or state authorities. The rise of the Commerce Clause-based regulatory state, "the fourth branch of government," insisted critics, ran roughshod over the original constitutional scheme prescribing a dual system of state and federal government, ultimately authorizing unelected federal functionaries to dictate compliance in ways that no county or state government official had ever imagined.

Beginning in the mid-1960s, growing congressional employment of commerce power, along with new understandings of individual rights made national by the Fourteenth Amendment, caused local issues concerning matters once deemed beyond the reach of government to take on national political implications. Congress and the United States Supreme Court deployed commerce power increasingly to rearrange the relations of race, class, and gender; the relations between increasingly militaristic law enforcement and newly-invented classes of law breakers; and the relations between human beings, a steadily growing array of protected flora and fauna, and natural resources, climate, and the weather. The stakes at election times became extraordinary high, as the customary celebrations of democracy became winner-take-all contests. Americans became ever more divided, fearful of what new exercise of federal power a victorious opposition might devise next. Trepidations about rising power and its interventions, whether in the name of social justice or crime control, were central features of a complex social, ideological and political engagement by which the American populace increasingly became polarized and

locked in a no-holds-barred grudge-match for political and cultural supremacy – a seemingly endless struggle that pundits and scholars, by the early 1990s, had dubbed the "culture wars."

Beginning in 1985, amid this escalating cultural and political clash, William Rehnquist assumed the position of Chief Justice of the United States Supreme Court, and that tribunal began to look more critically at the myriad encroachments on state authority committed in the name of the Commerce Clause – a development that was central to the larger judicial agenda of the Rehnquist Court to rein in federal power, one that jurists soon denominated the "New Federalism." Five Supreme Court decisions, which will be given extensive treatment in this study, stand out for being the most contentious and, not coincidentally, most indicative of the evolving relationship of congressional exertions of Commerce Clause power, Supreme Court accommodation or resistance thereto, partisan politics, and related culture wars conflict in the period 1995-2012.[4]

Several of the Rehnquist Court decisions seemed to inaugurate a New Federalism Commerce Clause jurisprudence that might turn back the clock on New Deal-era rulings that had seemed to affirm an unbounded commerce power. In *United States v. Lopez* (1995), the Supreme Court held that the lawmaking power of Congress under the Commerce Clause did not extend so far as to make criminal, under the Gun Free School Zones Act of 1990, the mere possession of a handgun in a statutorily-defined school zone, at least when Congress had not even bothered to explain the connection of the novel transgression with interstate commerce. In *Seminole Tribe of Florida v. The State of Florida* (1996), the Supreme Court ruled that the so-called "Indian Commerce Clause" did not give Congress the power to pass legislation that would authorize

[4] *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe v. the State of Florida*, 517 U.S. 44 (1996); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005); *National Federation of Independent Business v. Sebelius*, 576 U.S. ___ 2012).

Native American tribes to sue state officials for not agreeing on demand to contract state-tribal compacts to facilitate the establishment of Indian casinos as required by the 1988 Indian Gaming Regulatory Act. To do so would impermissibly abrogate the sovereign immunity of a state as provided for by the Eleventh Amendment. In *United States v. Morrison* (2000), the High Court declared unconstitutional the civil remedy for the new crime of gender-motivated violence set out in the Violence Against Women Act, passed by Congress in 1994, in part, because such egregious criminality had no more impact on interstate commerce than most other crimes of violence traditionally punished under state criminal codes. In *Gonzales v. Raich* (2005), however, the Supreme Court ruled that bona fide users of medical marijuana in the State of California, under its 1996 Compassionate Use Act, could not be exempted from criminal prosecution under the Commerce Clause-based 1970 Controlled Substances Act. To some jurists and commentators, the extraordinary rebirth of constitutional limits to the federal commerce power announced in *Lopez* and *Morrison* had died an untimely death because of the decision in *Raich*. Other jurists and commentators were not so sure.

Especially in the period 1995-2012, *Lopez*, *Morrison*, and *Raich* spurred intense debate among jurists, scholars, and commentators over how the Supreme Court interpreted the Commerce Clause and construed federalism – and the question of whether this triad of Commerce Clause decisions had, in fact, imposed a limit on commerce power. Some optimistic conservatives and anxious liberals believed that the decision in *Lopez* and *Morrison*, at least, had returned the commerce power and the Constitution to its pre-1937 incarnation. Others maintained that the rulings in *Lopez* and *Morrison*, had been, simply, aberrations that would have little or no enduring impact. Still, others occupied a cautious middle ground, supposing that the three decisions had signaled to Congress a need to support better with hard evidence and make

more textually explicit the interstate commerce rationale in forthcoming statutes based on the Commerce Clause. Other observers postulated that, in the future, perhaps Congress ought to be more circumspect in passing criminal legislation based on the commerce power – historically, and under the Constitution, a largely state and local government domain.

Complicating considerably the debate over the significance of the Rehnquist Court Commerce Clause decisions was the 2012 ruling of the Supreme Court, now presided over by Chief Justice John G. Roberts, in *National Federation of Independent Business v. Sebelius*. This decision, which will also be the subject of one case study chapter, reviewed the constitutionality of the Commerce Clause-based Patient Protection and Affordable Care Act of 2010, expedited in Congress by Democrats along exclusively partisan lines and signed into law by Democrat President Barack H. Obama. Known popularly as "Obamacare," superheated partisan conflict over this comprehensive regulatory scheme seemed to constitute yet another apocalyptic culture wars battle. Particularly galling to some was its "individual mandate" requiring most Americans to acquire health care insurance coverage before 2014. The highly-publicized conflagration pitted the well-intended decades-old liberal-progressive commitment to providing universal health care against conservatives and libertarians who viewed the measure as nothing less than socialized medicine and an unprecedented overreach of central power – certain to rob Americans of another portion of their liberty and burden them with yet another heavy layer of expensive, intrusive, and wasteful federal bureaucracy. Ultimately, Chief Justice Roberts and four of the more liberal justices, surprisingly, upheld the individual mandate with the power of Congress to tax, while the Chief Justice combined with four of the more conservative justices to hold that the Commerce Clause could not justify the individual mandate. Given the persistent quandary over

the significance of the Rehnquist Court Commerce Clause jurisprudence, the decision in *Sebelius* only compounded uncertainty, while also raising questions about the fate of the New Federalism.

The prime purpose of this dissertation is to assess the contentious development of commerce power from *United States v. Lopez* through *NFIB v. Sebelius* – as an integral feature of culture wars conflict from 1964 through 2012. As such it examines the dynamic interaction of Congress and the Supreme Court in the sociocultural, economic, and political contexts that shaped and were shaped by the key decisions under study – and by asking these questions: What were the roles of Congress and the Supreme Court in deploying commerce power and producing contention over that power in the period under study? To what extent did *Lopez, Seminole Tribe, Morrison,* and *Raich* shape or reflect the New Federalism commonly attributed to the Rehnquist Court? What does *Seminole Tribe*, particularly, tell us about Rehnquist Court New Federalism understandings of state sovereignty? Did the Rehnquist Court Commerce Clause decisions, in fact, signify a "constitutional revolution" akin to the decisions of the New Deal Supreme Court that had radically expanded commerce power beginning in 1937? If not, did the Rehnquist Court Commerce Clause decisions underwrite or, perhaps, forestall the expansion of commerce power that had occurred in the sixty years preceding *Lopez*? If *Lopez, Morrison*, and *Raich* established new limits to the commerce power, what were they? To what extent did the Roberts Court ruling in *NFIB v. Sebelius* reflect the New Federalism? Did *Sebelius* conflict with or augment the key Commerce Clause holdings in *Lopez*, *Morrison*, and *Raich*? Did *Sebelius* establish any new limitations on the commerce power? If so, what were they? And why should any limits to commerce power established by the Rehnquist Court and Roberts Court matter to ordinary citizens at the end of the second decade of the twenty-first century? What do all these

developments indicate to Americans about the future governance and political and cultural coherence of the United States?

Scholarship on Commerce Clause-based legislation and United States Supreme Court decisions dealing with such enactments, not surprisingly, exists in abundance. A great many book-length works have added to the scholarship on the topic; however, most of these comprehensive works were written before 1937. In the sixty years following the constitutional revolution of 1937, scholars showed little interest in the Commerce Clause since jurisprudence on it seemed settled. Later, however, Rehnquist Court decisions resulted in a renaissance of Commerce Clause publications. A plethora of academic papers debated whether the rulings were correct or incorrect, lacked breadth, or were overreaching; moreover, much attention was focused on ways the rulings may affect future Court decisions.

The Commerce Clause was studied most closely around the turn of the twentieth century to either justify or thwart progressive programs. Similar studies continued into the Great Depression, designed either to support or disparage Franklin Roosevelt's New Deal. However, in the period 1937-1994, when the Supreme Court upheld virtually all Commerce Clause-based legislation, the debate over the meaning of the Commerce Clause became moribund. After 1995 and the decision in *United States v. Lopez*, there was a renewed interest in the meaning of the Commerce Clause.

A worthwhile discussion of the Commerce Clause and the history of its interpretation must begin with a discussion of the contending constitutional theories that have given it meaning. Scholars have debated this subject since Chief Justice John Marshall made his first ruling on Commerce Clause power in 1824. Since the Supreme Court's adoption of the New Deal in 1937, two camps, broadly speaking, have emerged to argue the meaning of the Clause. One school

comprises those who take a relatively fixed view of the Commerce Clause that emphasizes the original intent of the Framers or common original understanding of the constitutional text, commonly denominated constitutional "originalists." The adherents of another school favor a broader and more flexible understanding, sometimes called constitutional "contextualists," but who generally embrace the theory of a "living Constitution." These labels are undoubtedly oversimplifications of the spectrum of views that exist, but will serve herein to define the major contentious points in the debate regarding what authority the Clause has given to Congress.

The debate over the original meaning of the Commerce Clause may be simplified by focusing on three basic areas of enquiry. First, what was the meaning (or intended meaning) of the word "commerce" at the time of the Constitutional Convention? Was the term confined to "trade," thus excluding manufacturing or agriculture, or did it mean something broader, like "all gainful activity"? Second, did "among the states" mean, in a limited sense, "between the states" or did it broadly encompass activities that took place wholly within individual states that affected commerce in other states? Third did "to regulate" mean, in a restricted sense, "to make regular," that is, to specify how some activity was to occur, or did its meaning imply the broader power to prohibit altogether? Some of the influential legal scholars who have taken a more limited view include Albert Abel, writing in 1941, and Raoul Berger, Richard Epstein, and Randy Barnett, all of whom published in the period 1987-2001.[5] Some of those who have taken a wider originalist view include Walton H. Hamilton and Douglas Adair, writing in 1937, and William Crosskey,

[5] Albert S. Abel, "The Commerce Clause in the Constitutional Convention and in Contemporary Comment," *Minnesota Law Review*, Vol. 25 (1940-1941): 432-494; Raoul Berger, "Judicial Manipulation of the Commerce Clause," *Texas Law Review*, Vol. 74, No. 4 (March 1996): 695-717; Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review*, Vol. 73, No. 8 (Nov. 1987): 1387-1455; Randy E. Barnett, The Original Meaning of the Commerce Clause, *University of Chicago Law Review*, Vol. 68, (2001): 101-147.

publishing in 1953, and Grant Nelson and Robert Pushaw, who published together in 1999 and 2002.[6]

As one might expect, arguments about the meanings of the Commerce Clause at the Founding have varied with Supreme Court decision-making across many decades – and the socioeconomic, cultural, and political contexts of such decisions. Writing with a relatively moderate view of the matter was the work of Albert Abel, completed in 1941, shortly after the Supreme Court had broadened its view of the scope of commerce power. His work followed the proceedings of the Constitutional Convention to understand the *intentions* of the framers as they constructed the founding document. He argued that the purpose was to create a general government that would have authority over areas "where the individual states lacked the capacity for effective action, or where state legislation constituted an appreciable interference with the conditions making for good relations between the several states."[7] Three decades later, his ideas about federalism and the sharing of power by the states and the federal government would make a significant resurgence.

In 1953, William Crosskey produced a two-volume work on the Constitutional Convention and its immediate aftermath. Written with a very broad view of federal power, he stated that the Commerce Clause includes the power "to govern universally *every species of gainful activity*

[6] Walton H. Hamilton and Douglas Adair, *The Power to Govern: The Constitution—Then and Now* (New York: W.W. Norton and Company, 1937); William Winslow Crosskey, *Politics and the Constitution in the History of the United States*, 2 vols. (Chicago: University of Chicago Press, 1953); Grant S. Nelson and Robert J. Pushaw, Jr., "Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues," *Iowa Law Review,* Vol. 85, (1999): 1, and "A Critique of the Narrow Interpretation of the Commerce Clause," *Northwestern University Law Review,* Vol. 96 (2002): 695-720.

[7] Abel, "The Commerce Clause in the Constitutional Convention," 440.

carried on by the people within the United States."[8] He reached his conclusion by attempting to determine the *original intent* of the framers, just as Abel did, rather than the less ambitious objective of determining the *original meaning* of the words used in the Commerce Clause. His definition of commerce as "every species of gainful activity" would also prove to be quite contentious among later writers.

Writing in 2001, Randy E. Barnett disputed Nelson and Pushaw's definition of "commerce," articulated just a few years earlier. Barnett researched the records of the Constitutional Convention, *The Federalist*, or "Federalist Papers," as well as the ratification debates. He discovered that "there is no surviving example" of the term "commerce" used but in a limited sense – meaning "*trade* or *exchange* of goods."[9] Regarding the other language in the Commerce Clause, Barnett concluded from then-contemporary usage that "'to regulate' meant 'to make regular' – that is, to specify how an activity may be transacted" between states and the additional power to regulate trade with Native tribes and foreign nations.[10] Additionally, Barnett pointed out that "[t]he only reason for adding 'among the several states' (and with foreign nations and Indian tribes) is to exclude some type of commerce from the power of Congress."[11] Barnett argues that common usage by the Founders of the term "among the states" equated to "between the states," and, thus, the power of Congress was not intended to extend to the internal matters of the states.[12] This argument makes a great deal of sense when it is considered in light of the trans-Atlantic slave trade. Barnett states that "[i]t can be asserted with certainty that the southern states would never have ratified the Constitution if the power to regulate commerce among the states

[8] Crosskey, *Politics and the Constitution,* Vol. I, 77, 81, 84, 117, Vol. II, 738. [Emphasis added]
[9] Barnett, "Original Meaning," 104, 112.
[10] Ibid., 146.
[11] Ibid., 132.
[12] Ibid.

included the power to regulate the slave trade within a particular state, which was unquestionably and reprehensibly thought to be a form of commerce."[13]

Barnett limited his research to the word "commerce," rather than searching also on closely related terms, such as "commercial." He identified the use of the word "commerce" in over 1,500 instances before concluding that the term was intended invariably to describe "trade" or "exchange." Had Barnett also examined the meanings of related words, it would certainly have resulted in an expanded meaning.

There is certainly ample documentation supporting the conclusion that the rubric "among the states" was intended to mean "between the states." Consider the view of James Madison on the subject:

> [t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers, reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[14]

The delimited view of the phrase "to regulate" suggests that the Framers intended it to mean "to make regular" or to "standardize." However, Randy Barnett and co-authors Robert Pushaw and Grant Nelson note that Article 1, Section 8, indicates that the new Congress also was to have the power to prohibit some kinds of trade.[15] They disagree about whether Congress was to have

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[13] Ibid., 134.

[14] Federalist 45 (Madison), in Clinton Rossiter, ed., *The Federalist Papers*, (New York: Penguin Putnam, 1999).

[15] "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year . . . ." U.S. Const., Art.

the power to prohibit only external trade or internal trade. In this regard, Barnett's attempt to create a dual meaning of the same phrase is not as convincing, as it seems reasonable that the Framers intended that Congress would have the power to make statutes that prohibited internal and external trade as it deemed "necessary and proper."[16]

While the debate over the original meanings of the Commerce Clause has been the subject of increased scholarship in the last several decades, disagreement over these meanings is not new. Before 1937, at least, debate focused on the way the Supreme Court interpreted the provision. Charles Warren employed the progressive perspective in his *The Supreme Court in United States History*, published in 1922. The influence of Theodore Roosevelt is apparent in Warren's interpretation of *Gibbons v. Ogden* (1824), in which the Supreme Court held that the power granted to Congress to regulate interstate commerce encompassed the power to regulate navigation.[17] According to Warren, Ogden's steamboat monopoly was "busted" by the Marshall Court. "It was the first great 'trust' decision in this country and quite naturally met with popular approval on this account."[18] Warren saw Marshall's decision to interpret the commerce power broadly as a step that paved the way for federally-funded projects, such as internal improvement efforts to facilitate interstate commerce and similar endeavors.

Publishing in 1937, Felix Frankfurter conveyed his disappointment with the Supreme Court's restricted view of the commerce power in the late nineteenth and through the early 1930s. His book *The Commerce Clause Under Marshall, Taney, and Wait*, however, strategically dealt with

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1, Sec. 9, Cl. 1. See Barnett, "Original Meaning," 143, and Pushaw and Nelson, "A Critique," 702.

[16] U.S. Const., Art. 1, Sec. 8, Cl. 18.

[17] *Gibbons v. Ogden,* 9 Wheat. (22 U.S.) 1 (1824).

[18] Charles Warren, *The Supreme Court in United States History*, 2 vols. (Boston: Little, Brown, 1922), 2:76.

the period 1801-1888.[19] In this sophisticated and succinct account, Frankfurter advocated for a strong centralized government and a policy of judicial restraint. In his opinion, one of the most important aspects of Chief Justice Marshall's decision in *Gibbons v. Ogden* was that the Court limited state authority; national authority was the purview of Congress, which, in turn, was subject to the oversight of the voters:

> What Marshall merely adumbrated in Gibbons v. Ogden became central to our whole constitutional scheme: the doctrine that the Commerce Clause, by its own force and without national legislation, puts it into the power of the Court to place limits upon state authority.[20]

Frankfurter also made the point that, although Chief Justice Taney had often been characterized as an advocate of states' rights, the chief justice had actually believed that it was the function of the Supreme Court to determine the existence of a conflict between state and federal law regarding commerce and "to override the state statute only if an indubitable conflict with [an] act of Congress was found to exist."[21] Frankfurter also warned his readers to beware "the traps of retrospective interpretation [of history] . . . . Marshall and Taney and Waite lived in their time and not ours."[22] The point he likely intended to make was that the Constitution was designed to be adaptable for the needs of the times – and that a new interpretation of it was needed to implement the New Deal. Thus, because of the Supreme Court's changed interpretation of commerce power beginning in 1937, and buttressed by the appointment of Frankfurter and other Roosevelt nominees to the Court, a majority sustained every legal

[19] Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (Chapel Hill: University of North Carolina Press, 1937).
[20] Ibid., 18-19.
[21] Ibid., 50.
[22] Ibid., 9-10.

challenge to Commerce Clause-based legislation for the next half a century. While certainly retaining the power of judicial review, the Court chose to leave constitutional considerations of the commerce power to Congress – and thus to congressional electoral majorities. Consequently, the production of scholarship that focused solely on the Commerce Clause dropped precipitously. And concerns about interpretation of its provisions to support increased federal power or revitalize recognition of state sovereign authority faded somewhat as most of the citizens of the United States accepted the post-1937 condition.

In the twentieth century, one of the first scholars to write about Commerce Clause decisions of the Supreme Court was Frederick H. Cooke, who published *The Commerce Clause of the Federal Constitution* in 1908.[23] This work engaged the so-called Lochner Era, when the progressive movement was gaining traction and the Supreme Court yet maintained a very conservative view of the Constitution. At issue was whether Congress should exclusively control all commerce, or whether the states should retain some authority besides basic police powers. Fundamental to the question was the fact that the United States had become interconnected after the Civil War through railroad, telegraph systems, and large corporations. Cooke was conservative in his views and advocated a return to a federal government of strictly defined powers. Regarding commerce, he sought to formulate a consistent rationale for delineating state versus federal power. In Cooke's view, the nineteenth century commerce decisions lacked consistency and the states had suffered as a result: "Rules applicable to such matters grew up in a somewhat sporadic, haphazard fashion, with what seems to me to have been inadequate comprehension of unifying principles."[24] Cooke maintained that commerce should be understood

[23] Frederick H. Cooke, *The Commerce Clause of the Federal Constitution* (New York: Baker, Voorhis & Company, 1908), iii.
[24] Ibid.

to encompass the transportation of property, people, and "intelligence"; he also contended that states should continue to hold power over issues beyond that definition, quite opposite from the more progressive view.

While Cooke presented his own ideas regarding how the Commerce Clause should be interpreted based upon a haphazard array of nineteenth-century Supreme Court rulings, David Walter Brown attempted to find the roots of the Commerce Clause to justify more fully broad federal power. In his descriptively titled work, *The Commercial Power of Congress Considered in Light of Its Origin*, Brown concluded that federal powers over the states in commercial matters far exceeded those over foreign commerce; hence, the federal government could restrict or prohibit commerce at will in the interest of great national purposes. [25] Brown's idea of returning to the original definition of the Commerce Clause would be used again eight decades later to reduce, rather than expand, the power of the federal government. Writing in 1999, Kazuyuki Matsuo emphasizes that the Interstate Commerce Act of 1887, which strengthened federal power over interstate trade at the expense of state power, constituted something of a popular response by Congress to an array of partisan groups. This array included the National Grange of the Order of Patrons of Husbandry, who sought relief from a depressed agricultural economy and the increasing practice by which railroad company monopolies set freight rates. Congress thus sought to increase competition and ensure equitable pricing.[26]

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[25] David Walter Brown, *The Commercial Power of Congress Considered in the Light of Its Origin: The origin, development and contemporary interpretation of the commerce clause of the Federal Constitution, from the New Jersey Representations of 1778, to the Embargo Laws of Jefferson's second administration in 1809* (New York: G.P. Putnam and Sons, 1910).

[26] Kazuyuki Matsuo, "Congressional Struggle for the First American Regulatory Agency: The Formation of the Interstate Commerce Commission as a Prelude to Modern America." *Journal of American and Canadian Studies*, Vol. 17 (1999): 25-48.

Amid the election of Franklin Roosevelt in 1932, Bernard Gavit produced *The Commerce Clause of the United States Constitution*.[27] Like its somewhat ambiguous title, the work itself lacked definition as well as argumentative direction. To his credit, Gavit described and categorized 839 Commerce Clause cases that had been adjudicated by the Supreme Court between the adoption of the Constitution and 1932. However, he provided no overarching theories or conclusions that would support greater or lesser federal power. A mere four years later, in 1936, New Deal proponents sought solid historical evidence to support expanded federal power.

Espousing the more liberal view, Hamilton and Adair published their work in 1937, evidently before the notable change in the Court's view of the Commerce Clause. Their work was a critique of how the Court had ruled with a very restricted view from the late 1880s until the time of their writing. The two authors argued that Chief Justice Marshall set a proper precedent for ruling on Commerce Clause decisions but that recent (as of 1936) rulings gave the Clause a meaning for too limited. Based upon their research of the founders, it was clear to them that the merchants who participated in framing the Constitution all would have understood the term "commerce" to mean "all activities directly affecting the wealth of the nation."[28] Such a view would certainly support the wider interpretation of the Clause, but their approach seems to neglect the views of those at the founding who were not merchants and had other concerns.

Edward S. Corwin wrote *The Commerce Power Versus States Rights* after the Court had struck down as unconstitutional the National Industrial Recovery Act in 1935 as well as the

[27] Bernard C. Gavit, *The Commerce Clause of the United States Constitution* (Bloomington, Indiana: Principia Press, 1932).
[28] Hamilton and Adair, *The Power to Govern*, 63.

Agricultural Adjustment Act in 1936 and other New Deal legislation.[29] Corwin wrote purely to convince his readers that the Commerce Clause of the Constitution should be interpreted in its broadest sense. He argued that just as the power of Congress to regulate overseas trade is absolute, so it is within that entity's power to regulate all aspects of commerce that occur within states. A steadfast fan of Chief Justice Marshall, he was equally critical of the restrictive precedents that came about after Marshall's death in 1835, which firmly supported states' rights prior to the Civil War. Corwin also argued that the Constitution provided the federal government power to handle issues that individual states were incapable of handling, like a severe economic depression. As a buttress to the New Deal, Corwin's work was quite powerful. In 1939, Corwin surely would have been pleased to see that President Franklin Roosevelt had the opportunity to nominate a strong New Deal advocate like Felix Frankfurter to be an Associate Justice of the Supreme Court.

Although a great number of works on the Commerce Clause were produced during the progressive era and during the early years of the New Deal, relatively few book-length studies were produced from 1937 when the Supreme Court took a broadened view of Commerce Clause-based legislation but before 1995. At the end of the turbulent 1960s, Paul R. Benson authored *The Supreme Court and the Commerce Clause, 1937-1970.*[30] Benson divides his work into three sections; the first section reviews the decisions from 1824 to 1942, which included the transition to unrestricted congressional power in 1937. Next, the second section elaborates the idea that Congress may use its plenary commerce power to address issues having only an indirect effect

[29] Edward S. Corwin, *The Commerce Power Versus States Rights* (Princeton: Princeton University Press, 1936).
[30] Paul R. Benson, Jr., *The Supreme Court and the Commerce Clause, 1937-1970* (New York: Dunellen Publishing, 1970).

on interstate commerce. This section also highlights the congressional debates on the public accommodations sections of the Civil Rights Act of 1964, which Congress grounded in the commerce power – and the related seminal decisions of the Warren Court in *Heart of Atlanta Motel* v. *United States* and *Katzenbach v. McClung*, both handed down in December 1964, which upheld Title II of the act requiring the desegregation of public accommodation. In the final section, Benson argues that states still burden interstate commerce through state taxation. Indeed, the balance of state and federal taxation of interstate commerce appeared to have been one of the few remaining disputes about commerce power in the period that Benson studied. While warning the Supreme Court against an undue deference to state power, Benson concludes that "the Court deserves high praise and strong public support for a job well done in an exceedingly difficult field."[31]

Writing in 1992, Neil H. MacBride argues that the administration of President John F. Kennedy was correct to take the view that Title II of the 1964 Civil Rights, which mandated the racial desegregation of public accommodations, was warranted by the Commerce Clause. But he also reveals that the internal deliberations of the Warren Court over this extraordinarily important question suggested a majority would have preferred to uphold Title II entirely on Section 5 of the Fourteenth Amendment. That section declared that Congress had the power to enforce the Fourteenth Amendment, including its equal protection provisions, by "appropriate legislation."[32]

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[31] See also Paul J. Hartman, *State Taxation of Interstate Commerce* (Buffalo: Dennis & Co., Inc., 1953).

[32] Neil H. MacBride, "The Politics of Public Accommodations: The Search for a Constitutional Basis for Title II." *Journal of Law & Politics*, Vol. 8, no. 2 (1992): 437-476. For a more critical discussion see Ann Althouse, "Inside the Federalism Cases: Concerns about the Federal Courts."

In the 1980s, scholarly interest in Commerce Clause adjudication picked up slightly as federal courts rendered several decisions appearing to calibrate the heretofore seemingly unlimited regulatory power it provided Congress. Publishing in 1980, Jerome M. Balsam examines closely a decision of the Burger Court, handed down that year, which invalidated a special tariff levied on foreign container cargoes.[33] Stephen L. Schechter, writing in 1978, assessed four lower federal court decisions upholding the power of Congress to preempt state and municipal authority to regulated noise produced by air traffic.[34] Quite similarly, in 1985, Charles A. Lofgren retrospectively examined a number of recently-passed congressional measures based on the commerce power to deal with the growing complexity of transportation and communications networks.[35]

The 1985 Commerce Clause decision of the Burger Court in *Garcia v. San Antonio Metropolitan Transit Authority* drew notable scholarly attention. Writing in 1987, with William Rehnquist now sitting as chief justice, Edward A. Lopez argued strenuously that the decision of the Burger Court declaring that Congress had preempted the regulation of employer-employee relations in the transit authority had improperly extended commerce power beyond its proper

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Annals of the American Academy of Political & Social Science, Vol. 574 (March 2001): 132-144.

[33] Jerome M. Balsam, "The Negative Commerce Clause – A Strict Test for State Taxation of Foreign Commerce: 'Japan line, Ltd. v. County of Los Angeles.'" *New Your University Journal of International Law & Politics*, Vol. 13, no. 1 (1980): 135-166.

[34] Stephen L. Schechter, "The Concorde and Port Noise Complaints: The Commerce and Supremacy Clauses Enter the Supersonic Age." *Publius: The Journal of Federalism*, Vol. 8, no. 1 (1978): 135-158.

[35] Charles A. Lofgren, "'To Regulate Commerce': Federal Power under the Constitution." *This Constitution: A Bicentennial Chronicle*, Vol. 10 (1986): 4-11.

bounds, that is the regulation of management-labor relations in the private sector.[36] In a similar vein, publishing the same year, William R. Denny complained that the failure of the Burger Court, in *Garcia*, to recognize the sovereign power of the states and their incorporated subdivisions marked yet another step in the slow demise of a proper administration of federalism principles.[37]

Scholarship on the Rehnquist Court amply addresses its novel conservative bearings. The Rehnquist Court began with Scalia and eight members of the Burger Court: Rehnquist, William Brennan, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, John Paul Stevens, and Sandra Day O'Connor. Powell retired in 1987 and was, ultimately, replaced by Reagan-appointee Anthony Kennedy. After Brennan's retirement in 1990 and Marshall's in 1991, President George H.W. Bush appointed David Souter and Clarence Thomas. After White retired in 1993 and Blackmun did so in 1994, President Bill Clinton appointed Ruth Bader Ginsburg and Stephen Breyer. Consequently, nine justices served together from 1994 until Rehnquist's death in 2005. Mark V. Tushnet describes the distinctive stability of the Court in these years.[38] The autobiography that Chief Justice Rehnquist published in 2001 suggests the importance he attached to the processes of Supreme Court decision making, from the assignment of cases to the scheduling and structuring of conferences.[39] According to David L. Hudson, Jr., the

[36] Eduard A. Lopez, "The Constitutional Doctrines of State Immunity from Federal Regulation and Taxation after Garcia v. San Antonio Metropolitan Transit Authority." *Journal of Law & Politics*, Vol. 4, no. 1 (1987): 89-122.
[37] William R. Denny, "Breakdown of the Political Safeguards of Federalism: A Response to Garcia v. San Antonio Metropolitan Transit Authority." *Journal of Law and Politics*, Vol. 3, no. 4 (1987): 749-767.
[38] Mark V. Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W.W. Norton & Company, 2005).
[39] William H. Rehnquist, *The Supreme Court* (New York: Alfred A. Knopf, 2001).

conservatism of Chief Justice Rehnquist was relatively mild in comparison to that of justices Clarence Thomas and Antonin Scalia, which the chief justice engaged with respect and moderation.[40]

On the other hand, biographer John Jenkins argues that Chief Justice Rehnquist politicized the Court, moved it to the right, and that he was the most openly conservative jurist ever to occupy the office of chief justice.[41] While Rehnquist was commonly the lone conservative dissenter on the Burger Court, the appointments of O'Connor, Scalia, Kennedy, and, perhaps most importantly, Thomas, situated him as something of a moderate among his conservative colleagues.[42] According to Mark V. Tushnet the key division of the Rehnquist Court was, in fact, between justices attuned to the ideals of the "modern post-Reagan Republican Party" and centrists who adhered to an older Republican tradition.[43] Contributors to an anthology edited by Christopher E. Smith, Christina Dejong, and Michael A. McCall conclude, among other things, that the Rehnquist Court refined and delimited many of the Warren Court decisions expanding the rights of criminal suspects and defendants.[44]

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[40] David L. Hudson, Jr., *The Rehnquist Court: Understanding its Impact and Legacy* (Westport: Praeger, 2007).

[41] John A. Jenkins, *The Partisan: The Life of William Rehnquist* (New York: Public Affairs, 2012). See also Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004); Stephen E. Gottlieb, *Morality Imposed: The Rehnquist Court and the State of Liberty in America* (New York: New York University Press, 2000); Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (*Minneapolis: University of Minnesota Press, 2005).

[42] Jeffrey Rosen, "Rehnquist the Great?" *The Atlantic*, April 2005, 79-80.

[43] Mark V. Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W.W. Norton & Company, 2005). See James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* (New York: Simon & Schuster, 1995).

[44] Christopher E. Smith, Christina DeJong, and Michael A. McCall, eds, *The Rehnquist Court and Criminal Justice* (Lanham: Lexington Books, 2011).

Richard Epstein, writing in 1987, sought to take advantage of the conservative judicial winds to weigh in on an argument most liberal-minded jurists thought was over – the significance of the Commerce Clause. According to him, "the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government."[45] Epstein explained that, based upon documents of the founding era, the term "commerce" is interchangeable with the term "trade." He grounded his assertions on his readings of David Hume's work on commerce, as well as Madison's notes on the convention and *The Federalist Papers*.[46] Based upon his argument that "commerce" means only "trade" and not "every species of gainful activity," it followed that the Lochner Era justices were correct in their jurisprudence and the subsequent New Deal Congress had no constitutional authority to legislate in areas of agriculture and manufacturing that occurred within a single state.[47] Epstein also stressed that Congress' powers were limited to those enumerated in Article 1, Section 8 and that the Necessary and Proper Clause only applied to those specific powers in their most restricted sense, rather than a power to create law in *any* area that Congress believed was needed.

In the early years of Chief Justice Rehnquist's tenure, it was not entirely clear to some legal scholars whether the Court would steer a new direction in federalism jurisprudence. An article by Earl A. Molander and Janice E. Jackson, published in 1988, commented favorably on the way

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[45] Epstein, "The Proper Scope," 1388.

[46] David Hume, "Of Commerce," *Essays: Moral, Political, and Literary* (Indianapolis: Liberty Classics, 1985), 252, 263-64 in Epstein, "The Proper Scope," 1389.

[47] The Lochner Era, 1897 to 1936, was characterized by the Court's view that the commerce power of Congress did not include the authority to regulate agricultural and manufacturing activities that occurred wholly within individual states. For a recent treatment of the period, see David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011).

Congress and the federal courts were employing Commerce Clause power quite consistently on behalf of affirmative action programs based on Title VII of the 1964 Civil Rights Act.[48] Publishing in 1992, Vicki C. Jackson concluded that several Burger Court rulings seemed to have drawn into question the long-established view that the Eleventh Amendment set out a broad constitutional principle of state sovereign immunity. In *Pennsylvania v. Union Gas,* handed down in 1988, the Rehnquist Court seemed to have departed from these decisions, holding, instead, that Congress had the power to abrogate states' immunity from suit under its commerce power – at least if the text of the congressional statute itself, as distinct from its legislative history, clearly and specifically so provided.[49] Writing in 1993, David M. O'Brien described how constitutional scholars had anticipated that the Supreme Court of the 1980s would become more protective of states' rights. He based this view on the ruling of the Supreme Court in *National League of Cities v. Usery* (1976), in which it held that Congress could not extend the minimum wage and maximum hours of the Fair Labor Standards Act to employees of states and their political subdivisions. According to O'Brien, however the Rehnquist Court had not retreated from decisions that found implied statutory preemptions of state authority in Commerce Clause-based congressional legislation or from otherwise finding dormant-Commerce Clause restrictions on state sovereignty. On the other hand, he identified a notable exception in the 1992 decision

[48] Earl A. Molander and Janice E. Jackson, "The Social Contract Between Business and Society in Constitutional Perspective." *Proteus,* Vol. 5, no. 2 (1988): 23-32.

[49] Vicki C. Jackson, "State Sovereignty and the Eleventh Amendment in the U.S. Supreme Court: The 1988 Term." *Publius: The Journal of Federalism*, Vol. 22, no. 1 (1992): 39-54. *Edelman v. Jordan* (1974) and *Pennhurst State School and Hospital v. Halderman* (1984) had declared that injunctive relief could be issued against state officers in federal courts, even though a suit for damages in compensation for past wrongs remained barred. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984); *Pennsylvania v. Union Gas*, 9491 U.S. 1 (1989).

New York v. United States, in which the Court declared that a provision of the 1985 Low-Level Radioactive Waste Policy Amendments Act had improperly attempted to coerce the states into participating in a federal regulatory program.[50]

Among those who, in response to the watershed 1995 decision *United States v. Lopez,* hopefully predicted a constitutional revolution much like that which occurred in 1937 were well-known constitutional originalists. Steven Calabresi, one of the more prominent of these legal scholars, writing in 1995, suggests that the decision in *Lopez* constituted a sea change in Commerce Clause doctrine, indeed, one that revitalized seminal understandings of its initial constitutional moorings."[51]

Also writing shortly after the *Lopez* decision, Kathleen F. Brickey argued that the greatest significance of *Lopez* might have been its communicative value, as the Court's message to Congress conveyed that the federal court system was overburdened with the "burgeoning body of federal criminal law, much of which overlaps with or merely duplicates state crimes."[52] Andrew Weis made similar comments and stressed that the Lopez decision "spawned a revival of

[50] David M. O'Brien, "The Rehnquist Court and Federal Preemption: In Search of a Theory." *Publius: The Journal of Federalism*, Vol. 23, no. 4 (1993): 15-31; *National League of Cities v. Usery*, 426 U.S. 833 (1976); *New York v. United States,* 505 U.S. 144 (1992). See also Nim Razook, "The Perils of Pragmatic Preemption: A Caution About Using Efficiency Norms in Federal Preemption Decisions." *Journal of Law & Politics*, Vol. 15, no. 1 (January 1999): 37-65.
[51] Steven G. Calabresi, "A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez," *Michigan Law Review,* Vol. 94, (1995), 752.
[52] Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez* (St. Louis Missouri: Washington University School of Law, 1995), 34.

Commerce Clause jurisprudence in lower federal courts across the states."[53] Indeed, the Supreme Court relied heavily on *Lopez* in its 2000 decision *United States v. Morrison*.

Raoul Berger's 1996 article criticizing the post-New Deal expansion of Commerce Clause power came in the wake of the *Lopez* ruling. He argued that it was not too late to correct the wrongs of previous precedents. In his view, *Lopez* offered a singular opportunity to appreciate anew what the Framers, in fact, intended the Commerce Clause to mean."[54] Berger mirrored the 1987 conclusions of Richard Epstein about the meaning of the Commerce Clause, although Berger especially emphasizes how the Founding generation expected the government to live firmly within the boundaries set by the Constitution.[55] Any increase in the commerce power of the federal government would have to be authorized by an amendment to Constitution per the requirements of its Article V. Having made the case to live within the Constitution's limits and showing why the Commerce Clause's meaning should be tightly constructed, Berger concludes by positing that current precedents should not impede the Supreme Court's return to a limited construction of the Clause: "The precedents of 'the past 60 years,' however, are entitled to no more respect than the Court."[56]

Countering the approaches to Commerce Clause interpretation advanced by Epstein and Berger were Grant S. Nelson and Robert J. Pushaw, Jr. Writing in 1999, they agreed with Epstein and Burger that "the Court's post-1937 jurisprudence sustaining congressional power to regulate any activity as long as some "rational basis" exists for the legislative conclusion that it

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[53] Andrew Weis, "Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes," *Stanford Law Review,* Vol. 48 (May 1996): 1432.
[54] Berger, "Judicial Manipulation," 696.
[55] Ibid.
[56] Ibid., 715.

"substantially affects" interstate commerce" was an overextension of the original commerce power. However, they argued, "[t]he Epstein/Burger/[Clarence]Thomas approach is historically unsound and lacks practical utility."[57] Nelson and Pushaw researched the meaning of "commerce" as well as the term "commercial" as used in the eighteenth century and determined that "commerce" meant "the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests."[58] With this broadened view of the Clause, they suggested sustaining federal laws pertaining to commercial matters that implicated more than one state. However, federal Commerce Clause-based laws that "cover conduct such as consensual sex, the possession of guns or drugs for personal use, and gender-related violence"[59] were to be struck down as unconstitutional. They concluded that this standard would be less disruptive to the modern regulatory state while still providing a constitutionally sound standard against which to apply Commerce Clause-based statutes.

Environmentalist Lydia B. Hoover, writing in 1997, was less enthusiastic about the recent decisions of the Supreme Court that had moved away from allowing the power of the federal government to increase steadily. In her view, the renewed recognition by the Court of state sovereign authority posed a serious problem for environmentalism and environmental legislation. Particularly worrisome to her was the holding in *United States v. Lopez*, which, in her view, articulated the view of the Court that the power of Congress under the Commerce Clause could,

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[57] As Nelson and Pushaw note, Justice Clarence Thomas expressed a view much like that taken by Epstein and Burger in the *Lopez* decision. Nelson and Pushaw, "Rethinking," 6.
[58] Nelson and Pushaw, "Rethinking," 9. The two scholars, in a second paper, provided ample evidence showing that "commerce," indeed, had a primary meaning – "trade and transportation of merchandise." But they allowed that the use of the term in this signification was not exclusive," which Randy Barnett maintains. Nelson and Pushaw, "A Critique," 696.
[59] Nelson and Pushaw, "Rethinking," 10.

in fact, extend only to commerce or economic activities that substantially affected actual interstate commerce.[60]

Economist Michael Conant, writing in 2001, declared that, notwithstanding the alarmed responses by some commentators to *United States v. Lopez*, the future of federalism had not, in fact, been at stake in the decision. He argued that the unusual federalism issue ruled on in *Lopez* was, simply, whether "noncommercial activity," the simple possession of a handgun in a school zone, was a proper subject for regulation by Congress under its interstate commerce authority. He declares that any conscientious student of constitutional law would know that the vast array of Commerce Clause decisions rendered by the Supreme Court, from *Gibbons v. Ogden* (1824) to the time of his publication, concerned the regulation of commercial transactions. In his view, the Rehnquist Court came to the obviously correct decision in *Lopez*.[61]

At the turn of the twenty-first century, numerous commentators concluded that the Rehnquist Court had, in various ways, doubled down on undergirding state sovereignty in ways unfavorable to progress. Publishing in 2000, Susan Gluck Mezey surveyed the federalism jurisprudence of the Rehnquist Court in the 1990s, emphasizing that the Court had rendered decisions interpreting the Commerce Clause that clearly placed limits on the power of Congress. According to Mezey, of critical importance in this development was the 1999 decision *Alden v. Maine,* in which the Court concluded that Article I of the Constitution did not provide Congress the power to subject nonconsenting states to private suits for damages in federal courts. Such immunity, the Court declared was necessary to maintain the state sovereignty that lay at the heart

[60] Lydia B. Hoover, "The Commerce Clause, Federalism and Environmentalism: At Odds After Olin?" *William & Mary Environmental Law and Policy Review*, Vol. 21, no. 3 (1997): 735-777.
[61] Michael Conant, *Constitutional Structure and Purposes: Critical Commentary* (Westport: Greenwood Press, 2001), 111-126.

of federalism and that such sovereign rights derived from the federal structure of the original Constitution. Mezey, however, concludes that this interpretation of sovereign-immunity doctrine posed a threat to a fundamental principle inherent to the rule of law: "where there is a right, there is a remedy."[62] Writing in 2001, Vicki Lens argued that, indeed, the Supreme Court had, through the 1990s, entered a new era by discarding precedents to reshape state-federal relations. In this court-generated policy of "devolution," new Commerce Clause interpretations severely threated numerous civil rights and social welfare laws.[63]

Some proponents of a "living Constitution" agreed with the 1995 prediction of Steven Calabresi that the decision in *Lopez* constituted a sea change in Commerce Clause doctrines – but viewed this turn of events with less enthusiasm. In 2002, Erwin Chemerinski lamented that "[w]e are at a time of the triumph of conservative judicial ideology" but reminded readers that "no single decision changes the nature of constitutional law." Instead, he argued, the Court had not overturned the most politically important Supreme Court decisions, such as those concerning abortion rights or affirmative action, but, instead, made its most dramatic changes in constitutional understanding in less newsworthy ways, such as limiting access to the federal courts and expanding sovereign immunity.[64] But, in 2000, Linda Greenhouse of the *New York Times* referred to the ruling in *Lopez* and others bolstering state sovereignty as part of "a federal

[62] Susan Gluck Mezey, "The U.S. Supreme Court's Federalism Jurisprudence: Alden v. Maine and the Enhancement of State Sovereignty." *Publius: The Journal of Federalism*, Vol. 30, nos. 1-2 (2000): 21-38; *Alden v. Maine*, 527 U.S. 706 (1999).
[63] Vicki Lens, "The Supreme Court, Federalism, and Social Policy: The New Judicial Activism." *Social Service Review*, Vol. 75, no. 2 (2001): 318-336.
[64] Erwin Chemerinski, "Progressive and Conservative Constitutionalism as the United States Enters the 21st Century," *Law and Contemporary Problems*, Vol. 67, No. 53 (Summer 2002): 53.

counterrevolution" in which "a constitutional development of potentially enormous significance has been unfolding."[65]

Other commentators and scholars were impressed, both positively and negatively, with the Rehnquist Court Commerce Clause decisions, although they were not convinced that a new era of Constitutional law had arrived. Mark V. Tushnet argued that no significant "revolution" had or could occur because the Republican side of the Court was divided into three Goldwater conservatives, Rehnquist, Scalia, and Thomas, and two socially liberal but fiscally conservative justices, O'Connor and Kennedy. Given that division, the likelihood that the Court would overturn precedents was minimal and its turnaround would be partial at most.[66] Likewise, Diane McGimsey commented that while the Rehnquist Court decisions were important, they held little meaning if Congress could simply rewrite statutes to include an express jurisdictional-element to satisfy the Court's requirement for a nexus with interstate commerce. She argued that the Court must limit congressional use of the jurisdictional element by imposing a "purpose nexus" requirement that "would require the jurisdictional element to conform both to the purposes of the statute and the purposes underlying the Commerce Clause power itself."[67]

Other legal scholars also saw no grand constitutional reversal in the Rehnquist Court Commerce Clause decisions, but perceived instead that these rulings presented a limited opportunity to exclude federal legislation from what had historically been the domain of states and localities, the area of criminal law. Ole O. Moen concludes that the Rehnquist Court adoption of a more

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[65] Linda Greenhouse, "Battle on Federalism," *New York Times*, May 17, 2000, A18, col. 3.
[66] Mark V. Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York and London: W. W. Norton and Company, 2005).
[67] Diane McGimsey, "The Commerce Clause and Federalism after *Lopez* and *Morrison*: The Case for Closing the Jurisdictional-Element Loophole," *California Law Review,* Vol. 90 (2002), 1677, 1681.

stringent understanding of federalism constituted a brand of conservative judicial activism that enlarged both the power of the states and the authority of the Court itself.[68]

Although book-length works published after 1937 focusing on the Commerce Clause are few, one such work appeared in 2004. Dan T. Coenen published *Constitutional Law: The Commerce Clause* as part of a "black letter law" series on constitutional law for law students and lawyers. Given its intended audience, the book offers few new historical interpretations. But it does provide a useful overview of Supreme Court decisions concerning the commerce power and, particularly, the twentieth century development of dormant Commerce Clause principles, which, as a matter of inference from the Commerce Clause, prohibited a state from passing legislation that impermissibly burdened interstate commerce. While concentrating on the then-current state of Supreme Court doctrine, Coenen presents his discussion of key decisions with an eye toward revealing how the New Deal Supreme Court produced Commerce Clause doctrines that undergirded the power of Congress to protect the rights of labor, regulate the financial industry, and promote the public welfare. He also maps out quite carefully the way that the mid-twentieth century Civil Rights Movement steadily generated new Commerce Clause jurisprudence to protect racial minorities, women, the aged, and persons with disabilities. With equal care he describes key rulings of the Court in the 1990s, when "officials in all branches of the federal government looked hard at whether sweeping post-New Deal invocations of the Commerce Clause had overshot constitutional boundaries."[69]

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[68] Ole O. Moen, "New Judicial Federalism: The Rehnquist Court, Judicial Activism, and Devolution." *American Studies in Scandinavia*, Vol. 36, no. 2 (October 2004): 49-76.
[69] Dan T. Coenen, *Constitutional Law: The Commerce Clause* (New York: Foundation Press, 2004), 3.

In 2006, Tinsley E. Yarbrough concluded that the Rehnquist Court had rendered decisions generally in continuity with precedents but with novel modulations commonly marked by a conservative outlook. The most significant departure of the Court, he emphasized, was to reverse the decades-old trend of ever-widening commerce power to regulate the national economy.[70] Rosalie Berger Levinson and Lori A. Ringhand showed that Chief Justice Rehnquist was, quite frequently, joined in this project by justices O'Connor, Scalia, Kennedy, and Thomas.[71] Michael Les Benedict took a more cynical view:

> One might expect a commitment to state rights to lead the Court to defer to state policy judgments and court decisions, but only O'Connor seemed to fulfill that expectation. Both the liberal and the conservative justices tended to praise state autonomy when state decisions conformed to their ideological commitments and to override it when they did not.[72]

Donald L. Doernberg, writing in 2005, examined the historical conflict between contending theories of sovereign immunity and the rule of law – and their relationship to the New

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[70] Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (Oxford: Oxford University Press, 2000). See also Tinsley E. Yarbrough, *David Hackett Souter: Traditional Republican on the Rehnquist Court* (Oxford: Oxford University Press, 2005). See Thomas R. Hensley, *The Rehnquist Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, 2006) and Craig M. Bradley, ed., *The Rehnquist Legacy* (Cambridge and New York: Cambridge University Press, 2006).

[71] Rosalie Berger Levinson, "Will the New Federalism Be the Legacy of the Rehnquist Court?" *Valparaiso University Law Review*, Vol. 40, no. 3 (Summer 2006): 589–598; Lori A. Ringhand, "The Rehnquist Court: 'By the Numbers' Retrospective." *Journal of Constitutional Law*, Vol. 9, no. 4 (April 2007).

[72] Michael Less Benedict, *The Blessings of Liberty: A Concise History of the Constitution of the United States*. Second ed. (Boston and New York: Houghton Mifflin Company, 2006), 413. See also ibid., "The Rehnquist Court and Federalism," 410-413.

Federalism of the Rehnquist Court, with two chapters devoted to the "dormant Commerce Clause" and state preemption issues.[73]

According to legal historians Kermit L. Hall and Peter Karsten, writing in 2009, the Commerce Clause rulings of the Rehnquist Court "applied the brakes on Congress's use of the interstate commerce clause" in a series of decisions that voided several congressional enactments, namely the Gun-Free School Zones Act of 1990 and the Violence against Women Act of 1994. The Rehnquist-led majority found these uses of the Clause to lack genuine commercial dimensions. Accordingly, these authors concluded that "the Court upheld Congress's use of the clause in decisions were state statutes were preempted by federal statutes that applied the clause to clear issues involving commercial traffic."[74] Christopher P. Banks and John C. Blakeman, writing in 2012, readily confirmed that the New Federalism of the Rehnquist Court had, indeed, entailed recognizing state sovereignty at the expense of federal power.[75]

In 2014, Richard A. Epstein argued that, while *United States v. Lopez* announced a wholly new direction in Commerce Clause jurisprudence, the significance of the decision remained unclear:

> The last stage of constitutional development started in 1995 with the *United States v. Lopez*. . . In one sense the opinion reads as a sea change insofar as it indicated that there was at least some outer limit on the scope of federal power, if only because a federal statute was actually struck down for exceeding the bounds of the Commerce Clause. But

[73] Donald L. Doernberg, *Sovereign Immunity or the Rule of Law: The New Federalism's Choice* (Durham: North Carolina Academic Press, 2005), 160-175.
[74] Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in American History*. Second edition (New York and Oxford: Oxford University Press, 2009), 376.
[75] Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From Rehnquist to the Roberts Court* (Lanham: Rowman & Littlefield, 2012).

> at root, the opinions in *Lopez* do nothing to unpack the deep contradictions in Commerce Clause interpretation. . . ."[76]

To reach this conclusion, Epstein argues that, in *Lopez*, Chief Justice Rehnquist reduced key Commerce Clause precedents to a tripartite standard, drawn from numerous decisions of the Court, without explaining contradictions in the various rationales that had produced them.

Most Supreme Court analysts presupposed that the Roberts Court would extend the Commerce Clause jurisprudence and New Federalism of the Rehnquist Court. Initially, at least, they concluded that the Court was more conservative than its predecessor. When John Roberts was confirmed chief justice in September 2005, eight of the sitting justices had served on the Rehnquist Court: John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. Most seemed to agree that that the Court became even more conservative because of the retirement of O'Connor and resulting 2006 appointment of more conservative Justice Samuel Alito.

But the direction of the Court became less obvious in 2009 and 2010, when President Barrack Obama appointed, respectively, Sonya Sotomayor (to replace David Souter) and Elena Kagan (to replace John Paul Stevens). With this composition, the Court ruled conservatively in some instances and more liberally in others. Mark V. Tushnet describes how, at least through 2013, the balance of the court was complicated and fluid. The five conservative-oriented justices included Alito, Thomas, Kennedy, Roberts, and Scalia, while Ginsburg, Breyer, Sotomayor, and Kagan generally took more liberal positions. But Kennedy sometimes sided with the liberals,

[76] Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge: Harvard University Press, 2014), 183.

while Chief Justice Roberts often served as a swing vote. In doing so he often sought compromise or advocated delimited holdings to find consensus.[77] Steve V. Mazie argues that the justices were commonly willing to break ideological ranks, a tendency particularly pronounced among the more conservative justices, including Chief Justice Roberts.[78] In this circumstance, as Michael C. Gizzi and R. Craig Curtis show regarding the increasingly complicated decisions of the Court on electronic privacy in the cyber-age, fathoming the ideological sources of opinion writing was not easy.[79] According to Justice Antonin Scalia, the willingness of Chief Justice Roberts to accommodate his fellow justices to reach consensus set him apart notably from his predecessor. This was a tendency that would have a major impact on the Commerce Clause jurisprudence of the Court. Many observers came to view Chief Justice Roberts as more of a centrist than a conservative – and certainly more moderate than Justice Antonin Scalia (before his death in February 2016) and Justice Clarence Thomas.[80]

Writing in 2013, Marcia Coyle surmised that Chief Justice Roberts had not demonstrated a particularly deep commitment to constitutional originalism. The strongest tendency exhibited by the chief justice, albeit certainly in keeping with the New Federalism, was to attempt, through moderation, to re-confirm the Supreme Court as a neutral, dispassionate tribunal operating

[77] Mark V. Tushnet, *In the Balance: Law and Politics on the Roberts Court* (New York: W.W. Norton & Company, 2013).
[78] Steve V. Mazie, *American Justice 2015: The Dramatic Tenth Term of the Roberts Court* (Philadelphia: University of Pennsylvania Press, 2015).
[79] Michael C. Gizzi and R. Craig Curtis, *The Fourth Amendment in Flux: The Roberts Court, Crime Control, and Digital Privacy* (Lawrence: University Press of Kansas, 2016).
[80] Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (St. Paul: Thomson West, 2008).

according to orderly processes and the rule of law.[81] Jonathan H. Adler observed that, in his first seven years as chief justice, in no instance did Roberts display a willingness to depart ideologically from his fellow justices to seek middle ground so dramatically as in *National Federation of Independent Business v. Sebelius* (2012). In this decision, the chief justice authored an opinion that engaged deeply, with both liberal and conservative approaches, the controversial question of whether the "individual mandate" of the 2010 Patient Care and Affordable Care Act could be supported by the Commerce Clause.[82] A number of scholars have noted that the tendency of the Roberts Court to render decisions pleasing to liberals on some occasions and to conservatives on others produced strongly worded critiques from both sides of the ideological aisle. This was so especially in response to decisions that upheld Second Amendment Rights, corporate financing of political campaigns, and gay marriage and abortion rights.[83]

Scholars assessing the work of the Supreme Court under Chief Justice Roberts

[81] Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* (New York: Simon & Schuster, 2013); Mark V. Tushnet, *In the Balance: Law and Politics on the Roberts Court* (New York: W.W. Norton & Company, 2013).

[82] For assessments of Roberts Court decisions regarding enterprise and labor relations, see Jonathan H. Adler, ed., *Business and the Roberts Court* (New York: Oxford University Press, 2016).

[83] Ronald K.L. Collins, "Foreword, Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism." *Albany Law Review* 76.1 (2013): 409-66; Stephen E. Gottlieb, *Unfit for Democracy: The Roberts Court and the Breakdown of American Politics* (New York University Press, 2016); Adam Liptak, "Court Under Roberts Is Most Conservative in Decades," *New York Times*, July 24, 2010; Lawrence H. Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (New York: Henry Holt and Company, 2014); Gregory P. Magarian, *Managed Speech: The Roberts Court's First Amendment* (New York: Oxford University Press, 2017).

before the July 2012 ruling of the Court on the 2010 Affordable Care Act appear to take somewhat divergent views on the extent to which the Court embraced Rehnquist Court New Federalism or otherwise articulated a viable set of federalism principles and doctrines. Christopher Banks and John Blakeman make the case that the federalism decisions of the Court depended vitally on the critical swing vote of Justice Anthony Kennedy. By summer 2008, however, neither Chief Justice Roberts nor Justice Samuel Alito, who had become an associate justice on January 31, 2006, could be counted on to advance consistently particular viewpoints on the question.[84] In any case, they conclude that the New Federalism "evolved" as the Roberts Court seemed to demonstrate a more pro-business orientation and affirm federal government power more frequently than its predecessor, with these tendencies exhibiting themselves in cases that involved statutory construction and "dormant Commerce Clause" preemption of state regulatory power.[85] In a more philosophical vein, Malcolm Feeley and Edward Rubin raise the question of whether steadfast constitutional recognition of state and local autonomy can address the increasingly complex challenges facing the United States.[86] Quite similarly, Erin Ryan makes the case that, as of early 2012, at least, the federalism jurisprudence of the Supreme Court had become unstable and unpredictable. Considering problems that required coordination of local and natural authority, such as those that became evident in Hurricane Katrina and amid efforts to

[84] Christopher Banks and John Blakeman, "Chief Justice Roberts, Justice Alito, and New Federalism Jurisprudence." *The Journal of Federalism*, Vol. 38, no. 3 (Summer 2008): 576-600.
[85] Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From Rehnquist to the Roberts Court* (Lanham: Rowman & Littlefield, 2012), 448-450.
[86] Malcolm Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008).

reform health care, Ryan argues that the federalism jurisprudence of the Roberts Court comes up woefully short.[87]

Scholarly analysis of *National Federation of Independent Businesses v. Sebelius* (2012) certainly has produced no consensus on the ruling itself or its implications for Commerce Clause or federalism jurisprudence. With respect to the "individual mandate" set out in the ACA requiring individuals to purchase health insurance, Einer R. Elhauge maintains that the claim made by the majority in *Sebelius* that Congress had never before commanded citizens to purchase a product was, simply, not true – pointing to a 1792 congressional enactment requiring all able bodied men to own a firearm.[88] Alan Brinkley praises the decision, which largely upheld the ACA, because it would make it possible for more citizens, including those with low incomes and pre-existing health problems, to obtain much-needed health insurance.[89] Alternatively, David T. Beito, decried the decision of the Court in *Sebelius*, and regarding the individual mandate in particular, concluded that the decision undermined personal liberty.[90]

In the introduction to their anthology of essays on *Sebelius*, Fritz Allhoff and Mark Hall emphasize the magnitude of the decision and, to many, the almost shocking positions taken by some of the justices. According to them, "*Sebelius* is a once-in-a-generation decision – perhaps even once in a lifetime. No case before it has had such monumental importance for how health care is financed and delivered in the United States. . . ." Congress had never used its commerce

[87] Erin Ryan, *Federalism and the Tug of War Within* (Oxford and New York: Oxford University Press, 2012).
[88] Einer Richard Elhauge, *Obamacare on Trial* (Elhuage, CreateSpace Self Publishing, 2012).
[89] Alan Brinkley, "The Battle over Health Care is Not Over." *Perspectives on History* (June 2012): 5-6.
[90] David T. Beito, "A Bleak Day for the Defenders of Personal Liberty." *Perspectives on History* (June 2012): 1-2.

power to "require the unconditional purchase of a regulated product." Consequently, the case "offered advocates of smaller government a prime opportunity to cabin the expansive federal commerce power." Surprising to observers was the holding of a 5-4 majority that the power of Congress to tax authorized the individual mandate "penalty," which all understood was central to the viability of the Affordable Care Act. But equally unexpected was that Chief Justice Roberts would turn out to be the swing vote saving the legislation. And "almost no one expected seven of the justices to concur that Congress lacked authority under the Constitution to require states to expand Medicaid at the risk, in the absence of compliance, of losing their extant Medicaid matching funds." No less surprising, say Allhoff and Hall, was the dissent by "the other four conservative justices," who signed their opinion jointly, and, in lieu of a concurring opinion, at least in part, reiterated key points about the Commerce Clause that the Chief Justice had made in one part of his opinion. According to Allhoff and Hall, Chief Justice Roberts "was satisfied to set conservative precedent that limited federal powers under both the Commerce Clause and the Spending Clause," not feeling the need to overturn the entire Affordable Care Act, at least when it could be salvaged with "tax law technicalities." "Roberts was Solomonic," they conclude, while "[o]thers harken to Judas."[91]

Marcus Schulzke and Amanda Cortney Carroll maintain that continuing heated arguments between liberals and conservatives over the power of the federal government in relation to state governments to shape domestic policy must inform any understanding of the *Sebelius* decision.[92]

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[91] Fritz Allhoff and Mark Hall, Introduction: *NFIB v. Sebelius*: A Case for the Ages," pp. 1-6, in Allhoff and Hall, eds., *The Affordable Care Act Decision: Philosophical and Legal Implications* (Routledge, 2014; Hoboken: Taylor and Francis, 2014), 1-3.

[92] Marcus Schulzke and Amanda Cortney Carroll, "The Health of the Commerce Clause: The Sebelius Decision and the Future of Federal Power," pp. 272-282, in Allhoff and Hall, eds, *The Affordable Care Act Decision*, 272.

Following the line of thought advanced earlier by Freely, Rubin, and Ryan – Cynthia J. Bowling and J. Mitchell Pickerill, writing in 2014, advance the view that, as a consequence of intense party polarization going back decades, federalism had become fragmented and, consequently, dysfunctional. Central to this problem, they argued, was a Supreme Court that protected state sovereignty from federal encroachments at times, while approving federal preemption of state laws at other times.[93]

Jeffrey Rosen took Chief Justice Roberts to task in 2013, it seems, for promising to promote a bipartisan legitimacy of the Court at the beginning of his tenure but, to some extent, succumbing to ideological agendas. While Roberts sided with the liberal wing of the Court to salvage the Affordable Care Act in *Sebelius*, the decision damaged public approval of the Court and confirmed, ironically, the nagging perception that the Court decides cases according to politics rather than the requirements of the Constitution.[94]

Pointing to the impact of culture wars conflict on constitutional adjudication is a 2002 anthology titled *Courts and Culture Wars*, contributors to which include Robert H. Bork, John C. Eastman, and Jeremy Rabkin. These jurists emphasize that, for much of the second half of the twentieth century, state and federal courts, relying on authority provided by the United States Constitution, "injected themselves into what many critics consider to be fundamentally moral or political disputes." By constitutionalizing these disputes, many believed that the courts had reduced the ability of Americans to engage in traditional, political modes of settling differences

[93] Cynthia J. Bowling and J. Mitchell Pickerill, "Fragmented Federalism: The State of American Federalism 2012-2013." *The Journal of Federalism* 43, no. 4 (October 2013): 315-346.
[94] Jeffrey Rosen, "Can the Judicial Branch be a Steward in a Polarized Democracy?" *Daedalus*, Vol. 142, no. 2 (Spring 2013): 25-36.

over issues that excite passions, including school prayer, abortion, gay rights, and expressive speech.[95]

Disputes over the Commerce Clause have produced some of the most profound controversies in United States history, especially in the last half of the twentieth century. In the view of Marcus Schulzke and Amanda Courtney Carroll, writing in 2014, "the Commerce Clause has repeatedly served as a means of enacting progressive policies, by allowing the federal government to intercede in politics at the state level to protect workers' rights, enact economic reforms, and eliminate de jure segregation." According to them, such progressive uses of the commerce power have been grounded in a "loose interpretation" of what amounts to interstate commerce. The decision of the United States Supreme Court to interpret the Commerce Clause to provide Congress a "broad grant of power" has been the foundation of contentious interventions at the state and local levels.[96]

That United States Supreme Court decisions ruling on the commerce power were central to culture wars conflict should not come as any surprise. Writing in 2011, Jamie Raskin maintains that, for more than a century, Congress has used the Commerce Clause as a tool for advancing social justice, fair competition, equal rights in the marketplace and workplace democracy. He also acknowledges that, because the Commerce Clause has been a powerful instrument of social reform over the last century, its meaning has provoked deep jurisprudential and political controversy. In his view, progressives had, for decades, enacted legislation grounded in the

[95] Bradley C. S. Watson, ed., *Courts and the Culture Wars* (Lanham, Maryland: Lexington Books, 2002), ix-xxv.

[96] Marcus Schulzke and Amanda Cortney Carroll, "The Health of the Commerce Clause: The *Sebelius* Decision and the Future of Federal Power, pp. 272-282, in Fritz Allhoff and Mark Hall, eds., *The Affordable Care Act Decision: Philosophical and Legal Implications* (Routledge, 2014; Hoboken: Taylor and Francis, 2014).

Commerce Clause that compelled corporate commerce to accommodate the agenda and values of progressive members of society.

For three decades following the Civil Rights Act of 1964, says Raskin, Congress acted with great energy and ambition to address civil rights, environmental, consumer, labor, trade, housing, public accommodations, public safety, education and occupational health and safety concerns. Congress acted with confidence that its enumerated constitutional power to regulate commerce, in conjunction with its powers under the Necessary and Proper Clause, was sufficiently expansive to protect and insulate such legislation. The Commerce Clause, Raskin emphasizes, had provided foundational authority for Congress not only to pass seminal civil rights legislation but also such measures designed to protect the environment and improve the rights of citizens in the workplace and marketplace.[97]

According to Raskin, the expansive definition of the commerce power set out by the United States Supreme Court in its New Deal-era and Great Society-era decisions created the space for Congress to enter the "modern era" of legislation. Most prominent among these, he argues, were *National Labor Relations Board v. Jones & Laughlin Steel Corp*. (1937) and *United States v. Darby Lumber Co.* (1941), upholding the power of Congress to regulate employment conditions, and *Heart of Atlanta Motel v. United States* 1964) and *Katzenbach v. McClung* (1964), which

[97] Raskin points to the Occupational Safety and Health Act of 1970; the Equal Pay Act of 1963; the Clean Air Act of 1963 (and its major amendments requiring regulatory controls for air pollution passed in 1970, 1977 and 1990) the Clean Water Act of 1972 (and its major amendments passed in 1977 and 1987).
Jamie Raskin, "The True Spirit of the Union: How the Commerce Clause Helped Build America and Why the Corporate Right Wants to Shrink It Today," People for the American Way Foundation. http://www.pfaw.org/report/the-true-spirit-of-the-union-how-the-commerce-clause-helped-build-america (accessed April 4, 2017).

upheld the constitutionality of Title II of the Civil Rights Act of 1964. [98] Those decisions also opened the door for the Supreme Court to begin issuing rulings on congressional legislation that steadily expanded Commerce Clause authority to promote liberal-progressive understandings of social justice, equality, and progress.

As indicated, the purpose of this study is not only to trace evolving Commerce Clause lawmaking and jurisprudence but also to demonstrate how changing meanings of the Commerce Clause were contested in the processes of congressional legislation, Supreme Court adjudication, and disputation among ordinary Americans – and proved pivotal in the culture wars conflict that engulfed the United States from the mid-1960s through at least 2012. Opening chapters deal broadly with socioeconomic, cultural, and political transformations and the contentious development of commerce power from 1789 through the New Deal and World War II (1789-1945); the early Cold War era (1946-1963); the tumultuous social movements of the 1960s and 1970s, the consolidation of the regulatory state, and the rise of the New Federalism (1964-1998). These three chapters, as narrative, set the stage. They also provide critical understandings of evolving commerce power and Commerce Clause principles and doctrines for the case-study chapters that follow. The first four chapter-length case studies lead off with the seminal 1995 Rehnquist Court Commerce Clause decision, *United States v. Lopez* and end with the controversial 2005 decision of that Court in *Gonzales v. Raich*. A fifth case study chapter examines the extraordinarily controversial "Obamacare" decision *NFIB v. Sebelius* (2012). Not anticipated at the outset of this project, this final case study chapter provides a distinctive opportunity to gauge the larger significance of the Rehnquist Court Commerce Clause decisions

[98] Ibid.

– and the Commerce Clause jurisprudence of the Supreme Court under the leadership of Chief Justice John G. Roberts, as well as the relationship of Roberts Court adjudication to the New Federalism.

This work largely draws on traditional source documents, including the *Congressional Record*, federal and state statutes, periodicals, federal district, circuit court and United States Supreme Court records and published decisions. All eight chapters include discussions of constitutional theories, principles, and doctrines quite likely not familiar to some American history generalists. The author can only say that politics, law, and policymaking in the United States by the mid-twentieth century had become extraordinarily complicated, relative to the Founding era, and especially from the perspective of those not formally trained in the law. Careful discussion of gargantuan congressional enactments and mercurial, arcane judicial rules and doctrines is, however, necessary for illuminating adequately the dynamic interaction of socioeconomic and cultural transformations, partisan politics, Commerce Clause-based congressional legislation, and United States Supreme Court decisions related thereto.

As indicated, the "culture wars constitutionalism" to be illuminated in this study focuses on the changing meanings and significance of commerce power in the period 1964-2012. As such, it proceeds from the proposition that a complete assessment of the development of that power, at least from the mid-1960s through 2012, must be understood as involving much more than simply a struggle between the federal government and state governments. One operational assumption is that, not only Congress, but also federal judges responded to and exerted partisan political pressures while rendering Commerce Clause-based law. As such, this study seeks to situate the work of both Congress and the Supreme Court in broad and dynamic contexts, including public opinion, interest group activity, partisan politics, the influence of organized

political parties on Congress and the Supreme Court, and related institutional practices. As well, a working rule of thumb will be that the decisions of the United States Supreme Court reflected changing judicial philosophies and approaches to decision-making that, to varying degrees, entailed a due regard for the text of statutes, the authoritativeness of judicial precedents, and the provisions of the Constitution.[99] This enquiry accepts that the decision-making of the Supreme Court involved periodic conflict over and re-formulation of Commerce Clause doctrines and normative constitutional theories.[100] The two most prominent constitutional theories in play, as discussed above, were ideas associated with the "living Constitution," near and dear to those with liberal-progressive orientations – and the originalist understandings of the Constitution, embraced by conservatives and libertarians, commonly associated with the New Federalism of the Rehnquist Court.[101]

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[99] Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2006), 1-24; Mitchell J. Pickerill and Cornell W. Clayton, "The Rehnquist Court and the Political Dynamics of Federalism," *Perspectives on Politics* 2 (2004): 233–248; Keith Whittington, "Taking What They Give Us: Explaining the Court's Federalism Offensive," *Duke Law Journal*, Vol. 69 (2002): 429–494; Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts C*ourt (New York: Rowman & Littlefield Publishers, 2012), 1-14.

[100] Lawrence B. Solum, "How *NFIB v. Sebelius* Affects the Constitutional Gestalt," *Washington University Law Review*, Vol. 91 (2013): 1-58, 41-45; Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge: Harvard University Press, 1997), 1-22; Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology, pp. 45-89, in James Boyle, ed. *Critical Legal Studies* (New York: New York University Press, 1992).

[101] Jack M. Balkin, "Commerce," *Michigan Law Review*, Vol. 109 (2010): 1-52; Jack M. Balkin, *Living Originalism* (Cambridge: Belknap Press of Harvard University Press, 2011); Randy E. Barnett, The Original Meaning of the Commerce Clause, *University of Chicago Law Review*, Vol. 68, no. 1 (2001): 101-147; Richard A. Epstein, "Constitutional Faith and the Commerce Clause," *Notre Dame Law Review*, Vol. 71 (1995): 167-191.

The case study chapters provide biographical sketches of litigants, defendants, victims, and key witnesses, as well as the attorneys and judges involved in each case, including at the federal district and appellate court levels. While situating changing constitutional understanding and jurisprudence within culture wars conflict in the period 1964-2012 constitute the core of this enquiry, the author intends each case-study chapter to render the participants active players in dramas whose outcomes were certainly not preordained but, rather, contingent on myriad circumstances. The idea is to bring the players to life by situating them deeply in the socioeconomic, cultural, and political circumstances in which their controversies arose. Close analysis of the circumstances of each case "down on the ground" also usefully reveals the relationship of litigation battles with the contentious cultural and political conflicts that roiled the intermingling waters of local, state, and national identities.

Chapter one examines the formulation of the Commerce Clause at the 1787 Philadelphia Constitutional Convention and its interpretation by the federal courts through 1945. In doing so, it examines how Congress and the Supreme Court during the nineteenth century developed commerce power suited for a rapidly-transforming nation, one that met the challenges of building transportation and communications infrastructure and, then, with unprecedented energy and success, embarked on rapid industrialization and urbanization. Equally important, it examines how New Deal renditions of "liberalism" in the late 1930s helped Americans perceive all these developments in positive terms and generally welcome the wholesale expansion of federal authority. In this connection, it investigates how political leaders and ordinary people steadily surrendered their local, state, regional, and national identities. Of larger importance, chapter one illuminates the fundamental reorientation of congressional and Supreme Court power to the exigencies of the Great Depression, New Deal, and Second World War. By 1945,

Congress and the Supreme Court had transformed the commerce power into a powerful tool for implementing the vision of liberal economists and technocrats bent on creating a stable, wholly-integrated national economy; controlling the production and prices of agricultural and manufactured products; bolstering the status and rights of organized labor; and regulating non-unionized employee-employer relations. No less important was the creation of a sizable federal bureaucracy whose operatives now wielded, often simultaneously, the authority to make regulations and enforce them. As had been established before the New Deal, commerce power held sway over the channels and instrumentalities of interstate commerce and goods transshipped in the flow of interstate commerce. The period 1937-1945, however, saw the most novel alteration of Commerce Clause understanding in the history of the United States to that time. This radical reorientation in Supreme Court adjudication established that the interstate commerce power of Congress and its new agencies could regulate intrastate activities having a substantial effect on interstate commerce – and, with the aid of the Necessary and Proper Clause, regulate or suppress altogether intrastate activities that undercut a federal regulatory scheme, new institutional arrangements that the New Deal produced in abundance.

The second chapter describes how commerce power from 1946 through 1963, more than any other constitutional authority, spurred the emergence of a centralized regulatory state far more encompassing and complicated than the federal apparatus that had existed before World War II. Party leaders, members of Congress, federal judges, and ordinary citizens affiliated with both major political parties energetically embarked on this project. Most Americans, amid rising Cold War tensions, viewed these changes with satisfaction, as they seemed, at the least, to be emblematic of rising United States wealth, prestige and power. Emerging commitments among conservative jurists to judicial restraint and process jurisprudence hardly impeded federal

expansion, as substantive liberal jurisprudence, flush with apparent New Deal and post-War successes, influenced both federal adjudication and lawmaking. Equipped with a preponderance of newly-liberalized Commerce Clause rules and doctrines, Congress and the Supreme Court deployed federal power as enthusiastically as in the late 1930s, albeit with novel purposes.

Americans viewed the rise of federal agencies and comprehensive regulatory schemes, variously, as praiseworthy, necessary, or wrong-headed, depending on individual socioeconomic, cultural, and political affiliations. Signal new interventions in the period 1946-1963 included new wage and hour regulations for non-unionized labor; antitrust measures aimed at corporate "bigness"; criminal statutes that targeted corrupt labor unions and their subversion by Soviet-sponsored communism; and other kinds of organized crime increasingly linked to multistate gambling, drug trafficking, and racketeering. More perceptible to most ordinary Americans were new agencies advancing marvelous public projects, such as the building of a new interstate highway system, or new food and drug regulations, understood by most to provide added safety and health for an increasingly affluent and rapidly-growing suburban middle-class. Given the astounding gains in employment, income, and the standard of living, relatively few Americans had much reason to concern themselves with the constitutional sources of an emerging federal bureaucracy. Certainly, under these circumstances, not many dissenters gained attention with charges that federal power had begun to encroach on personal liberty. Individuals targeted by federal authorities for labor union subversion probably had the most urgent motivations to resent expanding Commerce Clause-based federal police power. But entrepreneurs and corporate capital also had pressing financial reasons to be discontented with a federal regulatory apparatus that steadily increased their costs of doing business and their income tax obligations. The Commerce Clause-related Supreme Court decisions of the Warren Court undoubtedly did not

gain the attention garnered by important decisions such as *Brown v. Board of Education* (1954). But, by 1963, new commerce power interventions on behalf of environmental protection and equal pay for women, in fact, portended a sea change in American society and culture.

Chapter three explores how, more than any other constitutional authority, commerce power served the purpose of rapidly reordering American socioeconomic and political relations in the period 1964-1998. Liberal and conservative political operatives worked to actualize their visions of progress as quickly as possible with the most effective tool available – central government power. Federal authorities, indeed, transformed Commerce Clause authority into a virtual general police power that became a prime driver of intensifying culture wars conflict. Supported vigorously by a mostly liberal academy and print and electronic media – new congressional legislation, administrative agencies, and federal courts underwrote Commerce Clause power to ensure equity in hiring and promotion for women and minority members with affirmative action directives and end the sex-based harassment of women and members of the LGBT community in the work place. New regulatory regimes took aim at environmental hazards and threats to endangered species. But conservative initiatives in the 1980s and 1990s also drew media coverage. In this connection, the increasing reliance on commerce power by Congress to limit the availability of post-viability abortion, crack down on "super predators," restrain drug-cartel trafficking, and restrict gun ownership further intensified partisan conflict.

Congress and the Warren, Burger, and Rehnquist courts in the period 1964-1998 combined to establish and sustain most of the Commerce Clause-based legislation that powerfully stoked political and cultural conflict. The Warren and Burger courts underwrote pivotal New Deal Commerce Clause doctrines, especially the substantial effects and comprehensive regulatory scheme rationales. The Supreme Court also declared that it would uphold criminal statutes based

on commerce power if the language of such statutes contained a jurisdictional element identifying a nexus of the offense to interstate commerce – but reserved to the federal courts the right to decide, on a case-by-case basis, if prosecuted activity was, in fact, within the commerce power. The Rehnquist Court, which included a steadily increasing number of conservative justices, refrained from further expanding the scope of the substantial effects test, rendered Commerce Clause decisions upholding the sovereign prerogative of the states to refuse to be "commandeered" into federal regulatory schemes, and otherwise calibrated Commerce Clause-based measures to keep their mandates within the bounds of the New Federalism.

The decision of the Supreme Court in *United States v. Lopez*, the subject of chapter four, worked a substantial doctrinal breakthrough for the New Federalism. In this case, the Rehnquist Court held that the Commerce Clause could not support the 1990 Gun Free School Zones Act – which had made the possession of a firearm within a 1000-foot radius of a school a criminal offense. In and of itself, the GFSZA was a salve to liberal-progressives concerned about growing urban gun violence and a call to arms for Second Amendment enthusiasts. The 1992 prosecution under the act of San Antonio High School Student Alphonso Lopez, Jr., drove culture wars conflict to new levels of acrimony. The Supreme Court decision, authored by Chief Justice William Rehnquist, affirmed the ruling of the Fifth Circuit Court of Appeals setting aside the conviction of Lopez. In doing so, the chief justice articulated precisely the limits of the decades-old Commerce Clause substantial effects test and dispatched the idea that the rule had, for almost sixty years, provided an open-ended power of Congress to legislate. And he did so without purporting to or, in fact, needing to overturn any important precedents.

Rehnquist and the majority held that commerce power, under the substantial effects test, could reach intrastate activity only if it was commercial activity or, at least, *economic* activity.

Non-commercial activity and non-economic activity, such as simply possessing a firearm, were out of bounds. The Court also affirmed its Commerce Clause comprehensive regulatory scheme and criminal statue rationales. The decision in *Lopez* re-animated a longstanding tradition of judicial minimalism protective of state sovereignty. In doing so, it effectively articulated discernible limits to interstate commerce power.

The decision in *Seminole Tribe v. State of Florida* (1996), the subject of chapter five, implicated some of the most contentious issues fueling the culture wars of the 1990s – including the rising casino gambling industry, federal government environmental protection regulations, and the balance of power between the state governments and the federal government. Ultimately, five of the nine justices ruled that the so-called "Indian Commerce Clause" did not give Congress the power to pass legislation that would authorize Native American tribes to sue state officials for not agreeing on demand to contract state-tribal compacts to facilitate the establishment of Indian casinos as required by the 1988 Indian Gaming Regulatory Act. Equally important, in coming to this result, the Court also reversed a decision it rendered in 1969 to hold that commerce power did not authorize Congress to allow companies required to pay for hazardous waste site cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act to sue states for their role in creating such environmental hazards. Eleventh Amendment sovereign immunity protections, under the holding of the Court, now also forbade this. The decision in *Seminole Tribe* constituted a significant victory for the New Federalism, as it was symbolic of the determination of the Rehnquist Court to resist efforts by the Congress to undercut further state sovereignty with a divergent employment of commerce power to "commandeer" the states. Eleventh Amendment sovereign immunity holdings in *Seminole Tribe* migrated to decisions that dealt with private lawsuits under the Age

Discrimination Act and the Americans with Disabilities Act. These rulings, in turn, declared that Congress had no authority to establish private causes of action against state governments to coerce them into following Commerce-Clause-based employee wage and hour, hiring, and promotion policies.

The subject of chapter six is the decision *United States v. Morrison* (2000), in which a majority of the Rehnquist Court determined that the Commerce Clause did not empower Congress to establish a civil remedy for the crime of gender-motivated violence established by the 1994 Violence Against Women Act. The highly-publicized action brought by Christy Brzonkala against Antonio Morrison and James Crawford for rape shortly after its passage stirred controversy over the statute and the related rape prevention movement for the next six years. From the perspective of those who strongly supported the civil remedy set out in § 13981 of the VAWA, federalization of judicial authority over gender-based violence against women marked this brutality as a serious national problem. While acknowledging that such criminality required stern justice, the Supreme Court declared the VAWA civil remedy and its underlying criminal act to be beyond the scope of the Commerce Clause and thus unconstitutional. According to Chief Justice Rehnquist, gender-motivated violence did not constitute intrastate commercial activity nor even intrastate economic activity and, thus, did not meet the baseline criteria for regulation under the Commerce Clause substantial effects test articulated in *Lopez*. Gender-motivated violence, moreover, he concluded had no more impact on interstate commerce than many other crimes of violence traditionally punished under state criminal codes. Even when a given non-economic intrastate activity, aggregated with all other instances of it, had a substantial impact on interstate commerce, such activity was beyond the commerce power. Such legislation, moreover, constituted an unacceptable encroachment on state sovereignty and was

inimical to the dual system of federal government. For good measure, the Court seized the opportunity to affirm its Commerce Clause comprehensive regulatory scheme and criminal statute rationales.

Gonzales v. Raich, the subject of chapter seven, arose, in part, because of a decades-long nationwide campaign to legalize medical cannabis, which had produced the 1996 California Compassionate Use Act and a challenge by California medical marijuana consumers Diane Monson and Angel Raich to the proscriptions of such use set out in the 1970 Controlled Substances Act. The highly-publicized case pitted advocates of legalized marijuana against law enforcement and parent groups fearful about rapidly rising teen-age marijuana consumption and drug addiction. Amid much wringing of hands and somewhat exaggerated initial reactions in various culture wars encampments, the Rehnquist Court ruled that bona fide users of medical marijuana under the California statute were not to be exempted from the proscriptions of the federal Schedule I drug ban. In doing so, the Court, simply, affirmed holdings set out in *Lopez* and reiterated in *Morrison* that the substantial effects rationale permitted Congress to regulate intrastate economic activity, including the cultivation and consumption of marijuana, and that Congress also was authorized to regulate any kind of intrastate activity if necessary to give effect to a federal comprehensive regulatory scheme, including the one enforced with, perhaps, the most energy, resources, and coercive federal police power – the Controlled Substances Act. The decision, in fact, did not overturn any of the holdings that had constituted the Commerce Clause New Federalism jurisprudence of the preceding two decades. Notwithstanding the strenuous complaints of some liberals and conservatives, *Gonzales v. Raich* did not facilitate any kind of new threat to well-established areas of state government authority but, rather, held the line against the further expansion of commerce power that had commenced during the New Deal –

bolstering the New Federalism Commerce Clause doctrines set out by Chief Justice Rehnquist in *Lopez* and reaffirmed in *Morrison*.

Chapter eight examines the 2012 decision *NFIB v. Sebelius.* In doing so, it illuminates how the passage by Congress and President Barack Obama in March 2010 of the Patient Care and Affordable Care Act was the consequence of a distinctive surge in culture wars political polarization. The ACA constituted an extraordinary congressional overreach – driven by well-intended progressive commitments to providing universal health care. That the four most liberal members of the Court joined Chief Justice Roberts in *NFIB v. Sebelius* to uphold, under the taxing power, the ACA individual mandate penalty for omitting to acquire health insurance constituted a notable departure from the originalist and textualist principles of interpretation and the commitments to judicial restraint that had commonly actuated the decisions of the Rehnquist Court.

On the other hand, the holding of a different 5-4 majority, also led by Chief Justice Roberts, constituted a firm rejection of the prime legislative feature that fundamentally distinguished the ACA – its reliance on commerce power to support the individual mandate. Strongly indicating the persistence of Rehnquist Court New Federalism principles was that part of the opinion authored by the chief justice holding that the commerce power, under the Court's substantial effects rationale, could not reach inactivity – even in tandem with the ancillary power of the Necessary and Proper Clause. *NFIB v. Sebelius*, thus, held that the Commerce Clause did not authorize Congress to command the individual to engage in commercial activity because such an omission in the aggregate might affect, in any relevant market, the future price of goods or services in that market – or because the individual might later become active in that market. On the other hand, the four joint dissenters in *Sebelius* refused to join that part of the opinion

authored by the chief justice declaring that, under the Court's substantial effects rationale, intrastate activity of any kind having a substantial effect on interstate commerce was within the commerce power of Congress. This part of Chief Justice Robert's opinion, unsupported by any of the other justices, attempted to resurrect well-worn obiter dictum from the New Deal-era that had declared an unbounded, plenary commerce power.

The conclusions segment of this study will assay finally the relationship of culture wars contention and the relationship of this strife to congressional deployments of commerce power and Supreme Court adjudication in the entire period 1964-2012. It will, particularly, gauge the significance of a Rehnquist Court and Roberts Court New Federalism Commerce Clause jurisprudence that did not overturn seminal New Deal Supreme Court precedents but, nonetheless, established a substantial deterrent to further Commerce Clause-based expansions of federal power with a "this far and no further" doctrinal bulwark. As well, this segment will assess the prospects for this conservative judicial strategy in a United States that, by 2017, was riven by an unprecedented level of cultural and political contention that, in the view of some, seemed to threaten the ideological foundations of national unity.

Chapter One

The Long Road to Regulation of Employer-Employee Relations, 1789-1945

In 1787, delegates from the thirteen states convened to revise the Articles of Confederation, but ended up crafting a new Constitution for the United States – one based on a novel principle of federalism entailing divided sovereign power. One of their primary goals was to form a free trade area in which the individual states would cease to lay tariffs on each other's incoming products or otherwise restrain trade. The resultant U.S. Constitution, therefore, includes as one of the enumerated powers of Congress, the authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] At the time of its ratification, the framers and American political class saw the Constitution as an instrument that provided the "general government" with only the powers enumerated in it; all other governing powers ("police powers" concerning health, general welfare, safety, and morals) were retained by the individual states, which were deemed to retain the attributes of sovereignty. But the steady development of the United States in the next century and a half would radically rework original understandings of constitutional federalism.

This chapter examines congressional deployment of commerce power and United States Supreme Court responses thereto from the ratification of the Constitution through the mid-twentieth century. In this long span of years, the country developed a vibrant market economy with technologically-driven transportation and print revolutions; aggressively expanded its geographic reach to the Pacific Coast; weathered a traumatic Civil War to maintain the Union and end African-American bondage; and became an increasingly urban society amid voluminous

[1] U.S. Const. Art. 1, sec. 8, cl. 3.

European immigration, an unprecedented industrial revolution, and an extended period of rapid economic expansion – the latter years of which were punctuated by cyclical downturns which imposed politically charged hardship for farmers and industrial workers.[2] Through these tumultuous transformations, however, Congress and the Supreme Court steadily widened the commerce power – a process that, by the eve of Black Thursday 1929, had wrought relatively little intensive political conflict. This consensus foundered in the depths of the Great Depression as a new era of Commerce Clause lawmaking, adjudication, and understanding ensued with Franklin Roosevelt's New Deal, an upheaval in American government and constitutionalism that saw little effective opposition through World War II.

The first discreet period this chapter examines extends from 1801 to 1835, which comprises John Marshall's term as chief justice, during which the Supreme Court, amid rising nationalism, often ruled in favor of extending federal power with seminal interpretations of the Commerce Clause. Marking the second period, from 1836 to 1888, under chief justices Roger B. Taney, Salmon P. Chase, and Morrison Waite, was the concern of the justices with the constitutionality of state legislation that worked against an otherwise increasingly integrated national economic development. Exemplifying this trend, both before and after the Civil War, were their attempts to find the balance or demarcation line between federal and state power and the proper role of government, especially in the making of a national economic infrastructure. The third phase

[2] While the post-Civil War economic landscape was marked continuously by periods of growth and minor recession, historians agrees there were several late nineteenth century downturns that were notably severe. These include the five years of crisis brought on by the Panic of 1873, which produced the Great Railroad Strike of 1877, and the Panic of January 1893 that produced a generally depressed cycle until June 1897. Douglas Steeple and David O. Whitten, *Democracy in Desperation: The Depression of 1893* (Westport: Greenwood Press, 1998), 14-42.

includes the period from 1888 to 1936.[3] This era of fabulous wealth and increasingly visible urban poverty was marked by the Court's narrow view of the Commerce Clause, which coincided with conservative political winds favoring as little congressional interference with the booming industrial economy as urban-based demands for humanitarian intervention and radical political insurgency would allow. And it is during these years that the Supreme Court may be said to have tipped the balance of power toward the states. The fourth period commences with the "Constitutional Revolution of 1937" and extends through 1945, years in which President Roosevelt, a liberal Democratic Congress, and an unusually activist United States Supreme Court, eager to provide relief to a struggling nation, devised and consolidated new modes of wielding central authority, including, especially, novel employments of the commerce power.

Although the Supreme Court of the United States began hearing cases in 1789, it was not until 1824 that the Court addressed its first case involving the Commerce Clause. That case, *Gibbons v. Ogden*, was the result of a dispute between two parties of steamboat entrepreneurs who both wished to provide passenger service into New York Harbor.[4] Ogden operated under the auspices of a state granted monopoly that allowed him unchallenged access to New York Harbor. Gibbons, meanwhile, justified his access to the harbor based upon his possession of a federal license to participate in the coasting trade and held that a federal sanction trumped the state monopoly. Chief Justice John Marshall adjudicated the case with four others of his own Federalist Party as well as with Associate Justice William Johnson, who was a Jefferson appointee but had proven to be quite nationalist in his views. The Court's decision was a clear

[3] This period includes the terms of Chief Justices Melville Fuller (1888 to 1910), Edward D. White, Jr. (1910 to 1921), William Howard Taft (1921 to 1930), and Charles Evans Hughes (1930 to 1941).

[4] *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

victory for Gibbons and his federal coasting license, with all six justices ruling in his favor. Marshall provided the Court's opinion and Johnson concurred in his own separate view.

Marshall's opinion included a careful dissection of the Commerce Clause. Regarding the meaning of "commerce," Marshall was not persuaded by Ogden's contention that the term meant only the trafficking of goods. Marshall stated, "[c]ommerce, 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." He also added "[a]ll America understands, and has uniformly understood, the word 'commerce' to comprehend navigation.[5] Marshall was stating that commerce did not just include goods but all interactions and that included the use of watercraft. He was then ready to address the next part of the clause. "Among the several states," to Marshall meant "intermingled with," thus, "commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior." Marshall wrote that commerce which is "completely internal" within a state would fall under that state's jurisdiction. However, his definition of "completely internal" did not include commercial concerns that would "affect the states generally," as those would still be liable to federal power.[6]

The Chief Justice then addressed what this power included. In his view, the power of Congress was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution."[7] Marshall believed that states maintained their sovereignty but that those powers entrusted to the federal government were not

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[5] *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824) in Jonathan D. Varat, William Cohen, and Vikram D. Amar, *Constitutional Law*, 13th ed. (New York: Thomson Routers/Foundation Press, 2009), 151.
[6] *Ibid*., 152.
[7] *Ibid*., 153.

sharable in the sense that Ogden had argued. The chief justice maintained that the commerce power was "plenary" – as to its constitutionally defined object. However, he was careful to say that the very language of the Commerce Clause "among the several states" established limitations:

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.[8]

While reiterating that commerce power was plenary as to its enumerated object, Marshall also articulated the duty of Congress to keep its employment within constitutional bounds:

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often [rely] they solely, in all representative governments.[9]

In his separate but concurring opinion, Justice Johnson made an even stronger case for centralized commerce powers. In his view, the idea of the federal licensing law exerting dominance over a state law was irrelevant to the case at hand. He pointed out that, "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."[10] He

[8] *Gibbons v. Ogden*, 22 U.S. at 194-195.
[9] Ibid., 197; Varat, et al., *Constitutional Law*, 153.
[10] *Ibid*., 156-57.

went on to say that if there had never been a licensing act, Gibbons would still be unrestrained in participating in commerce between states. Williams saw the United States as a free trade area, sanctioned by the adoption of the Constitution, with the federal government as the commercial authority. The ramifications of the ruling in *Gibbons v. Ogden* have been immense and the Marshall Court's precedent is recalled frequently in subsequent Commerce Clause-based rulings.

Three years after the Marshall Court ruled that the commerce powers of the federal government were "plenary" it also ruled on the case of *Brown v. Maryland.*[11] The question to be decided in the case was "at what point in the course of trade does the jurisdiction of the state begin?"[12] The case revolved around a Maryland law that required international importers of wholesale goods to purchase a license from the state. Brown refused to pay the license fee and sued, arguing that the state law intruded upon federal power over imports and commerce. Maryland's case, argued by future Supreme Court Chief Justice Roger Brooke Taney, was that the state license fee applied equally to all wholesalers, importers or otherwise, and that the tax only affected imports incidentally. The Court ruled in favor of Brown, reasoning that a state had authority over the police powers to control incoming goods to protect the health, safety, and well-being of the citizenry, but it didn't have the power to tax those goods until they were removed from the "original package" and intermingled with other goods for sale. This doctrine still lends itself as useful to adjudicate some cases today based upon the character of the goods being brought into a state.

[11] *Brown v. Maryland,* 12 Wheaton 419 (1827).
[12] Forrest McDonald, *A Constitutional History of the United States* (New York: Franklin Watts, 1982), 82.

Two years later, in *Willson v. Black Bird Creek Marsh Company,* the Court refined its earlier nationalistic stance in *Gibbons v. Ogden.*[13] The state of Delaware authorized the Black Bird Creek Marsh Company to build a dam across Black Bird Creek to dry a marsh. Willson operated a sloop, utilizing a coasting license similar to the one used by Gibbons in the 1824 case. The dam impeded Willson's ability to navigate on the creek; therefore, he attempted to break through the dam, thus damaging it. The company sued him for trespassing and damages. Willson argued that the state had intruded on federal power by allowing for the construction of the dam on a navigable waterway. The counsel for Delaware downplayed the importance of the waterway, however, arguing that the creek was "one of those sluggish reptile streams, that do not run but creep, and which, wherever it possess, spreads its venom, and destroys the health of all those who inhibit its marshes."[14] Unlike the *Gibbons* case, in which the Court implied that federal power over navigation matters was exclusive, the Court in this case ruled six to zero that since Congress had not legislated on the small navigable creeks and since damming the creek to dry the marsh probably improved the health of the inhabitants of the area (a valid use of a state's police power), the state's action was constitutional.[15] *Willson* thus confused the Court's views about the delineation between federal and state powers over interstate commerce; it produced what has come to be known as the *dormancy doctrine* or *dormant commerce power,* implying that states are free to legislate over matters of commerce until Congress exercises its power over the same matter. Marshall stated in his opinion in *Willson,* "[i]f Congress had passed any act

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[13] *Willson v. Blackbird Creek Marsh Co*., 2 Pet. 245 (1829).
[14] *Ibid*., 249 in G. Edward White, *The Marshall Court and Cultural Change: 1815-1835,* abridged ed. (New York; Oxford: Oxford University Press, 1991), 583.
[15] *Willson v. Blackbird Creek Marsh Co*., 27 U.S. (2 Pet.) 245 (1829) in Jonathan D. Varat, William Cohen, and Vikram D. Amar, *Constitutional Law*, Thirteenth ed. (New York: Thomson Routers/Foundation Press, 2009), 157-158.

which bore upon the case; any act in execution of the power to regulate commerce . . . . we should feel not much difficulty in saying that a state law coming into conflict with such act would be void. But Congress has passed no such act."[16] This statement revealed that states did indeed possess "concurrent" power over commerce, particularly in the form of their police powers; however, federal laws, once created, superseded state law in the same area. The ruling has since resulted in the problem of whether the Court could also prohibit states from making laws that would intrude upon Congress' commerce power. There seems to be no clear standard except that each individual case receives its own treatment from the Court.[17]

Willson v. Blackbird Creek Marsh Co. was the last commerce case upon which Marshall ruled, although he did participate in hearing one more before his death in 1835. In *New York v. Miln,* the Court was challenged with a case that pitted a state's police power against the federal government's commerce power.[18] New York City was faced with an influx of poor immigrants who had traveled by ship to the United States. The state passed a law requiring ships' captains to post bond insuring that immigrants would not become public charges. Miln refused to post such a bond for his passengers and was sued by the state of New York to pay the bond. Chief Justice Marshall thought the state law was unconstitutional, but of the five justices who heard the case, three thought the law should be sustained. Since there were seven justices on the Court at the time, and Marshall's policy was that at least four justices (a majority of the whole Court) must

[16] *Ibid*., 158.
[17] Robert J. Steamer "Commerce Power," *The Oxford Companion to the Supreme Court of the United States* Kermit L. Hall, ed. (Oxford: Oxford University Press. 2005). Oxford Reference Online. Oxford University Press. University of Missouri - Columbia. October 20, 2011, accessed April 11, 2016, http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t184.e0236
[18] *New York v. Miln,* 8 Peters 120 (1837).

agree on a case, he directed a re-argument. However, Marshall's action only delayed the states' rights judgment. Marshall died in 1835; four other justices retired or died before 1837, and, also in that year, Congress raised the number of justices from seven to nine.[19]

President Andrew Jackson elevated all seven of the new appointees to the court, including Marshall's replacement, Roger B. Taney. Taney was an advocate of states' powers and had been critical of Marshall's rulings in the past. With only two of Marshall's allies remaining on the Court (Justices Joseph Story and Smith Thompson), Taney and company had the ability to readdress some of the Marshall court's judgments in favor of the states.[20] Returning to *New York v. Miln*, the Taney Court ruled six to one (Federalist Justice Story dissenting) that the state of New York's sovereign police power would be sustained against the federal government's enumerated power to regulate commerce, particularly since the New York law did not actually conflict with any existing federal law.[21] The ruling in *New York v. Miln* was effective until a Depression Era ruling occurred, stating that states could not limit a person's right to travel simply because of his low economic status.[22] Just one year after the judgment of *New York v. Miln*, the Court ruled on *United States v. Coombs*.[23] Coombs was charged with stealing goods from a shipwreck but he argued that his crime was not within federal jurisdiction because the goods in question were taken from above the high waterline. However, Justice Story, who wrote the opinion, referred to *Gibbons v. Ogden* and Marshall's ruling that interstate commerce "does

[19] McDonald, *Constitutional History*, 83.
[20] *Ibid*., 83.
[21] *Ibid*., 83.
[22] *Edwards v. California*, 314 U.S. 160 (1941) held that such a law violated conflicted with congress' authority under the commerce clause. A concurring opinion stated that the law violated the rights to equal protection granted by the 14th Amendment.
[23] *United States v. Coombs*, 37 U.S. (12 Pet.) 72 (1838).

not stop at the mere boundary line of a state; nor is it confined to acts done on the water."[24] In this case, a strong majority on the Court maintained the Federalist precedent.

In 1839, the Taney Court ruled on *Bank of Augusta v. Earle.*[25] The case tested the legality of a corporation that was incorporated in one state, while doing business in another state. A Georgia bank purchased some bills of exchange from a group within the state of Alabama. In the post-1837 depression, the Alabamians refused to pay their debt to the Georgia bank, claiming that the out-of-state corporation had no right to do business in Alabama. Daniel Webster argued for Georgia that a corporation should be entitled to the same interstate commercial rights as an individual. The Court was unwilling to go as far as Webster wished, but it did agree in an eight to one decision that harkened back to the doctrine of the dormant Commerce Clause formed in *Willson v. Blackbird Creek Marsh Co.*, stating that out of state corporations could do business within the borders of another state, unless that state had legislated specifically against it.[26]

A similar logic was used in *Groves v. Slaughter*, decided in 1841.[27] Mississippi had a constitutional prohibition against the importation of slaves for sale from out of state, but had not created any legislation to put the state constitutional prohibition into effect. Slaughter brought several slaves into Mississippi and sold them to Groves, whose notes defaulted. Groves argued that Mississippi's constitutional prohibition on out of state slave sales protected him from the lawsuit, while Slaughter claimed that the Commerce Clause made Mississippi's prohibition unconstitutional. The Court, in a five to two ruling, decided that indeed it was within a state's power to prohibit the importation of slaves for sale, but since Mississippi had not passed such a

[24] *Ibid*., 78.
[25] *Bank of Augusta v. Earle*, 13 Pet. 519 (1839).
[26] McDonald, *Constitutional History*, 86-87.
[27] *Groves v. Slaughter*, 15 Pet. (40 U.S.) 449 (1841).

law the Court ruled in Slaughter's favor. Although the five to two ruling appears to show somewhat of a consensus, only one justice besides the author agreed with the opinion of the court. Three justices, including Chief Justice Taney, only agreed with the outcome and not the opinion because of its anti-slavery overtones. The Court's judgments had begun to be significantly influenced by the conflict over slavery, thus the members rarely issued judgments that achieved the same consensus that had been achieved during the Marshall era.[28]

Eight years later, the Taney Court ruled on a consolidated pair of disputes known as the *Passenger Cases*.[29] Massachusetts and New York passed laws that imposed a tax on each immigrant who landed within their respective jurisdictions. In its ruling, the Court seemed to return to the precedents of *Gibbons v. Ogden*, only now applied to foreign commerce instead of interstate commerce. The Court ruled that the Massachusetts and New York laws were unconstitutional since states had no jurisdiction over foreign commerce, even in the absence of federal laws on the subject at hand. However, the ruling was a five to four decision and eight opinions were proffered. Taney was one of the dissenters, and carrying his previous arguments to issues of an international nature, he argued that states had the power to regulate foreign commerce unless Congress had legislated on the matter.[30]

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[28] Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (Chapel Hill, North Carolina: University of North Carolina Press, 1937), 67-68 and William M. Wiecek, "Groves v. Slaughter," *The Oxford Companion to the Supreme Court of the United States*, (Oxford: Oxford University Press, 2005), Oxford Reference Online, Oxford University Press, accessed October 20, 2011 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t184.e0510>

[29] *Smith v. Turner*, *Norris v. Boston*, 7 How. (48 U.S.) 283 (1849).

[30] McDonald, *Constitutional History*, 88 and Donald M. Roper "Passenger Cases," *The Oxford Companion to the Supreme Court of the United States*. Kermit L. Hall. Ed., (Oxford: Oxford University Press, 2005), Oxford Reference Online, Oxford University Press, accessed October 24, 2011 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t184.e0903>

It was clear that Chief Justice Taney believed that states had the power to legislate on matters of interstate commerce unless Congress had already done so; however, it was also clear that many of the Associate Justices on the earlier Marshall Court, and on Taney's Court as well, thought that Congress held exclusive power to legislate in those matters. The numerous conflicting opinions of the Court, even when the numbers seemed to show consensus, illustrated the contentiousness of Commerce Clause rulings in the pre-Civil War years. The issue was finally settled, to some degree, in 1852, in *Cooley v. Board of Wardens*, rejecting the idea that Congress could decide to re-grant the states a regulatory power that is otherwise exclusive.[31] The case revolved around the Pennsylvania Pilot Act of 1803, a law that required any vessel entering or leaving the port of Philadelphia to either hire a local pilot or pay half of the usual pilotage fee. Cooley chose not to comply with the law, arguing that it was a usurpation of Congress' interstate commerce power. However, the Court found that in 1789, the First Congress had written a law indicating that harbor pilots may continue to be regulated by local law "until further legislative provision shall be made by Congress."[32] Congress had clearly viewed states as having concurrent power to regulate interstate commerce. The Court ruled six to two in favor of the Pennsylvania law and the six all followed a single opinion, written by Justice Benjamin Curtis. The two dissenters were John McLean and James Wayne, who were both nominated to the Court by Andrew Jackson. The case resulted in a doctrine that has since been called "selective exclusivity." The term means that Congress has exclusive power over some aspects of interstate commerce, those that require a national uniform rule, while some issues, those of a local nature, and where Congress has not yet acted, may be left to the states to

[31] *Cooley v. Board of Wardens,* 12 Howard (53 U.S.) 299 (1852).
[32] McDonald, *Constitutional History,* 89.

regulate. It followed, therefore, that the Court would henceforth decide which aspects were of a national nature and which ones were to be under state jurisdiction.[33]

The last Commerce Clause case ruled upon before the Civil War was *Pennsylvania v. Wheeling and Belmont Bridge Co*.[34] The Ohio River forms the boundary between West Virginia (still Virginia at the time) and Ohio. The town of Wheeling is on the east side of the river and Bridgeport, Ohio is on the west bank; the National Road runs through both towns on its way west. The state of Virginia granted a charter to the Wheeling and Belmont Bridge Company to build a suspension bridge across the Ohio River at Wheeling to facilitate travelers' access to Ohio. However, before the waters of the river get to Wheeling, they run through Pittsburgh and other points in Pennsylvania. Once built, the bridge prohibited large steamboat travel. The state of Pennsylvania sued, arguing that the bridge restricted interstate commerce. The Court agreed with Pennsylvania in a seven to two ruling and ordered that the bridge be removed or raised to 111 feet above the level of the river. Justice McLean delivered the opinion of the court, while Chief Justice Taney dissented. Taney's dissent was consistent with his previous views; he said that since Congress had not legislated upon obstructions to the Ohio River, the charter and bridge were lawful. Indeed, six months after the case was decided, Congress passed a law declaring that the bridge was lawful at its original height; it would not have to be altered. In 1856, the Court again heard the same case, and though the Court was sharply divided, it overturned its first judgment and ruled that due to Congress' law the bridge was not an impediment to interstate commerce.[35]

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[33] Ibid., 88-89 and Steamer, "Commerce Power."
[34] *Pennsylvania v. Wheeling and Belmont Bridge Co.,* 13 Howard (54 U.S.) 518 (1852).
[35] Elizabeth B. Monroe "Pennsylvania v. Wheeling and Belmont Bridge Co." *The Oxford Companion to the Supreme Court of the United States.* Kermit L. Hall, ed. Oxford University

The pre-Civil War Commerce Clause-related judgments have, in some cases, had great impact upon future Supreme Court decisions, mainly those that have provided the foundation for an expansive authority. Marshall's three cases, *Gibbons v. Ogden*, *Brown v. Maryland*, and *Willson v. Blackbird Creek Marsh Co.*, each have set precedents that color modern Court decisions. During the Taney Court, the majority attempted to maintain the police powers of the states. *Cooley v. Board of Wardens*, the case that set the doctrine of selective exclusiveness, has never been overruled, nor is it likely to be, because the Court derives a great deal of power in its ability to decide on a case-by-case basis whether to defer matters to legislatures or judicially intervene; this doctrine also allows the Court to decide where the line of demarcation between federal commerce power and state police power resides.

Another case with lasting impact on future Commerce Clause jurisprudence was decided at the end of Reconstruction under the Chief Judgeship of Morrison R. Waite. In *Munn v. Illinois*, Waite ruled with a 7-2 majority that an Illinois law regulating Chicago granary prices was a constitutional use of the state's police power and was not repugnant to the commerce clause or the due process clause of the recently passed Fourteenth Amendment.[36] He argued that some forms of property take on a public interest, such as bridges, toll roads, and in this case, a granary. He furthermore stated that when a private individual submits his "property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created."[37]

Press. 2005. Oxford Reference Online, Oxford University Press, accessed October 10, 2011 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t184.e0918>

[36] 94 U. S. 113 (1877).

[37] *Munn v. Illinois*, 94 U. S. 118, 124 (1877) quoted in Augustus M. Burns III, "Munn v. Illinois," *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall, ed. (Oxford: Oxford University Press, 2005), Oxford Reference Online, Oxford University Press,

Writing in 1937, future Associate Justice Felix Frankfurter pointed out that Waite discarded the dormant commerce clause notion and also rejected the idea that courts could decide better than a legislature what was reasonable compensation for private industry that had a "public interest."[38]

In 1888, with a new Chief Justice presiding, Melville W. Fuller, the Court similarly upheld a state's police power in *Kidd v. Pearson*.[39] The Court recognized that the state of Iowa could prohibit the manufacture of alcohol for out of state sales, based solely upon the state's police powers. This ruling defeated the dormant commerce clause attack but it also illustrated the Court's differentiation between trade and manufacturing.[40]

By the late 1880s, the United States Supreme Court had little choice but to begin engaging the legislative responses of Congress, under its commerce power, to the emergence of massive, multi-state corporate enterprises, holding companies, and vertical and horizontal integration. Democrat President Grover Cleveland signed off on the Interstate Commerce Act in early February 1887. The act established the Interstate Commerce Commission, which was charged with curbing the monopolistic practices of the nation's railroads. Congress and Republican President Benjamin Harrison passed the Sherman Antitrust Act in July 1890, which, on paper, at least, set up a regime of regulatory laws intended further to break up anti-competitive trusts. And Democrat President Woodrow Wilson and Congress adopted the Clayton Antitrust Act in mid-October 1914, another antitrust regime that outlawed and provided mechanisms for the prosecution of numerous anticompetitive practices, such as price discrimination; "tying," or

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[38] Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (Chicago: Quadrangle Books, 1964), 83-85.

[39] *Kidd v. Pearson*, 128 U.S. 1 (1888).

[40] Nelson and Pushaw, "Rethinking," 65.

exclusive dealings; and mergers and acquisitions deemed to be particularly uncompetitive.[41]

Notwithstanding the development of national regulatory regimes based on the Commerce Clause, the United States Supreme Court continued to render conservative decisions in cases that implicated the growing power of big business. The narrow regulatory view that Chief Justice Fuller exhibited in *Kidd v. Pearson* persisted in the decision of the Court in *United States v. E.C. Knight, Co.* In that case, the Court ruled that the American Sugar Refining Company could purchase the stocks of four Philadelphia refineries without violating the Sherman Antitrust Act.[42] Fuller, writing for an 8-1 majority, said that manufacturing is not commerce; manufacturing affects commerce "only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."[43]

The momentary consistency of commerce clause jurisprudence took an important deviation in 1903; in that year, the Court decided *Champion v. Ames*, one of the more significant rulings in the expansion of federal police power.[44] As part of the rise of the Progressive movement and its concern over the nation's morality, Congress had passed a law in 1895 prohibiting the transport of lottery tickets across state borders. A five-to-four majority emerged with Associate Justice John Marshall Harlan writing that lottery tickets have real value and their transport may be

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[41] Interstate Commerce Act of 1887, 24 Stat. 379, approved February 4, 1887; Sherman Antitrust Act, 26 Stat. 209, approved July 2, 1890; Clayton Antitrust Act of 1914, Pub. L. 63-212, 38 Stat. 730, enacted October 15, 1914. David M. Potter, "Discriminatory Freight Rates: Implications of the Interstate Commerce Commission's Regulatory Powers," *University of Chicago Law Review*, Vol. 15, no. 1 (1947): 177-188; William L. Letwin, "Congress and the Sherman Antitrust Law: 1887-1890," *University of Chicago Law Review*, Vol. 23 (1956): 221-258, 222; David Dale Martin, *Mergers and the Clayton Act* (Berkeley: University of California Press, 1959), 1-3, 57-103.

[42] *United States v. E.C Knight Co.*, 156 U.S. 1, (1895).

[43] *Ibid*., 12.

[44] *Champion v. Ames*, 188 U.S. 321 (1903).

deemed as commerce. Chief Justice Fuller, writing for the minority, claimed that lottery tickets were not commerce, but were instead contracts between the buyers and sellers. Further, Fuller argued that legislating to discourage immorality was not a federal, but a state police power. The case is notable because it opened the door for Congress to legislate in areas that had nothing to do with keeping avenues of trade between states open, and a lot to do with establishing a national power to regulate in matters of general welfare, morals, health, and safety.[45]

Surprising to many at the time, the Court returned to its previously narrow view of commerce in *Hammer v. Dagenhart*, which struck down the Keating-Owen Child Labor Act of 1916.[46] Concerned with the mistreatment of children who worked away from the protection of their parents in industry, Congress had attempted to prohibit the shipment of goods produced in factories that employed children. However, five members of the Court, including the Chief Justice, Edward D. White, ruled that such a law was an unconstitutional act to regulate production, not commerce. Writing for the Court, Justice William Rufus Day stated, "[c]ommerce consists of intercourse and traffic, and includes the transportation of persons, land, property, as well as the purchase, sale and exchange of commodities." He continued, "If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States."[47] In dissent, Justice Oliver Wendell Holmes, Jr. stated, "if an act is within the powers specifically conferred upon Congress, it seems to me that it is not

[45] See Robert H. Bork and Daniel E. Troy, "Locating the Boundaries: The Scope of Congress' Power to Legislate Commerce," *Harvard Journal of Law and Public Policy,* Vol. 25, No. 3 (2002), 880.
[46] *Hammer v. Dagenhart,* 247 U.S. 251 (1918).
[47] *Ibid*., 272.

made any less constitutional because of the *indirect effects* [emphasis added] that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void."[48] He continued, "[t]he act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line, they are no longer within their rights. If there were no Constitution and no Congress, their power to cross the line would depend upon their neighbors. Under the Constitution, such commerce belongs not to the States, but to Congress to regulate."[49]

Although Holmes' views would eventually prevail, the narrow view of the Commerce Clause was maintained after *Hammer v. Dagenhart* for the next eighteen years. The last case in which it was used was *Carter v. Carter Coal Co.* in 1936; moreover, it was during this period that the Court was under great pressure to rule in favor of Franklin Roosevelt's answer to the devastating depression that had destroyed markets and rendered millions without the means to make a living – the New Deal.[50] The case revolved around the Bituminous Coal Conservation Act of 1935, which allowed coal industry boards to create minimum prices for coal and employees the right to organize and negotiate collectively. Many in Congress operated under the assumption that the Commerce Clause allowed them to regulate industry, but a majority on the Court saw things otherwise. Justice Sutherland wrote for the Court's five-to-four majority to overturn the law. Indeed, he warned that a broader view of the Commerce Clause was a slippery slope, saying,

> [e]very journey to a forbidden end begins with the first step, and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or – what may amount to the same thing – so relieved of the

[48] *Ibid*., 277.
[49] *Ibid*., 281.
[50] *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

> responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that, if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.[51]

In response, Justice Benjamin Cardozo, writing the dissenting opinion and taking a broad view of the Clause, addressed the idea of "direct" and "indirect" effects on commerce. He wrote, "[a]t all events, 'direct' and 'indirect,' even if accepted as sufficient, must not be read too narrowly. . . . A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it."[52] Indeed, many Americans agreed with President Roosevelt that the Great Depression presented such a need.

Eventually, as the Depression dragged on, and with the President's belief that federal intervention was required to alleviate the country's poor economic conditions, the Court made a dramatic shift from its former views about federal commerce power. After Roosevelt's landslide reelection in 1936, he felt confident enough to put forth legislation that would have raised the number of Supreme Court justices from nine to fifteen so that he could "pack" the Court with justices friendly to his New Deal programs. Consequently, the Court issued several rulings in 1937 indicating that two justices had broadened their interpretations of the Constitution. Four justices had maintained a narrow understanding of the Commerce Clause, while three others generally took the broader view.[53] Chief Justice Charles Evans Hughes and Associate Justice

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[51] *Ibid*., 295-96.

[52] *Ibid*., 328.

[53] Often referred to by the press as the "four horsemen," the four conservative justices who maintained a narrow view included Pierce Butler, Willis Van Devanter, James C. Reynolds, and George Sutherland. Likewise, the three liberal justices who took the broader view were termed "the three musketeers" and included Louis Brandeis, Benjamin N. Cardozo, and Harlan F. Stone. For an overview of how the jurisprudence of Justice George Sutherland illustrates some of the ways that the Supreme Court justified commerce-clause federalism from 1865 through 1932, see

Owen Roberts had been considered the "swing" voters on the Court; Hughes was more likely to vote liberally, while Roberts often voted with the Court's more conservative members. However, in 1937, both justices began to consistently rule in favor of New Deal legislation, even overturning previous judgments to do so, thus enabling President Roosevelt to greatly expand federal power. This rapid change in the Court's point of view has been tagged as "the constitutional revolution of 1937" with good reason.[54] The change in the Court's view allowed Congress to create laws that encompassed nearly every aspect of American lives. Whether the Court buckled to political pressure, evolved its previous views, or was steered by some combination of the two factors, it became clear that the power relationship between the federal government and the states was changed for the foreseeable future.[55]

The impact of the Court's new outlook was evident in the 1937 case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[56] The new National Relations Labor Board, established by the 1935 National Labor Relations Act of 1935, instituted proceedings against Jones and Laughlin Steel Corporation for, at its plant in Aliquippa, Pennsylvania, having fired ten employees who sought to join the Steel Workers Organizing Committee – in direct contravention of the act. The NLRB ordered the company to rehire the workers and give them back pay, and Jones & Laughlin Steel refused. *NLRB,* consequently, brought before the Supreme

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Eric R. Claeys, "Justice George Sutherland and Commerce-Clause Federalism before the New Deal." *The Journal of Federalism* 34, no. 4 (Fall 2004): 9-32.

[54] It has also been called, "the switch in time that saved nine."

[55] For a debate on the three views, see Laura Kalman, AHR Forum: The Constitution, the Supreme Court, and the New Deal, *American Historical Review,* Vol. 110 No. 4 (October 2005), 1052-80, William E. Leuchtenburg, "AHR Forum: Comment on Laura Kalman's Article," *Ibid,* 1081-93, and G. Edward White, "AHR Forum: Constitutional Change and the New Deal: The Internalist/Externalist Debate," *Ibid,* 1094-1115.

[56] *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937).

Court the constitutionality of the National Labor Relations Act as applied to an attempt to impede unionizing efforts at a plant operated by one of the largest steel companies in the United States. The lower court found this application of the act unconstitutional because it concerned only manufacturing activity.[57] In a five to four ruling, issued on April 12, 1937, the Court reversed its previously narrow definition of commerce as trade or intercourse and concluded instead that any activity that "affects" commerce (including manufacturing wholly within an individual state) is, indeed, commerce. [58]

Writing the majority opinion, Chief Justice Hughes articulated succinctly the modern "substantial effects test." First, he cautioned that the commerce power "must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[59] But, according to Chief Justice Hughes, the "unfair labor practices" of the respondent, insofar as they reasonably could be expected to lead to a strike and stoppage of its operations "would have a most serious effect upon interstate commerce."[60] The commerce power was to have full sway within its domain:

> Although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[61]

[57] Coenen, *Constitutional Law: The Commerce Clause*, 80.
[58] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 37.
[59] Ibid.
[60] Ibid. at 41.
[61] Ibid. at 37. [Emphasis added]

With references to the Necessary and Proper Clause set out in Article I, Section 8, Chief Justice Hughes also indicated that Congress could regulate purely intrastate labor practices because such was "essential" or "necessary or appropriate," under the Necessary and Proper Clause, to ensure the efficacy of the National Labor Relations Act.[62] With its holding *Jones & Laughlin Steel* Corp, the Supreme Court sustained the authority of the National Labor Relations Board to regulate union-employer bargaining in the steel industry by upholding the National Labor Relations Act (also known as the Wagner Act) of 1935.

Equally important, the decision *Jones & Laughlin Steel Corp* swept away the principle laid down thirty-two years earlier in *E.C. Knight* and reaffirmed one year earlier in *Carter v. Carter Coal Company*. "[T]he fact that the employees here concerned were engaged in production," Chief Justice Hughes declared, "is not determinative."[63] On behalf of the four dissenters, Justice McReynolds could barely contain himself. "Whatever effect any cause of [labor] discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything – marriage, birth, or death – may in some fashion affect commerce."[64] Justice McReynolds certainly could reasonably complain that employer-

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[62] Ibid., 37-38, referencing *Houston E. & W. Tex. Ry. Co. v. United States*, also known as the "Shreveport Case," 234 U.S. 342 (1914): "This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." Ibid., 353. Article I, Section 8, Clause 18, United States Constitution.

[63] Ibid., 40. In *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), the Court held that Congress could not draw authority from the Commerce Clause to impose wage-and-hour rules on coal mining companies with an affecting-commerce rationale. The Court relied on *E.C. Knight* and *Hammer v. Dagenhart*, declaring that coal mine production was "a purely local activity," having only an "indirect" effect on interstate commerce. Coenen, *Constitutional Law: The Commerce Clause*, 55, 80. But see *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

[64] *NLRB v. Jones and Laughlin Steel*, 99.

employee relations did not constitute commerce, much less interstate commerce. But this should not obscure the fact that the regulation of employer-employee relations involved activities that were, fundamentally, economic in nature – and, thus, of a wholly different order from the activities of getting married, being born, or dying.

On the same day the Court rendered its decision in *NLRB. v. Jones & Laughlin Steel*, it issued its ruling in *National Labor Relations Board v. Friedman-Harry Marks Clothing*, with Chief Justice Hughes authoring the majority opinion. In this case, the National Labor Relations Board had required the Virginia-based Friedman-Harry Marks Clothing Company to cease and desist from firing its employees, threatening to do so, or discriminating against them in response to their having joined the Amalgamated Clothing Workers of America or otherwise having engaged in union activity. The Board had also required the clothing company to reinstate wrongfully discharged employees and pay them back wages. The Court reversed the decision of the Second Circuit Court of Appeals denying the workers the relief ordered by the NLRB. Chief Justice Hughes declared that, to some extent, the challenged NLRA was authorized by the commerce power because the clothing company imported its cloth from other states and sold almost all its finished garments in other states. He otherwise relied on the rationale set out in *NLRB. v. Jones & Laughlin Steel* to conclude that the claims of the clothing company that the National Labor Relations Board, under the Commerce Clause, had no authority to issue its ruling, were "without merit."

Justice McReynolds vigorously dissented and was joined by justices Van Devanter, Sutherland, and Butler. Invoking *Schechter Poultry Corporation v. United* States (1935) and *Carter v. Carter Coal Co.* (1936), the dissenters insisted that the commerce power did not,

categorically, extend to relations between employers and their employees engaged in manufacturing. Unlike the situation in *NLRB v. Jones & Laughlin Steel*, unfair labor practices producing a strike at the clothing manufacturing plant would have no significant effect on interstate commerce – given the relatively small productive capacity of the industry. And the fact that Friedman-Harry Marks Clothing used (perfectly legal) raw materials from states other than Virginia and that it regularly carried its (perfectly legal) products to other states did not change this. Whether the owner of the company bargained collectively with his employees, or not, did not directly affect interstate commerce."[65]

Less than a year after the seminal 1937 rulings in *NLRB v. Jones & Laughlin Steel* and *NLRB. v. Friedman-Harry Marks Clothing*, the Hughes Court handed down, in February 1938, a ruling in *South Carolina State Highway Department v. Barnwell Bros.* that narrowed slightly dormant Commerce Clause principles by recognizing the power of states to regulate the width and weight of semi-trailer trucks on their own highways. The district court upheld the South Carolina regulations because Congress had omitted to regulate this area of interstate commerce, leaving all regulation of heavy, long-bed trucks to the individual states. The Court of Appeals reversed the district court. With Justice Stone authoring the majority ruling, the Supreme Court reversed that ruling with a measured response. According to Stone, in the absence of federal legislation on the subject, the regulations at issue were generally with the competency of the state. Judicial enquiry into their validity under the Commerce Clause, under the circumstances,

[65] *National Labor Relations Board v. Friedman-Harry Marks Clothing* Co., Inc., 301 U.S. 58 (1937).

was limited to the question of whether the restrictions were reasonably calculated to the end sought and in a way that did not discriminate against interstate commerce.[66]

According to Herbert Wechsler, the April 1939 decision of the Court in *National Labor Relations Board v. Fainblatt* demonstrated that Justice Stone was adamant that the prior decisions of the Court dealing with the National Labor Relations Act of 1935 were, before the NLRB, to be taken with the utmost seriousness – and that the act was certainly applicable to unfair labor practices regardless of the extent of their effects on interstate commerce. In his words, "The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved." The term "affecting commerce," meant "in commerce," or burdening commerce, or restricting the flow of commerce or "having lead or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[67]

On the other hand, the Court issued rulings that required regularity in the proceedings of both the NLRB and the federal courts to which the board sometimes turned to enforce its orders. In the March 3, 1941, decision *NLRB. v. Express Publishing Co*., with Justice Stone writing the majority opinion, the Court dealt with a case arising from the refusal of the Express Publishing Company to discuss the proposals of the San Antonio Newspaper Guild for changes in work arrangements. According to Justice Stone, an employer deemed by the NLRB to have refused to

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[66] *South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177, 184, 190 (1938). For the initial articulation by the Supreme Court of the "dormant Commerce Clause," see *Reading Railroad v. Pennsylvania*, 82 U.S. 232 (1873).

[67] Herbert Wechsler, "Stone and the Constitution." *Columbia Law Review*, Vol. 46, no. 5 (September 1946): 764-800, 778; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601 (1939).

bargain collectively in violation of the NLRA was to obey the order of the board to cease and desist. On the other hand, the Court held that an order by the NLRB, to warrant judicial confirmation, was, like the injunction order of a court, to state with reasonable specificity the acts that the employer was to do or refrain from doing.[68] In the decision of the Court returned later the same month, *NLRB v. White Swan Co.*, Justice Douglas, writing for the majority, quite similarly ruled invalid questions certified by the Fourth Circuit Court of Appeals in a case pitting the NLRB against a laundry and dry cleaning business in Wheeling, West Virginia. The flaw certified questions arose from the order of the NLRB requiring the laundry to cease and desist from unfair labor practices, rehire terminated employees, and award them back pay. The damning deficiency of the certified questions was their "objectionable generality" – the omission to include the precise findings and conclusions of the NLRB.[69]

In the period 1938-1941, Associate Justice Stone wrote majority opinions that expanded the regulatory power of Congress under its Commerce Clause authority to prohibit flawed or otherwise problematic products from interstate commerce – rulings that also substantially advanced the fundamental liberties of minorities and fair labor employment practices. *United States v. Carolene Products Company*, handed down in April 1938, ruled on the constitutionality of the Filled Milk Act of Congress of 1923. Carolene Products Company, a Michigan Corporation, was indicted for shipping interstate packages of an article deemed by the act to constitute an impermissible adulterated food. The company argued that the act could not constitutionally be authorized by the Commerce Clause and that it violated the due process clause of the Fifth Amendment, denying defendant of its property rights. The company also

[68] *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941).
[69] *NLRB v. White Swan Co.*, 313 U.S. 23 (1941).

argued that the act violated the Fifth Amendment due process clause insofar as that amendment embraced the equal protection provisions of the Fourteenth Amendment. The Court reversed the judgment of the trial court sustaining a demurrer to the indictment. It also upheld the Filled Milk Act under the power of Congress to exclude from interstate commerce products reasonably shown to be injurious to the public health, relying on a long line of decisions, most recently, at the time, *Kentucky Whip & Collar Co. v. Illinois Central R. Co.* (1937)[70]

Of considerable importance was that part of the majority opinion announcing the appropriate parameters for judicial review in the case of regulations affecting ordinary commercial transactions. Justice Stone declared the Filled Milk Act was "presumptively constitutional" and properly within the discretion of Congress because it was based on ample evidence showing the public health benefits of the act and was not arbitrary or irrational. As many constitutional scholars have pointed out, this appears to have been the first overt articulation by the Court of what came to be called the "rational basis" test. This test declared that, for economic regulatory legislation to meet constitutional muster, it must be rationally related to a legitimate state interest. In this inaugural formulation of the test, the legitimate end was the protection of public health. The power to enact this legislation, however, was grounded in the so-called "commerce prohibiting" rationale for legislation based on the Commerce Clause. In his famous Footnote Four, however, Justice Stone declared that review of legislation aimed at "discrete and insular minorities," in the absence of normal safeguards of the political process,

[70] *United States v. Carolene Products Company*, 304 U.S. 144 (1938); *Reid v. Colorado*, 187 U.S. 137 (1902); *Lottery Case*, 188 U.S. 321 (1903); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334 (1937).

would not enjoy the rational-basis presumption of constitutionality – but rather require a higher level of scrutiny:

> 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. . . .[71]

By 1940, President Roosevelt had the opportunity to appoint seven new justices to the Supreme Court, including Felix Frankfurter, Hugo Black, and William O. Douglas, all of whom he believed would be amenable to his New Deal legislation. In that year the Court heard the case of *United States v. Darby Lumber Co.*, handed down its decision on February 3, 1941.[72] The case involved the Fair Labor Standards Act of 1938 (also known as the Wages and Hours Act), which prohibited interstate shipment of products manufactured by firms that did not comply with the Act's wage and work hour requirements. The defendant in the case, Darby Lumber Company, was situated in Statesboro, Georgia.[73]

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[71] Footnote Four suggested a higher level of judicial scrutiny for legislation that, on its face, violated a provision of the Constitution; attempted to derange the political process; or discriminated against minorities, particular those with numbers insufficient to obtain redress through the political process. This higher level of scrutiny, now dubbed "strict scrutiny," was first articulated by Justice Hugo Black in the December 18, 1944 decision *Korematsu v. United States*, 323 U.S. 214 (1944). *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938); Herbert Wechsler, "Stone and the Constitution." *Columbia Law Review*, Vol. 46, no. 5 (September 1946): 764-800, 781; Jack M. Balkin, "The Footnote." *Northwestern University Law Review*, Vol. 83 (1988): 275; Robert A. Levy and William H. Mellor, *"Earning an Honest Living": The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom* (New York: Sentinel, 2008), 187-197.

[72] *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

[73] Robert H. Bork and Daniel E. Troy, "Locating the Boundaries: The Scope of Congress' Power to Legislate Commerce," *Harvard Journal of Law and Public Policy,* Vol. 25, No. 3 (2002), 881.

Under the original 1938 Federal Labor Standards Act, one whose work was in the channels of interstate commerce was covered as an individual. According to the legislation, Congress imposed the new standards to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general wellbeing of workers." Thus, while invoking constitutional authority under the Commerce Clause, Congress targeted practices that caused commerce and the channels and instrumentalities of commerce to be used to propagate unfair labor conditions in the several states; burdened commerce and the free flow of goods in commerce; constituted unfair method of competition in commerce; led to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and/or interfered with the orderly and fair marketing of goods in commerce. The act adopted an eight-hour day and a forty-hour workweek, while allowing workers to earn wages for an extra four hours of overtime. The act required employers to pay a minimum wage and to provide overtime pay at the rate of one-and-a-half times regular pay. Of considerable importance for assessing the widening scope of the FLSA in coming decades, its initial version exempted numerous categories of employees, including persons employed 1) in a bona fide executive, administrative, or professional capacity; 2) in a local retailing capacity; 3) in the capacity of outside salesman; 4) in any retail or service establishment the greater part of whose selling or servicing was in intrastate commerce; 5) as a seaman; 6) as a railway worker [with some exceptions]; 7) in the harvesting, cultivating, or farming of any kind of aquatic animal and vegetable life; 8) in agriculture; 9) in connection with the publication of a newspaper [those with a defined limited

readership]; 10) in the processing or packing of various agricultural or horticultural commodities for market; and 11) in making cheese, butter, other dairy products.[74]

In *Darby*, a unanimous Court referred to *Dagenhart* as "a departure from the principles which have prevailed in the interpretation of the Commerce Clause," the justices overturned the opinion of *Dagenhart*, and ruled instead that the Wages and Hours Act was within the bounds of Congress' commerce power.[75] Writing the opinion of the Court, which characterized the FLSA as a "comprehensive legislative scheme," was Justice Harlan F. Stone. In his view, "[w]hile manufacture is not, of itself, interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of commerce."[76] Justice Sone embraced the prime rationale Congress employed to justify the FLSA – "that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows."[77] Another key component of the decision, according to Herbert Wechsler, was the direct application of the FLSA standards to all employees engaged in production for commerce interstate. According to Justice Stone, "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the

[74] Pub. L. No. 718, 52 Stat. 1060, enacted June 25, 1938; Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage." *Monthly Labor Review*, Vol. 101, no. 6 (1978): 22-30; Suzanne B. Mettler, "Federalism, Gender, & the Fair Labor Standards Act of 1938." *Polity*, Vol. 26, no. 4 (1994): 635-654.
[75] *Darby*, 116.
[76] Ibid., 109, 113.
[77] Ibid., 115.

. . . exercise of the granted power of Congress to regulate interstate commerce.[78]

According to Dan T. Coenen, the Court recognized that its rationale in *Darby*, insofar as it relied on the well-established commerce-prohibiting approach, was problematic. For the first time, the Court upheld the use by Congress of its commerce prohibiting power to ban the interstate shipment of products that were, in and of themselves, perfectly legal, indeed, extraordinarily useful and valuable – that is, finished planks and boards for construction purposes. The Congress and the Court justified this novel ban by condemning the production processes that had produced the innocuous goods. After all, in *Hammer v. Dagenhart*, the Court had declared that Congress, with the Child Labor Act of 1916, could not prohibit from interstate shipment goods, otherwise harmless, simply, because they were manufactured impermissibly by children. The commerce-prohibiting approach required "bad goods." In *Darby*, the Court dealt with this difficulty by, simply overruling *Hammer*. It declared that, thereafter, the Court would allow Congress to employ the commerce-prohibiting approach whether the goods transported across state lines were inherently "harmful or deleterious" or not.[79] Gerald Gunther, writing in 1985, emphasized that this rationale entailed a kind of "bootstrapping" that raised large questions about just how far Congress could go in leveraging the commerce-prohibiting technique to regulate intrastate behavior.[80]

Of considerable importance is that the *Darby* Court, independent of its prohibition of interstate shipment of proscribed goods, held that provisions of the FLSA designed to suppress illegal employer activities involved in their production were also within the commerce power of

[78] Ibid., 118; Wechsler, "Stone and the Constitution," 779.
[79] Coenen, *Constitutional Law: The Commerce Clause*, 66-69.
[80] Gerald Gunther, *Constitutional Law*, 11th ed. (Mineola: Foundation, 1985), 143-144.

Congress.[81] Justice Stone deployed a "substantial effects" rationale for the purpose. He conceded that state governments might pass laws that affected interstate commerce, but emphatically declared that "it does not follow that Congress may not, by appropriate legislation, regulate intrastate activities where they have a substantial effect on interstate commerce."[82] Justice Stone cited *Jones & Laughlin Steel* and a 1937 decision of the Court, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, which had affirmed an order of the NLRB ordering the packing company to reinstate workers who had been fired for union organizing. With Chief Justice Hughes writing for the majority in *Santa Cruz*, he discounted all challenges to the commerce authority of Congress to regulate labor union-management relations. And he made clear the requisite nexus of intrastate activities not amounting to commerce that were, nonetheless, within the reach of the commerce power:

> It is also clear that, where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a *close and substantial relation to interstate commerce* in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system.[83]

Based on the Necessary and Proper Clause, the ruling in *Darby*, moreover, upheld the power of Congress to establish the FLSA wage and hours mandates even though the statute did not provide that courts might find, in particular cases, that violations of work and hours regulations did not substantially affect interstate commerce. This regulatory power, said the Court, extended to intrastate activities that "so affect interstate commerce *or* the exercise of the

[81] *Darby*, 119-122.
[82] *Darby*, 119.
[83] *Santa Cruz Fruit Packing Co. v. Labor Board*, 303 U.S. 453, 466 (1938). [Emphasis added]

power of Congress over it as to make regulation of them "appropriate means to a legitimate end" – that is, the regulation of interstate commerce.[84]

As indicated, the decision in *Darby* ratified that part of the FLSA that transmuted what an earlier Supreme Court would have deemed intrastate manufacturing (and thus, not interstate commerce) into an activity properly within the ambit of the Commerce Clause. And it did so with, in addition to the renovated "commerce prohibiting" rationale, a new "affecting interstate commerce" rationale – one that imaginatively (and, in some cases, fictively) tied the manufacturing process of all lumber in a venue to the sale of some of the lumber so produced in another state. According to the Court, "the evils. . . of substandard labor conditions" had the consequence of dislocating commerce and "driving down labor conditions in [other] states." In the words of Justice Stone:

> "Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the [interstate] commerce which do not conform to the specified labor standards. . . may choose the means reasonably adapted to the attainment to [the] permitted end, even though they involve control of intrastate activities."[85]

On the same day as the Supreme Court ruled in *Darby*, it returned its decision in *Opp Cotton Mills v. Administrator*, which involved a challenge by the Opp Cotton Mill, an Alabama corporation, to the order of the FLSA Administrator of the Wage and Hour Division of the Department of Labor. The order required textile mill owners to pay its employees a thirty-two and one-half cents per hour wage, which an industry committee had, in coordination with the administrator, made uniform in the textile industry. In addition to complaints that the proceeding before the administrator violated due process, a primary complaint of the owners was that

[84] Ibid., 118, 125. [Emphasis added]
[85] *Darby*, 121. Coenen, *Constitutional Law: The Commerce Clause*, 66-69.

Congress, with the FLSA, had unconstitutionally delegated to the administrator, in cooperation with an industry committee, essentially legislative power to set industry wage scales.[86] Justice Stone, writing for the majority, invoked *Darby,* to conclude that the FLSA, as applied to textile manufacturers, was certainly within the Commerce Power of Congress and did not violate the Tenth Amendment.[87] The Court approved that part of the FLSA allowing an industry committee and the administrator to establish wage scales "as rapidly as economically feasible without substantially curtailing employment." There was no "failure of legislative function" insofar as Congress had provided standards, guidelines, procedures, and record keeping requirements for the administrator, including the keeping of hearing records.[88] As well, the Court held that the proceedings involving Opp Cotton Mill were entirely within constitutional bounds, as they satisfied the requirements of due process of a hearing on notice. And there was no error or want of due process in permitting the industry committee to appear before the Administrator and to offer evidence in support of its recommendations. Nor was there want of due process in permitting members of the staff of the Wage and Hour Division to give testimony.[89] As Wechsler pointed out, "attacks upon delegation had, indeed, lost their old magic as the Agricultural Adjustment Act of 1938, the Bituminous Coal Act of 1937 and the Agricultural Marketing Agreement Act were successively sustained." In this context, the solid practical judgment of Justice Stone met the challenge, now, of adjusting legislative mandates for regulation and oversight to the need for flexible administrative implementation:

> The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the

[86] *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 145 (1941).
[87] *Ibid*., 142.
[88] *Ibid*., 144.
[89] *Ibid*., 154.

> legislative function are the determination of the legislative policy and its formulation as a rule of conduct. These essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.[90]

Coenen argues that, just as *Darby* registered that Congress could regulate intrastate manufacturing activities with its commerce-prohibiting approach, the January 1939 decision of the Court in *Currin v. Wallace* announced that Congress could reach intrastate sales activities with an "in commerce" approach – that is, when such was necessary to regulate the sale of products ultimately involved in interstate commerce, whether or not interstate sale was the intention of their manufacturers.[91] Plaintiffs were tobacco warehousemen and auctioneers in Oxford, North Carolina, who sought a declaratory judgment that the Tobacco Inspection Act of August 12, 1935, was unconstitutional and an injunction restraining Secretary of Agriculture Henry A. Wallace from enforcing it. The act authorized the secretary to establish standards of tobacco quality and to designate those auction markets where tobacco bought and sold moved in interstate or foreign commerce. It also provided, under penalty, that at a market so designated, no tobacco was to be offered for interstate or intrastate sale at auction until it had been inspected and certified by an authorized representative of the secretary. This regulatory apparatus had been developed to deal with numerous sharp practices and "an unusual degree of uncertainty in . . . prices," typically resulting from a lack of accurate information about the quality of tobacco at the time of auction. [92]

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[90] Wechsler, "Stone on the Constitution," 780; *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 145 (1941).

[91] Coenen, *Constitutional Law: The Commerce Clause*, 76-77; *Currin v. Wallace*, 306 U.S. 1 (1939).

[92] *Currin*, 10. See also, *Ibid*., p. 12.

With Chief Justice Hughes delivering the majority opinion, the Court declared it was "idle to contend" that the case did not concern "sales in interstate or foreign commerce" because "[w]here goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."[93] It made no difference that "inspection and grading of the tobacco took place before the auction" because "it is obvious that the inspection and grading have immediate relation to the sales in interstate and foreign commerce."[94] Equally important, the Court held that the tobacco inspection scheme was within the commerce power, even though the act required inspection before auction in the case of tobacco bound both for interstate shipment *and* intrastate use.[95] The Court declared that practical considerations authorized Congress to impose inspection requirements on tobacco sold for intrastate use. In its view, "the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner that made it necessary, if the congressional rule were to be applied, to make it govern all the tobaccos thus offered for sale."[96]

In April 1939, in *Mulford v. Smith*, the Court further elaborated its "in commerce" jurisprudence to regulate the intrastate production and sale of tobacco. Producers of flue-cured tobacco in Georgia and Florida challenged the constitutionality of provisions of Title III of the Agricultural Adjustment Act (AAA) of 1938 that authorized warehousemen to deduct penalties from the sales price of tobacco grown in amounts that exceeded producer quotas and held by the warehousemen to be sold on behalf of the producers. The appellant-producers maintained that the AAA was unconstitutional on a number of grounds, including the argument that its

[93] *Ibid*.
[94] *Ibid*., 32.
[95] *Currin*, 1-2, 9, 11.
[96] *Ibid*., 32.

regulatory scheme was beyond the powers of Congress and, most certainly, beyond its commerce power.[97] With Chief Justice Owen Roberts authoring the majority opinion, the Court held, contrary to the claims of the producers, that the act did not purport to control production, did not amount to an unconstitutional delegation of legislative authority to the secretary of agriculture, nor did it deprive the producers of due process. More important for present purposes, the Court held that Congress was authorized to regulate the volume of tobacco produced to protect and conserve interstate commerce. Where marketing conditions were such that regulation as to sales in interstate and foreign commerce could not be effective unless extended to sales in intrastate commerce also, such extension of regulation was constitutional. According to Justice Roberts, the rule reached interstate commerce "at the throat where the tobacco enters the stream of commerce – the marketing warehouse." Citing *Currin*, the Court also declared "In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation, to be effective, must, and therefore may constitutionally, apply to all sales."[98] And Coenen observes that Justice Roberts supplemented his "in-commerce" justification of the act by invoking a commerce-prohibiting rationale, holding that, if Congress was authorized to prohibit all interstate movements of a commodity, this power extended "a fortiori to limitation on the amount of a given commodity which may be transported in such commerce."[99]

In June 1939, the Court returned its decision in *United States v. Rock Royal Cooperative, Inc.*, which further articulated "in commerce" jurisprudence and extended the commerce power

[97] *Mulford v. Smith*, 307 U.S. 38 (1939).
[98] *Mulford*, 47.
[99] Coenen, *Constitutional Law*, 77; *Mulford*, 48.

to the intrastate production and sale of milk.[100] Under the Agricultural Marketing Agreement Act (AMAA) of 1937, Secretary of Agriculture Henry Wallace issued an order fixing minimum prices to be paid the producers of milk to dealers, or "handlers," and sold by the latter within a "marketing area" encompassing New York City and adjacent counties. Two-thirds of the milk to be regulated in the marketing area came from other states where it had been produced or from the New York area through other states. One third of the milk to be sold to consumers in the New York City marketing area was produced exclusively in the state of New York. According to the secretary, this milk became "physically and inextricably intermingled" with the "interstate milk." The federal government brought a suit to enforce the order against Rock Royal Cooperative, an association of milk producers, who had objected to the order and its underlying congressional legislation – because the AMAA exceeded the power of Congress generally and, especially, its commerce power. The Supreme Court, with a majority opinion authored by Justice Stanley F. Reed, relied on *Currin* and *Mulford* to declare that the AMAA passed constitutional muster. According to Justice Reed, where milk sold by dairy farmers locally and milk from other states were drawn into a general plan for "protecting interstate commerce in the commodity from interferences, burdens, and obstructions," and from "the social and sanitary evils" created by impermissibly low prices, the commerce power of Congress to establish milk prices extended to the local, intrastate production and sale of milk.[101]

Justices McReynolds and Butler dutifully, it seems, registered their dissent. In the view of the two associate justices, "the challenged order of the Secretary must succumb to two manifest objections." These were, simply put, an impermissible employment by Congress of its commerce

[100] *United States v. Rock Royal Co-op.*, 307 U.S. 533, 568-569 (1939).

[101] *Rock Royal Cooperative*, 568-569.

power and impermissible delegation by Congress of its legislative authority. According to the dissenters, "Congress possesses the powers delegated by the Constitution – no others." In the estimation of McReynolds and Butler, the decision of the Court in *Schechter Poultry* had made it abundantly clear that Congress did not possess "authority to manage private business affairs under the transparent guise of regulating interstate commerce." The dissenters conceded that the production and distribution of milk were important enterprises but pointed out that "so is breeding the cows, authors of the commodity; also, sowing and reaping the fodder which inspires them." The second objection entailed some equally pithy language:

> If perchance Congress possesses power to manage the milk business within the various states, authority so to do cannot be committed to another. A cursory examination of the statute shows clearly enough the design to allow a secretary to prescribe according to his own errant will and then to execute. This is not government by law, but by caprice. Whimseys may displace deliberate action by chosen representatives and become rules of conduct. To us, the outcome seems wholly incompatible with the system under which we are supposed to live.[102]

Under the circumstances, Justice McReynolds undoubtedly was gratified to join the majority of the Court in *FTC. v. Bunte Bros*, handed down in February 1941, only a few weeks subsequent to the decision of the Court in *Darby*.[103] *FTC v. Bunte Bros*. was a decision that set up something of a restraint to the rapidly growing "in commerce" jurisdiction of Congress and its agencies. This case involved a challenge brought by a candy manufacturer in Illinois to the order of the Federal Trade Commission, under Section 5(a) of the 1914 Federal Trade Commission Act, to cease and desist from selling "break and take" assortments of candy to retailers situated in the State of Illinois. "Break and take" bundles made the amount of candy the retailer received

[102] *Ibid*., 582-583.
[103] *FTC. v. Bunte Bros.*, 312 U.S. 349 (1941); Coenen, *Constitutional Law: The Commerce Clause*, 77.

dependent upon chance and, according to the FTC, allowed Illinois manufacturers who used this mode of packaging an unfair advantage in competition with manufacturers of candy outside the State of Illinois who marketed their products within that state. The Seventh Circuit Court of Appeals reversed the judgment of the district court that had affirmed the order of the commission. And the Supreme Court affirmed the ruling of the Court of Appeals. According to the majority opinion of the Supreme Court, authored by Justice Felix Frankfurter, the "unfair competition" to be suppressed by the Federal Trade Commission was "designed by Congress as a flexible concept with evolving content."[104] On the other hand, "in ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background. . . ."[105] Justice Frankfurter pointed out that the Trade Commission Report for 1939 "listed as 'unfair competition' thirty-one diverse types of business practices which run the gamut from bribing employees of prospective customers to selling below cost." In his estimation, the construction of Section 5 of the 1914 act urged by the commission in the present case would "give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law."[106]

In *FTC v. Bunte Bros.*, the Court appears to have suggested that, when the relationship between intrastate commerce and interstate commerce was excessively tenuous – "in commerce" frameworks of assessment were insufficient; only explicit legislation by Congress could reach such intrastate commerce. Justice Frankfurter seemed to point to the "substantial effects test" first articulated in *NLRB v. Jones & Laughlin Steel* four years earlier. In his view, "to read

[104] *FTC. v. Bunte Bros.,* 354.
[105] *Ibid*., 352.
[106] *Ibid*., 354-355.

'unfair methods of competition in commerce' as though it meant "unfair methods of competition in any way affecting interstate commerce" required, in view of all the relevant considerations, much clearer manifestation of intention than Congress had furnished in the Federal Trade Commission Act.[107] One passage of the dissent authored by Justice Douglas, and joined in by justices Black and Reed, similarly seemed to invoke a "substantial effects" argument in favor of upholding the decision of the FTC:

> The Commission found that respondent's use of chance assortments in the sale and distribution of its candies in Illinois has a direct and powerful burdensome effect upon interstate commerce in candies from other states to the Illinois, and gives respondent an undue and unreasonable preference over competitors located in other states.

Yet Justice Douglas followed this observation with the point that "The only question . . . is whether respondent's practices constitute unfair methods of competition 'in commerce' within the meaning of § 5(a) of the Federal Trade Commission Act."[108]

The Great Depression, the New Deal, and post-1936 changed direction of the United States Supreme Court brought to fruition what many commentators have dubbed "liberal legal culture." Central to its emergence was the sociological jurisprudence of Roscoe Pound, which had emphasized the actual socioeconomic effects of law and its institutions and reflected the social reform activism of early twentieth-century progressives.[109] Equally important was a body of thought that built on these ideas in the 1920s and 1930s – "legal realism,"

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[107] *Ibid*., 356.
[108] *Ibid*.
[109] Roscoe Pound, *Outlines of Lectures on Jurisprudence* (Cambridge, Mass., 1914); idem, *The Spirit of the Common Law* (1921; Boston: Beacon Press, 1966); idem, *Law and Morals* (1924); idem, *Criminal Justice in America* (New York: H. Holt, 1930).

whose most influential proponents were Karl Llewellyn and Jerome Frank. Thinkers such as these stressed the flexibility and artificiality of legal rules and principles. The realists proposed to bring aggregate social data, sociological analysis, and theories of behavioral psychology into the operation of the judiciary – ahead of older, "formalistic" concerns about coherence, certainty, and predictability.[110] Legal realists believed in general legal principles, but they insisted that the traditional deference accorded to precedent was merely a screen that shielded the inherently conservative biases of judges. In 1930, Frank published *Law and the Modern Mind*, which proposed that judicial decisions were motivated primarily by the influence of psychological factors of the individual judge, a proposition that created no small amount of controversy among jurists who remained committed to the now-hidebound notion that legal principles and rules, more than any other considerations, shaped judicial decisions.[111]

Liberal legal culture fully embraced New Deal commitments to the regulatory state.[112] Amid an almost continuous popular perception of deep national crisis, Congress and the president delegated a growing segment of the increasing federal regulatory power into the hands of administrative agencies, whose rules and procedures steadily replaced Anglo-American common law principles and courts of law as the framework for managing a national capitalist economy. The aim was to reduce wide swings in the business cycle and address the ill socioeconomic effects of such patterns as efficiently and rationally as possible. This innovation

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[110] Karsten and Hall, *The Magic Mirror*, 292-294; Edward G. White, *Patterns of American Legal Thought* (Indianapolis: Bobbs-Merrill, 1978), 123.

[111] Jerome Frank, *Law and the Modern Mind* (Transaction Publishers, 1930); Lon Luvois Fuller and Thomas W. Bechtler, *Law in a Social Context:* Liber Amicorum *Honouring Professor Lon L. Fuller* (1978), 17; N.E.H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (1997), 197, 200, 316.

[112] Karsten and Hall, *The Magic Mirror*, 309; Peter H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982), 295.

featured powerful interventions into decisions about the allocation of resources; prices and production levels of farm products and other commodities; and employee-employer relations, while creating the rise of a substantial social welfare apparatus.[113]

The involvement of the United States in World War II substantially shaped the contours of liberal legalism in the United States Supreme Court. President Franklin Roosevelt undoubtedly appointed Harlan F. Stone as chief justice, who took office on July 3, 1941, in part, at least, for his demonstrated commitment to New Deal reforms as an associate justice of the Court. After Chief Justice Stone had presided for only five months, however, Congress responded to the Japanese attack on Pearl Harbor with a declaration of war against Japan followed shortly by a declaration of war against Germany in response to that country's declaration against the United States. Congress and the president worked quickly to put the United States on a war footing. Key enactments included the War Powers Act of 1941 and the War Powers Act of 1942, both of which authorized the executive branch to organize industrial production for the two-front war effort.[114] The Emergency Price Control Act of 1942 established the Office of Price Administration, which was charged with the task of controlling inflation and regulating agricultural commodities and an array of goods and services.[115]

Some commentators have concluded that consensus among the justices of the Stone Court steadily deteriorated through World War II. But most scholars agree that the Court remained friendly to Roosevelt policies.[116] In any case, the Court proved serviceable for bolstering

[113] Karsten and Hall, *The Magic Mirror*, 307-309.
[114] First War Powers Act 55 Stat. 838 (1941); Second War Powers Act 56 Stat. 176 (1942).
[115] Pub. L. 77-421, 56 Stat. 23, 50a U.S.C.§ 901, effective January 30, 1942.
[116] Marcus E. Hendershot, Mark S. Hurwitz, Drew Noble Lanier, Richard L. Pacelle, "Dissensual Decision Making: Revisiting the Demise of Consensual Norms with in the U.S. Supreme Court." *Political Research Quarterly*, Vol. 66, no. 2 (June 2013): 467-481; Pamela C. Corley, Amy

necessary wartime enhancements of federal power. In July 1942, for example, Chief Justice Stone wrote the per curiam opinion of the Court in *Ex Parte Quirin*, which upheld the authority of the president to try by military tribunal Nazi saboteurs captured in the United States.[117] In *Yakus v. United States*, decided in March 1944, with Chief Justice Stone again writing for the majority, the Court affirmed an overly-broad congressional delegation of authority to the Office of Price Administration (OPA). According to the Court, the OPA could stand because it could "save" an otherwise unconstitutional delegation of power to set prices through a narrowing construction that constrained the discretion of the agency.[118] Chief Justice Stone, in 1942, authored the majority opinion in *Hirabayashi v. United States*, sustaining against constitutional challenge the application of curfew restrictions targeting persons with Japanese ancestry. The next year, he wrote the majority opinion in *Korematsu v. United States*, which ratified the order by President Roosevelt to inter Japanese Americans for the preservation of national security.[119]

Notwithstanding *Hirabayashi* and *Korematsu*, legal scholars credit the Stone Court with otherwise advancing enlightened understandings of ordered liberty. Melvin I. Urofsky argues its decisions, as well as those of the Vinson Court (1946-1953), signaled a fundamental shift in

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Steigerwalt, Artemus Ward, "Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus." *Journal of Supreme Court History*, Vol. 38, no. 1 (2013): 20-50; Stacia L. Haynie, Leadership and Consensus on the U.S. Supreme Court." *Journal of Politics*, Vol. 54, no. 4 (November 1992): 1158-1170; Thomas G. Walker, "On the Mysterious Demise of Consensual Norms in the United States Supreme Court." *Journal of Politics*, Vol. 50, no. 2 (May 1988): 361-390.

[117] *Ex parte Quirin*, 317 U.S. 1 (1942).

[118] *Yakus v. United States*, 321 U. S. 414 (1944); Wechsler, "Stone and the Constitution," 783; Sprecher, Robert A. (1944). "Administrative Law—Price Control Act—Recent Amendments." *Michigan Law Review*. Michigan Law Review, Vol. 43, No. 1. 43 (1): 188-203.

[119] *Hirabayashi v. United States*, 320 U. S. 81 (1943); *Korematsu v. United States*, 323 U. S. 214 (1944; Wechsler, "Stone and the Constitution," 785.

jurisprudence – from protection of private property to the enhancement of individual liberties.[120] Chief Justice Stone worked both to vindicate centralizing power and, paradoxically, to develop new areas of constitutional protection. For example, he authored the majority opinion in the 1942 decision *Hill v. Texas*, which held that evidence showing that state grand jury commissioners had consciously omitted to place any African American on a county grand jury list constituted a *prima facie* case of systematic racial discrimination in violation of the Fourteenth Amendment.[121] More well-known is the April 1944 decision of the Court in *Smith v. Allwright*, which overturned a Texas statute that authorized the Democrat Party of that state to hold all white primary elections. The Court held that the restricted primary denied black citizens equal protection under the law in violation of the Fourteenth Amendment.[122]

According to Wechsler, some of Justice Harlan Stone's most important contributions to Supreme Court jurisprudence engaged the problem of "determining the boundaries and distribution of power under the federal constitution." In particular, he was deeply committed to overturning doctrines that limited congressional power under the Commerce Clause, first, as an associate justice and then as chief justice.[123] According to Melvin I. Urofsky and Peter Renstrom, notwithstanding occasional differences on the parameters of federalism among justices Hugo Black, Felix Frankfurter, William O. Douglas, and Robert H. Jackson, all of whom were

[120] Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953* (Columbia: University of South Carolina Press, 1997),118-120.
[121] *Hill v. Texas*, 316 U. S. 404 (1942).
[122] *Smith v. Allwright*, 321 U.S. 649 (1944).
[123] Herbert Wechsler, "Stone and the Constitution." *Columbia Law Review*, Vol. 46, no. 5 (September 1946), 765-771.

confirmed as associate justices in the period 1937-1941, the Stone Court generally supported the steady extension by Congress of its commerce power.[124]

Decisions of the Supreme Court ruling on the implementation of the National Labor Relations Act, which came in abundance after Pearl Harbor and through 1942, persistently dealt with the challenge of delineating the authority, discretion, and duties of the NLRB. In *NLRB v. Virginia Elec. & Power Co.* (1941), with Justice Murphy writing the majority opinion, the Court recognized the power of the board to determine if an employer had interfered with, restrained, or coerced employees in contravention of their right to organize. But it also required the board to take into account, not only impermissible communications of an employer to its employees, but also the actual course of conduct engaged in by company officials.[125] In January 1942, the Court rendered a per curiam opinion in *NLRB v. P. Lorillard Co.*, which affirmed the prerogative of the board to decide which of two competing labor unions actually represented the majority of employees at the time the board determined that the employer was to be cited for refusing to bargain collectively.[126] In March of that year, with Justice Reed delivering the majority opinion, the Court held in *NLRB v. Electric Vacuum Cleaner Co.* that the determination by the board that a closed shop agreement between an employer and a labor union was not valid because, prior to such agreement, the union had been assisted by cooperation of the employer – was a proper ruling if supported by substantial evidence.[127]

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[124] Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953* (Columbia: University of South Carolina Press, 1997),118-120; Peter Renstrom, *The Stone Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, 2001), 179-180.
[125] *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 476-479 (1941).
[126] *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942).
[127] *NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685 (1942).

In a per curiam opinion rendered in April 1942, *NLRB v. Nevada Consolidated. Copper Corp.,* the Court again addressed the scope of the decision-making power of the NLRB – this time in a case involving allegations of labor union misconduct. The board determined that the respondent was, for discouraging union organizing, guilty of unfair labor practices, that is, of refusing to reemploy former employees and employ two new applicants. The Court determined that there was "substantial evidence" before the board showing that the refusal of the respondent to hire the men was "motivated by its belief that they had engaged or threatened to engage in destruction of respondent's property and had threatened to injure some of respondent's managerial employees and members of their families." But the Court upheld the determination of the board because "there was also substantial evidence . . . that respondent's motive for refusing the employment was discouragement of membership in a labor union." Since the determination of the board had evidentiary support, its determination was not to be disturbed.[128]

New Deal collective bargaining rights and the work of the NLRB appear to have encouraged aggressive tactics among some labor union members, which more than a few justices of the Supreme Court viewed with a notable amount of understanding and toleration. In early March 1942, the Court rendered its decision in *United States v. Teamsters Local 807*, which entailed review of the racketeering conspiracy convictions of New York City Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America – and twenty-six members of the union.[129] Evidence presented at the trial showed that union "delegates" for the west side of Manhattan and other union members waylaid trucks passing from New Jersey to New York, forced their way onto the trucks and, with threats of beating and

[128] *NLRB v. Nevada Consol. Copper Corp.*, 316 U.S. 105 (1942).
[129] *United States v. Teamsters Local 807*, 315 U.S. 521 (1942)

actual beatings, obtained payments from the drivers or employers of $9.42 for a large truck and $8.41 for a small one, which they claimed to be, in each case, the equivalent of the union wage scale for a day's work. After payment, they sometimes assisted in unloading the besieged trucks, sometimes they did not. The convictions came under the 1934 Anti-Racketeering Act, which held "any person who, in connection with or in relation to any act . . . affecting interstate commerce or any article or commodity moving in such commerce . . . Obtains or attempts to obtain, by the use of or . . . threat to use force, violence, or coercion, the payment of money. . . shall be guilty of felony."[130] But, in a majority opinion authored by Justice James F. Byrnes, the Court reversed the convictions. First, the Court observed that Congress intended the Anti-Racketeering Act to suppress the terroristic activities of professional gangsters – not to interfere with "traditional labor union activities." More important, Section Two of the act declared an exception: force, violence or coercion employed to obtain "the payment of wages by a *bona fide* employer to a *bona fide* employee." Clearly, concluded Justice Byrnes, the convicted Teamsters intended to obtain payment for services, not protection money.[131] Justices Roberts and Jackson took no part in the decision, but Chief Justice Stone authored a dissent, which included this comment:

> When the Anti-Racketeering Act was under consideration by Congress, no member of Congress and no labor leader had the temerity to suggest that such payments, made only to secure immunity from violence and intentionally compelled by assault and battery, could be regarded as the payment of "wages by a *bona fide* employer," or that the compulsion of such payments is a legitimate object of a labor union, or was ever made so by any statute of the United States. I am unable to concur in that suggestion now. It follows that all the defendants who conspired to compel such payments by force and

[130] Section Two, Act of June 18, 1934, 48 Stat. 979; Craig M. Bradley, "Anti-Racketeering Legislation in America," *The American Journal of Comparative Law*, Vol. 54 (2006): 671-692.
[131] *United States v. Teamsters Local 807*, 531-532.

> violence, regardless of the willingness of the victims to accept them as employees, were rightly convicted.[132]

In January 1943, the Court dealt with the February 1940 judicial petition of Indiana & Michigan Electric Company to reopen a case heard before the NLRB, in which the board had determined that the electric company had engaged in unfair labor practices, namely coercing its employees to join a company-controlled labor union, Michigana Association. The difficulty, however, was that leaders of Local B-9 of the International Brotherhood of Electrical Workers had attempted to coerce officers of the electric company to compel its employees to join their union. In this connection, officers of Local B-9 had employed extortion and sabotage to achieve their goal during the extended pendency of proceedings before the board. Two B-9 officials and one regular member were tried and convicted in state court of, on at least five separate occasions, sawing off high-voltage transmission line poles and dynamiting high-voltage transmission line towers owned by Indiana & Michigan Electric. Some of the sabotage occurred along public highways and railroad tracks. According to the Court in *NLRB v. Indiana & Michigan Elec. Co.*, it was incumbent on the NLRB to reopen the case and consider the possibility that the union misconduct and the testimony of the saboteurs improperly influenced the outcome of its ruling. According to the majority, the NLRB had relied heavily, if not primarily, on the testimony of the two union officials convicted of sabotage to arrive at its determination.[133] The concurrence of justices Black, Douglas, and Murphy, however, admonished the majority for its presumptuousness:

> A desire to punish dynamiters does not justify a failure to protect respondent's employees, innocent of wrongdoing, in their freedom either to bargain collectively

[132] *Ibid*., 543-543.
[133] *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 19, 29 (1943).

> through representatives of their own choosing or to be represented by no one at all. Without relying in the slightest degree on the evidence of persons convicted of or charged with dynamiting, the Board found the [Michigana] Association to be company-dominated. Its order gave no benefit to anyone even remotely suspected of complicity in the crimes charged. Instead, it carefully eliminated such individuals, and the Union, from the scope of its award, and gave no credence to the suspect witnesses.[134]

Decisions regarding the scope of the Fair Labor Standards Act reflected the pronounced sympathy of most of the justices of the Supreme Court. In *Kirschbaum v. Walling*, handed down in June 1942, the Court ruled that FLSA wage and hour rules extended to all workers employed by companies engaged "in the production of goods for interstate commerce." With this further elaboration of "in commerce" doctrine, Justice Frankfurter, who authored the majority opinion, declared that even employees not directly involved in the production process of a company were to be covered, at least if they were engaged in an "occupation necessary to the production."[135]

In *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, the Court dealt with lower court rulings that had denied three iron ore mining companies operating twelve underground mines in Jefferson County, Alabama, a declaratory judgment that time spent by miners traveling underground to their work sites did not constitute compensable employment under the Fair Labor Standards Act. With a majority opinion authored by Justice Frank Murphy in March 1944, the Court held that the travel time of the miners, indeed, constituted "work" under the FLSA – that the act was a "remedial and humanitarian" measure and "must not be interpreted or applied in a narrow, grudging manner." In a dissent authored by Justice Roberts,

[134] *Ibid*., 31.
[135] *Kirschbaum v. Walling*, 316 U.S. 517, 526 (1942).

and joined by Chief Justice Stone, the holding of the majority was overly expansive. In the words of Justice Roberts,

> The question for decision in this case should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not with a desire to construe legislation so as to accomplish what we deem worthy objects, but in the traditional and, if we are to have a government of laws, the essential attitude of ascertaining what Congress has enacted, rather than what we wish it had enacted.[136]

In a decision rendered in early May 1945, the Court dealt with the petition of the Jewell Ridge Coal Corporation, which operated two bituminous coal mines in Virginia, for a declaratory judgement against the United Mine Workers of America and other unions that time spent traveling by coal miners between the underground portals of the mines and the working faces counted as compensable work under the FLSA. With a majority opinion rendered by Justice Murphy, the Court decided that, indeed, such travel time was compensable, referring to its decision in *Tennessee Coal.* In his dissenting opinion, however, Justice Jackson maintained that the majority opinion both violated and ignored collective bargaining agreements between unions and employers and was contrary to the intent of the FLSA.[137]

In February 1946, the Court ruled on the refusal of the Oklahoma Press Publishing Company to provide company records in response to a subpoena issued by the administrator of the FLSA – to determine if the company was violating the wage and hours requirements of the act. In a majority opinion delivered by Justice Rutledge, the Court held that the FLSA, as applied to the

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[136] *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 607 (1944).
[137] *Jewell Ridge Coal Corp. v. United Mine Workers of America*, 325 U.S. 161 (1945); Dennis Hutchison, "The Black-Jackson Feud." *Supreme Court Review* (1988): 203-243; Theodore J. St. Antoine, "Justice Frank Murphy and American Labor Law." *Michigan Law Review*, Vol. 100, no. 7 (2002): 1900-1926.

business of publishing and distributing newspapers, did not violate the First or Fifth Amendment or exceed the power of Congress under the Commerce Clause. The Court refused the demand by the press that the question of FLSA coverage be adjudicated, in a court of law, before being required to comply with the subpoena of the administrator. According to the Court in *Oklahoma Press Publishing Co. v. Walling*, the administrator of the Wage and Hour Division of the Department of Labor was entitled to issue his subpoena *duces tecum* and to judicial enforcement of the subpoena without a prior federal court ruling authorizing it. Congress had explicitly authorized the administrator, rather than the federal district courts, in the first instance, to investigate the question of FLSA coverage by obtaining the production of relevant books, records, and papers.[138]

In early February 1942, the Court further elaborated its "affecting interstate commerce" rationale to justify New Deal regulations of intrastate industries. In *United States v. Wrightwood Dairy Company*, the Court dealt with yet another challenge to the Agricultural Marketing Agreement Act of 1937, particularly its sections authorizing the Secretary of Agriculture Henry A. Wallace to issue marketing orders fixing minimum prices to be paid to producers of milk by handlers or dealers. Wrightwood Dairy, a handler of milk in the Chicago marketing area, objected to the order of the secretary requiring the payment of a uniform price to producers and other regulatory mandates – because its milk business was entirely local, that is, intrastate, in nature. At the same time, the company argued that the AMAA did not, under a proper reading of the Commerce Clause, apply to its operations. With a majority opinion authored by Chief Justice Stone, the Court declared that the federal power to regulate intrastate transactions was not limited to those who were engaged also in interstate commerce. "It is the effect upon interstate

[138] *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192, 214 (1946).

commerce or its regulation. . . which is the test of federal power."[139] Thus the Court supplemented the "in commerce" rationale set out in *Rock Royal*, which upheld the AMAA in 1939, with an "affecting commerce" rationale similar to that which the Court employed in *Darby* to justify the extension of FLSA wage and hour coverage to employees of intrastate enterprises.[140]

In *Wrightwood Dairy*, Chief Justice Stone also declared the commerce power could reach intrastate activity that, in a substantial way, interfered with a federal interstate commerce regulatory regime. Again, the issue before the Court was the power of Congress to regulate the price of milk moving intrastate into the Chicago, Illinois, marketing area as part of its larger interstate regulation of milk production, pricing, and distribution. Invoking the Necessary and Proper Clause and a long line of relevant Commerce Clause decisions of the Court, Chief Justice Stone was adamant that Congress could control local buy-sale transactions to effectuate the proper regulation of interstate milk transactions.

> The commerce power . . . extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce . . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence, the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.[141]

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[139] *United States v. Wrightwood Dairy Company,* 315 U. S. 110, 120 (1942).

[140] *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939); Wechsler, "Stone and the Constitution," 779.

[141] *Wrightwood Dairy Co.*, 315 U.S. at 119 referencing McCulloch v. Maryland, 17 U.S. 421 (1819); *United States v. Ferger,* 259 U.S. 199 (1919); *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 221 (1938); *United States v. Darby*, 312 U.S. 100, 118-119 (1941).

Dan A. Akenhead points to *Wrightwood Dairy* as the first United States Supreme Court decision to employ a "comprehensive regulatory scheme" rationale.[142] As discussed, however, the Supreme Court, in *Jones & Laughlin Steel* and *Darby*, first upheld legislation suppressing regulatory noncompliant intrastate activity that competed with or undercut activity in compliance with the strictures of what, in fact, amounted to a comprehensive regulatory scheme. In none of these cases, did the Supreme Court employ the phraseology "comprehensive regulatory scheme." In all three, the noncompliant intrastate activity at issue was either commercial or economic activity. But the Court, in each case, conveyed that the commerce power, aided by the Necessary and Proper Clause, could reach noncompliant intrastate activity of any kind, even if not commercial or economic activity – but only if necessary to preserve the integrity and viability of the larger comprehensive interstate regulatory scheme.[143]

Perhaps the most dramatic illustration of the New Deal expansion of commerce power came on December 9, 1942, when the Court decided *Wickard v. Filburn*.[144] In an attempt to raise wheat prices by reducing the supply of wheat while many Americans were going hungry, the Agricultural Adjustment Administration (AAA) placed limits on how many acres of wheat each farmer could grow. Roscoe Filburn was a farmer who grew wheat to sell, but he also set aside a few acres to be harvested *for his own use*. However, the total acreage that he grew (twenty-three

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[142] Ibid.; Dan A. Akenhead, "Federal Regulation of Noncommercial, Intrastate Species under the ESA after *Alabama-Tombigbee Rivers Coalition v. Kempthorne* and *Stewart & Jasper Orchards et al. v. Salazar*," *Natural Resources Journal*, Vol. 53 (2013): 325-355, 328.

[143] *Jones & Laughlin Steel Corp.*, 301 U.S. at 36-43; *Darby*, 313 U.S. at 122. In *Darby*, Justice Stone cited and quoted from *McCulloch v. Maryland*, the landmark Marshall Court decision holding that the Necessary and Proper Clause set out in Article I, Sec. 8, was to be interpreted broadly to permit Congress to execute its enumerated powers. *Darby*, 118-119; *McCulloch v. Maryland*, 4 Wheat. 316, 17 U. S. 421 (1819).

[144] *Wickard v. Filburn*, 317 U.S. 111 (1942).

acres) exceeded the number AAA administrators allowed him to grow (11.9 acres).[145] The Court ruled that the restriction was constitutional under the Commerce Clause. The actions of Filburn alone, the Court reasoned, might not affect interstate commerce, but the effect of other farmers acting similarly, taken in the aggregate, would certainly become substantial. According to the majority opinion authored by Justice Robert H. Jackson,

> Whether the subject of the regulation in question was "production," "consumption," or "marketing," is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. . . . But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Thus, the Court articulated the most expansive version to date of its "substantial effects test," emphatically rejecting the erstwhile distinctions between "direct" and "indirect" effects. Justice Jackson also made it clear that, in the view of the Court, the regulation of local production of wheat was rationally related to the goal of Congress set out in the AAA: to stabilize prices by limiting the supply of wheat produced.[146]

One passage in the holding by Justice Jackson, quoted above, if taken alone, suggests a scope for commerce power under the substantial relations test that federal courts could not challenge: "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." Indeed, for decades to come, constitutional law textbooks and casebooks and federal courts eager to support such congressional authority homed

[145] Ibid., 114-15.
[146] Ibid.

in on this statement time and time again. After all, it was crystal clear and, in and of itself, with no qualification.[147] On the other hand, Justice Jackson made this declaration in the context of upholding the "comprehensive regulatory scheme" at hand, the 1938 Agricultural Adjustment Act.[148] As well, he quoted from *Wrightwood Dairy* to make the point that the commerce power, aided by the Necessary and Proper Clause, was sufficient to reach "intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."[149] He brought the rule to bear on the question before the Court:

> This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.[150]

It is worth noting that the employment of "comprehensive regulatory scheme" reasoning in *Wickard* was somewhat different from its use in *Wrightwood Dairy*. The AMAA regulatory regime the Court dealt with in *Wrightwood Dairy* set up a sanction to bring intrastate milk pricing practices into compliance a national regulatory scheme. In that eventuality, AMAA permitted compliant intrastate milk businesses to continue operations. In *Wickard*, the AAA regulatory scheme empowered administrators to prohibit, or ban entirely, the intrastate production of wheat for home consumption. Under one statutory regime Congress regularized economic and commercial activity. Under the other, Congress, simply, proscribed an economic

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[147] Ibid., 124-125; *Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 *(1964)* 379 U. S. 294; *Perez v. United States*, 402 U.S. 146, 151 (1971).
See, for example, Michael Les Benedict, *The Blessings of Liberty: A Concise History of the Constitution of the United States,* 3rd ed. (New York and London: Rowman & Littlefield, 2017), 302, 304-308.
[148] Akenhead, "Federal Regulation," 329.
[149] Ibid., 124, quoting *Wrightwood Dairy* at 119.
[150] Ibid., 129.

activity, with the adjective "economic" defined, in this case, in its most basic sense, as that which relates to the production and consumption of goods.[151]

As indicated, a distinction between the words "commerce" and "economic" is in order. Constitutional originalist Randy E. Barnett, who argued before the Court in *Gonzales v. Raich*, who had written extensively the Commerce Clause, supports the contention that the term "commerce" was, in the words of Justice Clarence Thomas, "used in contradistinction to productive activities such as manufacturing and agriculture" and that "commerce" had a much narrower definition -- the trade or exchange of goods (including the means of transporting them).[152] Barnett researched the usage of the word "commerce" in the records of the Constitutional Convention and the ratification debates and discovered that the term "commerce" was consistently used in the narrow sense and that *there is no surviving example of it being used in either source in any broader sense.*"[153] That understanding, as a matter of semantics, at least, would certainly preclude the liberal post-1937 view of commerce as being "all gainful activity" or the idea that Congress may pass laws regulating any activity that "affects" interstate commerce. If the framers had intended the Commerce Clause to refer to intrastate activity that affected interstate commerce, says Barnett, they should have included "affects" or "affected" in the passage. Clearly, adding the term "affects" would have, from the beginning, substantially

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[151] The adjective "economic" is also defined as "of, relating to, or based on the production, distribution, and consumption of goods and services"; "having practical or industrial significance or uses" and "affecting material resources." The economic activities of production and consumption do not involve buying and selling, that is, commerce. *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Springfield, Mass.: Merriam-Webster, Inc., 2001), 230, 365.

[152] 545 U.S. 1 (2005); See for example, Randy E. Barnett, "The Original Meaning of the Commerce Clause," *University of Chicago Law Review*, Vol. 68, (2001): 101; *United States v. Lopez*, 514 U.S. at 586 (1995); Barnett, "The Original Meaning," 146.

[153] Ibid., 104 [Emphasis in the original].

broadened Congress' power to extend to intrastate activity.[154] Taking an opposing view to that of Barnett is Herbert Hovenkamp.[155] Hovenkamp argues that the term "commerce" encompassed far more than mere trade to the Founders, but instead included such things as manufacturing and agriculture. Why else, he argues, would the Constitution's framers frequently speak of "trade and commerce" if the two words meant the same thing?[156] He also notes that, "Noah Webster's influential American Dictionary of the English Language (1828) gave 'trade' or 'interchange' as its first meaning of 'commerce,'" but its second meaning was "intercourse between individuals; interchange of work, business."[157] Certainly the argument is a significant one if the meaning of the word "commerce" remained completely unchanged for four decades in the rapidly evolving republic. Additionally, on the point of enumerated powers, Hovenkamp takes issue with originalists such as Justice Thomas who maintain that Congress' powers enumerated in Article I, Section 8 of the Constitution were listed there to define the limits of federal power. Instead, Hovenkamp argues, "The purpose of the enumeration of power that Justice Thomas recites was not to grant these powers as opposed to the states, but to grant them to *Congress* as opposed to

[154] Ibid., 137.
[155] Herbert Hovenkamp, "Judicial Restraint and Constitutional Federalism: The Supreme Court's "Lopez" and "Seminole Tribe" Decisions, *Columbia Law Review* 96, no. 8 (Dec. 1996): 2213-2248.
[156] Ibid., 2230. However, Alexander Hamilton's words in *Federalist 17* would seem to contradict Hovenkamp's view. Hamilton wrote, "The administration of private justice between the citizens of the same State, the supervision of *agriculture* [emphasis added] and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."
[157] Ibid., 2229.

the President."[158] It's a thought provoking view; however, *Federalist 45* would seem to clarify the issue beyond doubt.[159]

In any case, liberal commentators in the next five decades would insist that *Wickard*, in tandem with other New Deal decisions, recognized a broad and virtually boundless power in the hands of Congress to regulate aggregated intrastate activity of any kind – whether commercial, economic, or not – limited, it would seem, only by constitutional protections of individual liberties and civil rights.[160]

The Stone Court jettisoned a longstanding exclusion from the reach of the commerce power with its June 1944 decision in *United States v. South-Eastern Underwriters Association*. This case dealt with the prosecution of an insurance company group situated in northern Georgia for fixing non-competitive rates in violation of the 1890 Sherman Anti-Trust Act. The group controlled ninety percent of the insurance market for fire insurance in six southern states and had employed coercion and intimidation to advance its operations. At trial, South-Eastern Underwriters set up as its defense the argument that the insurance business did not fall within the purview of the Sherman Act because it was "not commerce, either intrastate or interstate"; in so

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[158] Ibid., 2235 [Emphasis in the original].

[159] *Federalist 45*'s author, James Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

[160] Ibid., 124-125; Peter Renstrom, *The Stone Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, 2001), 179-180; Jim Chen, "Filburn's Legacy." *Emory Law Journal*, Vol. 52 (2003): 1719; idem, "The Story of *Wickard v. Filburn*: Agriculture, Aggregation, and Commerce," pp. 69-118, in Michael C. Dorf, *Constitutional Law Stories* (New York: Foundation Press, 2004); Richard A. Epstein, *How Progressive Rewrote the Constitution* (Washington: Cato Institute, 2006), 67-76, 117-121; Robert Natelson, "The Legal Meaning of 'Commerce' in the Commerce Clause." *St. John's Law Review*, Vol. 80 (2006): 789-848.

doing, it invoked the 1869 holding of the Supreme Court to that effect in *Paul v. Virginia*.[161] According to Justice Black, who rendered the majority opinion, to hold that the word "commerce," as used in the Commerce Clause, did not include "business such as insurance" would give the word a meaning narrower than would "common parlance" at the time of the framing of Constitution. According to the Court:

> The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; — to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.[162]

Relying, in part, on *Wickard*, the Court held that a fire insurance company conducting a substantial part of its business transactions across state lines was engaged in "commerce among the several States" and, thus, subject to the commerce power of Congress.[163] Chief Justice Stone, one of three justices who all dissented for similar reasons, declared he had no doubt that the business of insurance "as presently conducted, has in many aspects such interstate manifestations and such effects on interstate commerce as may subject it to the appropriate exercise of federal power." His objection to the holding of the majority was its interpretation of the Sherman Act: "Nothing in its legislative history," said the chief justice, "suggests that it was intended to apply to the business of insurance."[164]

The decision of the Court in *United States v. South-Eastern Underwriters Association* stirred more than few members of Congress to action. In early March 1945, Congress passed the McCarran-Ferguson Act, which was enacted on March 9, 1945. This measure, sponsored by

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[161] *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 539 (1944); *Paul v. Virginia*, 75 U.S. 168 (1869).
[162] *South-Eastern Underwriters*, 553.
[163] *Ibid*., 539, 547.
[164] *Ibid*., 563-564, 575; Wechsler, "Stone and the Constitution," 781.

Democrat Senator Pat McCarran of Nevada and Republican Senator Homer Ferguson of Michigan, constituted a notable reaction; pro-New Deal rulings of the Supreme Court had gone largely unchecked by the national political process for eight years. According to the legislation, acts of Congress that did not explicitly purport to regulate the business of insurance, such as the Sherman Act, were not to preempt state statutes that did regulate the business. The act also declared that federal antitrust laws would not apply to the business of insurance in any state if that state had already regulated this industry, although federal anti-trust laws were to apply in cases of boycott, coercion, and intimidation.[165]

The rebuke made by Congress in March 1945 does not appear to have deterred the Supreme Court from further consolidating congressional commerce power over the transportation infrastructure of the nation. In *Southern Pacific Company v. Arizona*, decided in June 1945, the Court held that, under the "dormant commerce clause," the Arizona Train Limit Law of 1912, which limited the number of passenger and freight cars operating in Arizona, placed an unconstitutional burden on interstate commerce. Even though Congress had not established a national standard for the number of cars acceptable along the railways of the country, the Arizona statute was unacceptable. Writing for the majority, Chief Justice Stone surmised from the available evidence that virtually all rail activity in Arizona was interstate traffic. Consequently, trains with cars numbering in excess of the state limit were stopped or rerouted, and more trains meeting the state standard were required to move people and products out of the state than would have been the case without the state restriction. Under the circumstances, the

[165] Pub. L. 79-15, 59 Stat. 33, enacted March 9, 1945, 15 U.S.C. §§ 1011-1015; Jonathan R. Macey and Geoffrey P. Miller, "The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation." *New York University Law Review*, Vol. 68 (April 1993): 13-88.

train law provided few if any health and safety benefits, while substantially burdening interstate commerce. In his words

> The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state, and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service.[166]

Stone further concluded that "The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this, the interest of the state here asserted is subordinate."[167] But several dissents seemed to show a due regard for the police power of the states and some hesitancy about the intervention favored by the majority. In his dissent, Justice Black took the view that the Arizona statute was "unwise" but that legislatures rather than the Supreme Court should take the lead in repealing such measures.[168] And, in his dissent, Justice Douglas maintained that the negative commerce clause doctrine should extend only to state statutes that discriminated against interstate commerce, not merely ones that burdened it.[169]

During the tenure of Chief Justice Stone, the Court did not appear to retreat in the least from employing its commerce prohibiting approach to uphold the use by Congress of its commerce power over intrastate manufacturing and its authority to preempt conflicting state regulation thereof. In *Cloverleaf Butter Co. v. Patterson*, the federal district court enjoined Alabama officials, from inspecting, seizing, or detaining the stock butter of the petitioner company

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[166] *Southern Pacific Company v. Arizona*, 325 U.S. 761, 774 (1945).
[167] *Ibid*., 761, 783.
[168] *Ibid*., 784-795.
[169] *Ibid*., 795-796.

because, it decreed, federal regulations concerning the process for renovated butter preempted such state action. Cloverleaf Butter Company, situated in Birmingham, Alabama, obtained twenty-five percent of its packing stock butter from the farmers and country merchants of Alabama and seventy-five percent of it from other states, while shipping ninety percent of its finished renovated butter out of the state. With Justice Reed writing the majority opinion, in February 1942, the Court upheld federal authority over the manufacturing process of renovated butter under the Commerce Clause – as well as its authority to preempt state laws authorizing pre-shipment seizures of deficient products. In the view of the Court, federal preemption of pre-shipment seizures by state officials was one of several "appropriate means" that Congress could employ – in tandem with its power to ban the movement of the product across state lines. Where Congress had exercise its power over interstate commerce by legislation that conflicted with a state regulatory regime, such state regulations became inoperative and the federal legislation exclusive in its operation.[170] In dissent, Chief Justice Stone, joined by justices Frankfurter, Murphy, and Byrnes, took the view that the majority had gone too far. In his words:

> The decision of the Court appears to me to depart radically from the salutary principle that Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy.[171]

In its April 1946 ruling in *North America Co. v. SEC*, the Court further extended the authority of Congress under its commerce prohibiting power to regulate public utility holding

[170] *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 155-156 (1942); Coenen, *Constitutional Law: The Commerce Clause*, 70.
[171] *Cloverleaf Butter Co.,* 171.

companies. In this case, the Securities and Exchange Commission, under authority of the Public Utility Holding Company Act of 1935, ordered North America Company to divest itself of electric and gas utility operations across the United States, many of which served large cities and contiguous regions. With control of some eighty corporations, North America had an aggregate capitalized value in excess of $2,300,000,000. The idea was to bring the holding company into compliance, that is, to limit its operations to a single integrated public utility system. North America challenged this action because, it argued, the 1935 Act and order of the SEC were not within the power of Congress under the Commerce Clause.

According to the Court, with Justice Murphy rendering the majority opinion, the commerce clause did "not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather, it is an affirmative power commensurate with the national needs." According to the Court, the Commerce Clause authorized the Congress to impose conditions and restraints on those who use the channels of interstate commerce so that such "will not become the means of promoting evil, whether of a physical, moral or economic nature. Justice Murphy concluded this way:

> This power permits Congress to attack an evil directly at its source, provided that the evil bears a substantial relationship to interstate commerce. Congress thus has power to make direct assault upon such economic evils as those relating to labor relations. . .to wages and hours. . . to market transactions. . . and to monopolistic practices. . . *Northern Securities Co. v. United States, supra.* The fact that an evil may involve a corporation's financial practices, its business structure, or its security portfolio does not detract from the power of Congress under the commerce clause to promulgate rules in order to destroy that evil. Once it is established that the evil concerns or affects commerce in more states that one, Congress may act.[172]

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[172] *North America Co. v. SEC*, 327 U.S. 686, 706-707 (1946).

From the ratification of the Constitution in 1789 through 1936, congressional legislation and Supreme Court interpretation worked a steady expansion of commerce power. Ever-broadening employments of such authority by Congress considered, first, the needs of a national market economy and increasingly complex transportation systems, steamboats and then railroads; by the turn of the twentieth century, the requirements of a rapidly industrializing national economy; and by early 1930s, the felt needs of industrial laborers who struggled more than ever to make a living during the Great Depression. In the same way, Congress and the Supreme Court, over many decades, produced an application and jurisprudence of commerce power that extended beyond the regulation of simple exchange – to expanding federal authority over the channels and instrumentalities of commerce; limiting the authority of state governments that interfered with federal regulation of those channels and instrumentalities; and then to the restraining of monopoly corporate power and the prohibiting of interstate trade in products deemed unhealthy, immoral, or unsafe.

Commerce power took a quantum leap during the New Deal, which culminated a long-term trend toward greater centralization of law-making and judicial power in the national government and a declining role for the states as primary centers of policy making. Beginning in the early 1930s, political leaders and ordinary people exchanged their regional ties for more nationalistic orientations. Certainly, the New Deal radically and quickly augmented presidential power, a development underscored by the fact that Franklin D. Roosevelt served as president from 1933 to 1945. To a larger extent than ever before, lawmakers, judges, and administrators emerged as a college-educated elite caste of social engineers, who sincerely believed that government had both a responsibility and a right to ensure progress according to their own understandings of the

concept. Legal liberalism announced the death of the traditional liberal ideals of laissez-faire and individualism. Its leaders placed a premium on broad-scale "social justice," which included prominently the redistribution of income for the benefit of ordinary people, especially unionized workers.

Meanwhile, the idea of "liberalism" came to denote a level of concentrated government power and regimentation largely inconsistent with its eighteenth and early nineteenth century meanings and almost entirely at odds with understandings of individual liberty that had, more than any other single set of ideas, inspired Americans to fight for independence from Great Britain a century and a half earlier. President Franklin Roosevelt, the Democrat Congress, and the "reformed" United States Supreme Court after 1936 succeeded in presenting New Deal policy as a breakthrough for freedom. That they succeeded so well in this project suggests rather strongly the extent to which many Americans came to place a greater value on the economic security offered by New Deal *parens patriae* than a personal autonomy all too often besieged by modern economic uncertainties far beyond their control. Such was the choice made by a persistent electoral majority. Learning how to lend new, inverted meanings to familiar political terminology was, it seems, not so difficult and, very likely, quite comforting amid a transformation that was, in any case, massive in its depth and breadth.

In response to the Great Depression, New Deal enactments and Supreme Court rulings turned the commerce power into a powerful tool for implementing the vision of liberal economists and technocrats bent on creating a stable, wholly-integrated national economy. Decisions such as *NLRB v. Jones & Laughlin Steel*, *United States v. Darby*, and *Wickard v. Filburn* clearly showed that the broad view of the Commerce Clause would now prevail. These rulings, in tandem with others less pivotal, refashioned commerce authority to reach, for the first time, intrastate

manufacturing and other local economic activity. In doing so, they established the power of Congress to bolster the status and rights of organized labor, regulate employer-employee relations, and control the production and prices of agricultural and manufactured products. A critical and contentious aspect of the more extensive regulatory power was the creation by Congress of a vast bureaucracy of administrators who now wielded, often simultaneously, the authority to make regulations and enforce them. The new administrative machinery featured knowledgeable experts largely insulated from the judgments of democratic politics and, thus, electoral accountability, much like the federal judges who generally defended the new agencies against constitutional challenges.

During World War II, commerce power continued to expand, perhaps more rapidly than before in some ways, to meet the needs of wartime. But through the entire period of 1937-1945, previously developed judicial doctrines, such as those allowing the commerce power to reach the channels and instrumentalities of interstate commerce and to regulate or prohibit the interstate movement of products, were critical in achieving the purposes of New Deal legal liberalism. The most striking new Commerce Clause doctrines developed by the Supreme Court in the period 1937-1945, however, were those that buttressed the power of Congress to regulate intrastate activities having a substantial effect on interstate commerce – and, with the aid of the Necessary and Proper Clause, to regulate or suppress altogether intrastate activities that undercut a federal regulatory scheme.

Chapter Two

Cold War Regulatory Vistas: From Labor Union Subversion to Equal Pay for Women, 1946-1963

At the end of World War II, the United States and its former ally, the Soviet Union, became rivals in what came to be known as the Cold War. Although the two superpowers never directly confronted each other, they did engage in proxy wars across the globe as they vied to gain the upper hand on each other by influencing smaller nations to align with them. In the United States, the Cold War had a great deal of influence on politics as Republicans and Democrats settled into an era of political consensus to thwart the threat of communism. Indeed, Republicans and Democrats attempted to sway voters by proclaiming each was the better at defending the world from the Soviets. The result was a further centralization of federal power and the growth of a "military-industrial complex," described by President Eisenhower in his farewell address in 1961.[1] Certainly the 1954 decision of the United States Supreme Court in *Brown v. Board of Education* declaring racial segregation in public schools a denial of Fourteenth Amendment rights employed federal power to bring about a much needed and long overdue change. It was, to say the least, problematic for the United States to claim to be a beacon of freedom to the world while a large number of Americans were walled off in many ways from the rest of society simply because of their race.

Far less, however, have students of the Cold War considered the way Congress and the United States Supreme Court deployed centralizing Commerce Clause power from 1946 through

[1] Eisenhower, Dwight D., Farewell Address, January 17, 1961, accessed April 6, 2017, http://mcadams.posc.mu.edu/ike.htm

1963 to begin remaking post-World War II America in ways that could undercut the freedom of all its citizens – whether it be the consolidation of federal authority to control the wages and work hours of employees or otherwise reconfigure the operations of large- and small-scale business enterprises; leverage economically problematic attacks on mergers and vertically-integrated corporations; virulently suppress communist influence within the labor unions; or vest power in the federal government at the expense of traditional state and local authority. Such inquiries show that Commerce Clause authority in the period 1946-1963 increasingly functioned as a general police power, even if the federal government did, to good effect, bring it to bear on several national problems, such as labor union racketeering and other novel kinds of organized crime. As well, careful assessment of the expanding deployment of Commerce Clause authority in the period 1946-1963 points to the rise of several controversies that would help produce strident culture war conflict in the coming decades – congressional legislation to combat air pollution and a 1963 FLSA amendment mandating equal pay for women.

Scholarly assessments of the interstate commerce policies of Congress and the United States Supreme Court from the end of World War II through the 1950s engage an extensive set of interpretations describing "Cold War liberalism." As James MacGregor Burns, Alonzo L. Hamby, and many others have argued, federal government domestic policy in this contentious period featured a liberal consensus fueled by rising concerns over the growing influence of communism across the globe.[2] Hamby, along with scholars such as Richard Parker, Herbert Stein, and Richard M. Abrams, show, more or less, that the basic principles of Cold War liberalism, at least in its initial incarnation, were set out in Franklin Roosevelt's "Four

[2] James MacGregor Burns, *Roosevelt, The Soldier of Freedom 1940–1945* (New York: Harcourt, Brace, Jovanovich, 1970); Alonzo L. Hamby, *Liberalism and Its Challengers: From F.D.R. to Bush*, 2nd ed. (New York: Oxford University Press, 1992).

Freedoms" (1941). Freedom of speech, worship and freedom from fear (tyranny) were rooted in classical understandings of liberty. Roosevelt and his New Deal coalition grounded the fourth freedom, "freedom from want," in a new conception of the American political system that made room for positive government action in managing the relationship of organized labor and capital and otherwise providing for the economic needs of citizens. Such core beliefs inspired increased spending on education, science, infrastructure, and resources for the aged and the poor. Liberal central planners, who were generally disciples of Keynesian economics, favored increased government expenditures to stimulate the economy, which included spending on a potent conventional military force and a vast arsenal of nuclear weaponry to contain Soviet expansion.[3]

James T. Patterson concludes that, notwithstanding conservative reactions, Cold War liberalism remained the dominant political ideology in the United States through the victory of Democrat Lyndon B. Johnson over Republican Barry Goldwater in 1964.[4] Beginning in about 1948, during the administration of President Harry Truman, Cold War liberalism began to embrace the civil rights movement. This commitment to improving the status and rights of African Americans alienated more than a few leading southern Democrats. Neil Jumonville, Richard M. Fried, and Alexander Bloom show that Cold War liberals generally opposed what

[3] Richard Parker, *John Kenneth Galbraith: His Life, His Politics, His Economics* (New York: Farrar, Straus and Giroux, 2005); Herbert Stein, *Presidential Economics: The Making of Economic Policy from Roosevelt to Clinton*, 3rd rev. ed. (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1994); Alonzo L. Hamby, "The Vital Center, the Fair Deal, and the Quest for a Liberal Political Economy." *American Historical Review* (1972): 653–678; Alonzo L. Hamby, *Man of the People: A Life of Harry S. Truman* (New York: Oxford University Press, 1995); Richard M. Abrams, *America Transformed: Sixty Years of Revolutionary Change, 1941–2001* (Cambridge and New York: Cambridge University Press, 2006).

[4] James T. Patterson, *Grand Expectations: The United States, 1945–1974* (New York: Oxford University Press, 1996) 148–64, 413, 542-547.

they perceived to be over-zealous loyalty programs associated with McCarthyism.[5] In the last several decades a number of scholars, including Manfred Berg, Mary L. Dudziak, and Eric Arnesen, among others, have posited a not entirely admirable connection between the legislative and judicial expansion of civil rights for African Americans in the 1950s and 1960s and concern among United States political leaders about criticisms of American race relations advanced by the propaganda organs of the Soviet Union.[6]

The genesis of Cold War liberalism may be seen in the immediate aftermath of World War II. Harry S. Truman had replaced Franklin Roosevelt after Roosevelt died in April 1945. World War II ended in August 1945, and in February the following year, Joseph Stalin proclaimed publicly that capitalism and communism were incompatible. In March 1946 Winston Churchill claimed that an "Iron Curtain" had descended over Europe and one year later Truman advocated political, military, and economic assistance to Greece and Turkey in their fights against

[5] Neil Jumonville, *Henry Steele Commager: Midcentury Liberalism and the History of the Present* (Chapel Hill: University of North Carolina Press, 1999); Richard M. Fried, *Nightmare in Red: The McCarthy Era in Perspective* (New York: Oxford University Press, 1991); Alexander Bloom, *Prodigal Sons: The New York Intellectuals & Their World* (New York: Oxford University Press, 1986), 178.

[6] Dean J. Kotlowski, *Nixon's Civil Rights: Politics, Principles, and Policy* (Cambridge: Harvard University Press, 2001); John David Skrentny, "The Effect of the Cold War on African-American Civil Rights: America and the World Audience, 1945-1968." *Theory and Society*, Vol. 27, no. 2 (April 1998): 237-285; Renee Romano, "Moving Beyond: The Movement that Changed the World: Bringing the History of the Cold War into Civil Rights Museums." *The Public Historian*, Vol. 31, no. 2 (2009): 32-51; Manfred Berg, "Black Civil Rights and Liberal Anticommunism: The NAACP in the Early Cold War." *The Journal of American History*, Vol. 94, no. 1 (2007):75-96; Eric Arnesen, "Civil Rights and the Cold War at Home: Postwar Activism, Anticommunism, and the Decline of the Left." *American Communist History*, Vol. 11, no. 1 (2012): 5-44; Ofra Friesel, "Changing the American Race Narrative, 1962–1965: Transparency as a Guiding Rule in American Cold War Diplomacy." *Journal of Social History*, Vol. 49, no. 1 (2015): 168-193; Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, N.J.: Princeton University Press, 2000).

communist insurgents. Communist insurgencies became a major concern of Americans as the Cold War heated up.

Fearing insurgency within the United States, in 1948, Truman utilized the Alien Registration Act of 1940 (the Smith Act) to indict and convict twelve members of the Communist Party of the United States, whom the prosecution claimed advocated the overthrow of the United States government.[7] In 1951 the Supreme Court confirmed the convictions handed down by lower courts as well at the constitutionality of the Smith Act. The Smith Act continued to be used by the House Committee on Un-American Activities, which had been formed in 1938. Indeed, Congress strengthened its hand against communists within the United States with the McCarren Act of 1950.[8] That law created the Subversive Activities Control Board, which broadened existing loyalty programs. It also tightened controls on communists by forcing them to register with the government, revoking the passports of those suspected of being communists, and stipulated the creation of concentration camps for suspected subversives in the case of a national emergency.[9]

President Truman's nominations to the Court, and their receptions by the Senate, reflected the Cold War consensus as well. Truman nominated Harold Burton to replace Owen Roberts, who retired in 1945. Burton was a United States Senator from Ohio and a Republican. Truman nominated him as a gesture of goodwill and bipartisanship and Burton was confirmed by the Senate unanimously in one day with no hearings.[10] Burton tended to rule for less expansion of

[7] The Alien Registration Act of 1940 (the Smith Act), 54 Stat. 670; *United States v. Dennis*, 341 U.S. 494 (1951)
[8] 64 Stat. 987
[9] Karsten and Hall, *The Magic Mirror*, 348-49.
[10] "Harold Hitz Burton," The Supreme Court of Ohio and the Ohio Judicial System, accessed April 6, 2017, https://www.supremecourt.ohio.gov/MJC/places/hhBurton.asp

government in the commercial realm than his New Deal cohorts on the Court but joined them on many cases in other areas of law. In 1946, Truman nominated Frederick Vinson to be the Chief Justice of the United States. Vinson was a former United States Representative (D-KY) and was Truman's Secretary of the Treasury as well. He was easily confirmed by a voice vote in the Senate.[11]

In 1949, Truman's nominee, Tom C. Clark, was confirmed to the Supreme Court. Clark had worked as a prosecutor with then-Senator Truman to investigate war frauds. Truman appointed him as Attorney General in 1945 and, when Roosevelt appointee Frank Murphy died in office, Clark was nominated to the Court. Clark refused to testify before the Senate since he believed it would "[jeopardize] his future effectiveness on the Court."[12] Clark is difficult to define as either a conservative or liberal based upon his record, although he was a strong advocate of racial equality. He was known to practice judicial restraint but also held a broad view of government powers.[13]

Also in 1949, Sherman Minton replaced Roosevelt appointee Wiley Rutledge, who died in office. Minton and Truman sat next to each other when both were senators, and Minton was a strong back backer of Roosevelt's "court packing" plan. Minton lost his seat in 1940 and Roosevelt appointed him to the Seventh Circuit Court of Appeals. When Truman nominated him to the Supreme Court, similarly to Clark, Minton refused the Senate's request for him to appear before them, claiming that his record on the circuit court should suffice to show his competence.

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[11] Chicago-Kent College of Law at Illinois Tech., "Fred M. Vinson, Jr." Oyez, accessed July 15, 2017, https://www.oyez.org/justices/fred_m_vinson
[12] Chicago-Kent College of Law at Illinois Tech., "Tom C. Clark," Oyez, , accessed April 6, 2017, https://www.oyez.org/justices/tom_c_clark
[13] *Ibid*.

He was confirmed 48-16. Although he was a liberal Senator, he proved to be somewhat conservative on the Court and typically deferred to the other branches of government.[14]

Ideologically, there were significant differences among the Vinson Court justices. Michael R. Belknap maintains that the decisions of the Vinson Court reflected a persistent ideological battle between the conservativism, and resulting judicial restraint, of Justice Felix Frankfurter and the civil rights activism of justices William O. Douglas and Hugo Black; dissents authored by the latter two justices laid the foundation for major civil rights breakthroughs during the tenure of Chief Justice Earl Warren. But Roosevelt appointees on the Court energetically supported New Deal regulations grounded in an expansive understanding of the Commerce Clause. Alternatively, the chief justice was reluctant to oppose such economic legislation amid rising Cold War concerns.[15] Russell Galloway, Jr., similarly concludes that the Vinson Court generally took more conservative positions than its predecessor, especially after 1949.[16]

Legal thought among many jurists returned with special energy to concerns about doctrine and rules after World War II, as appellate judges, law school professors and others embraced the policy-making functions of lawmaking and adjudication. In the face of conservative charges that New Deal judges who had embraced legal realism had also discounted

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[14] "Sherman Minton," Oyez, IIT Chicago-Kent College of Law, accessed April 6, 2017, https://www.oyez.org/justices/sherman_minton

[15] *Michal R. Belknap, The Vinson Court: Justices, Rulings, and Legacy (Santa Barbara: ABC-CLIO, 2004), 3-4, 89-91, 162-163.* See also Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca: Cornell University Press, 1984); Howard Ball and Phillip Cooper, "Fighting Justices: Hugo L. Black and William O. Douglas and Supreme Court Conflict." *American Journal of Legal History*, Vol. 38, no. 1 (January 1994): 1–37; Jeffrey D. Hockett, "Justices Frankfurter and Black: Social Theory and Constitutional Interpretation." *Political Science Quarterly*, Vol. 107, no. 3 (1992): 479–499; Burton M. Atkins and Terry Sloope, "The 'New' Hugo Black and the Warren Court." *Polity*, Vol. 18, no. 4 (April 1986): 621–637.

[16] Russell Galloway, Jr., "The Vinson Court: Polarization and Conservative Dominance (1949-1953)." *Santa Clara Law Review*, Vol. 22, no. 2 (January 1982): 377, 388.

the power of rules to shape judicial outcomes, the new emphasis was on "reason" rather than fiat.[17] The era of "post-realism," a number of scholars conclude, began with the publication in 1943 of an influential article by Yale professors Harold D. Lasswell, a political scientist, and Myres S. McDougal, a professor of property law. "Legal Education and Public Policy: Professional Training in the Public Interest" debuted in *The Yale Law Journal*.[18] The two innovators purported to integrate developments in jurisprudence dating back to World War I into approaches that came to be associated with "policy science" and "process jurisprudence" – the latter of which placed a premium on carefully defined roles for legislators, courts, and administrative agencies. While the new adherents of process jurisprudence continued to value highly the knowledge provided by the social sciences, they looked askance at the willingness of judicial realists to discount precedents, rules, and legal principles to achieve preferred policy outcomes. Process jurisprudents took the view that lawmakers and judges could and should respect legal rules and principles – while also maintaining social responsibility. The most conspicuous adherent of process jurisprudence, perhaps, was Roosevelt appointee to the United States Supreme Court Felix Frankfurter, who emphasized the ideal of judicial restraint, regarding the Commerce Clause and otherwise.[19] However, some critics of process jurisprudence and policy science were quick to associate these new intellectual currents with the fierce conservatism attendant on the growing Cold War.[20]

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[17] Karsten and Hall, *The Magic Mirror*, 315.
[18] Harold D. Lasswell and Myres S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest." *The Yale Law Journal*, Vol. 52, No. 2 (March 1943): 203-295.
[19] See Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chapel Hill: University of North Carolina Press, 1937); idem., *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: Macmillan, 1927).
[20] Karsten and Hall, *The Magic Mirror*, 315-316, 343; Laura Kalman, *Legal Realism at Yale 1927-1960* (1986), 179, 222-223; Alfred H. Kelly, Winfred A. Harbison, and Herman J. Belz,

Perhaps the most contentious decision of the Vinson Supreme Court to develop further the meaning of the Commerce Clause-based Fair Labor Standards Act of 1938 was *Anderson v. Mt. Clemens Pottery Co*. This controversy arose when seven workers of Mt. Clemens, situated in Michigan, filed a class action suit under the FLSA. Plaintiffs alleged that the record keeping of the company, which employed about 1,200 workers, did not accurately reflect the time that workers labored and that they had not received minimum wages for this work or overtime compensation when due. Complainants alleged that, on average, each worker was denied credit for fifty-six minutes each working day. Management determined work duration with time in and time out shown on punched cards and by deducting a standard number of minutes for walking to and preparing to work at their work benches – that is, fourteen minutes per shift. More precisely, compensable working time extended from the succeeding even quarter hour after employees punched in to the quarter hour immediately preceding the time when they punched out.[21]

Litigation in the lower courts brought to a whole new level the time consciousness that had emerged in the United States with the advent of the modern mechanized workplace more than a century earlier. A special master appointed by the district court recommended that the suit against Mt. Clemens be dismissed because the complainants "have not established by a fair preponderance of evidence" a violation of the FLSA. He found that the employees were not required to, and did not, work fifty-six minutes more per day than the clocked work time for which they were paid. He also determined that the plaintiffs "have not sustained their burden to prove that all the time between the punched entries on the clock was spent in working, and that,

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The American Constitution: Its Origins and Development, 6th ed. (1983), 519; G. Edward White, "From Realism to Critical Legal Studies: A Truncated Intellectual History." *Southwestern Law Journal*, Vol. 40 (June 1986): 827.

[21] *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946).

conversely, none of the time in advance of the starting time spent by employees arriving early was their own time." Production work, he surmised, did not customarily include time walking from the time clock to the work bench – and "did not regularly commence until the established starting time, and, if in some instances it was commenced shortly prior thereto, it was counterbalanced by occasions when it was started after the hour and by admitted occasions when it was stopped several minutes before quitting time."[22]

The district court affirmed the findings of the master – but with one important reservation. It concluded that the evidence adduced before the master showed that, as a practical matter, employees punched in, walked to their work benches, and were situated for productive work from five to seven minutes before start time – and that it was probable that the employees usually began work as soon as they were situated to do so. From this supposition, the court constructed a formula, applicable to all workers, for computing this supposedly uncompensated time. Operationalizing the formula, the court calculated a judgement against Mt. Clemens amounting to $2,415.74 in compensatory damages. Mt. Clemens appealed to the Sixth Circuit Court.[23]

The Sixth Circuit Court of Appeals concluded that the findings of the special master were supported by substantial evidence – and that the district court had erred by failing to accept the determination of the master that productive work did not actually start until the scheduled time. The Sixth Circuit Court also held that the formula the district court had devised for computing the supposed uncompensated work was invalid because it was based on mere presupposition and conjecture. Equally important, the court held that the burden rested upon the employees to

[22] Ibid., 682-684.
[23] Ibid., 686.

demonstrate by a preponderance of the evidence that they did not receive the wages to which they were entitled – and to do so with "evidence, rather than conjecture, the extent of overtime worked, it being insufficient for them merely to offer an estimated average of overtime worked." With these holdings, the Circuit Court dismissed the action.[24]

With a 6-2 decision rendered on June 10, 1846, the Supreme Court held that preliminary work activities, when controlled by company officials and for the benefit of the company, were properly included in the statutory workweek defined by the FLSA. Writing for the majority was Justice Frank Murphy, by then well-known as a liberal champion of individual liberties, if not one to render decisions in this regard sometimes based more on passion than strict logic.[25] In any case, the majority ruled that the Sixth Court of Appeals correctly held that the district court erred in failing to accept the findings of the master that, at St. Clemens, work generally began and ended at the scheduled hours – and in crafting a formula of compensation based upon presuppositions and conjecture. On the other hand, Justice Murphy held that the time necessarily spent by St. Clemens employees in walking from the time clock to their work benches, and vice versa, was working time within the scope of § 7(a) of the FLSA. "Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. The employees' convenience and necessity, moreover, bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business." Allowing that "minimal walking time," need not be compensated, Justice Murphy held that "[t]ime necessarily spent by the employees in walking to

[24] Ibid., 682-686; *Anderson v. Mt. Clemens Pottery Co*., 149 F.2d 461.
[25] Howard J. Woodford, Jr., *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1968), 75, 219-220, 496, 384.

work on the employer's premises is working time within the scope of § 7(a), and must be compensated accordingly, regardless of contrary custom or contract." As well, he clarified the meaning of "compensable work": "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer."[26]

Equally innovative was the holding of the Supreme Court that the Sixth Circuit Court of Appeals had employed an improper standard of proof to the detriment of the Mt. Clemens employees. According to Justice Murphy, the FSLA imposed upon the employer, not the worker, the duty to keep proper records of hours worked. In cases where an employer omitted to keep adequate records, the law was not to deny recovery because the employee was unable to prove the precise amount of wrongfully uncompensated work. Murphy insisted that "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." The employer may rebut such claims by producing records that document precisely the amount of work performed. But, lacking such evidence in rebuttal, the court was authorized to award damages to the complaining employee, notwithstanding that the amount determined was only approximate.

In support of its holding on the burden of proof, it seems, Justice Murphy concluded that, even though work at Mt. Clemens typically began and ended as scheduled, time clock evidence was not reliable.[27] "[Time] clocks do not necessarily record the actual time worked by employees." Since it took eight minutes for the lined-up workers of one shift to punch in, it

[26] Ibid., 691-692.
[27] Ibid., 690.

would be unfair to credit the first worker in line for eight minutes of work. As well, he pointed out, time clocks could not show the actual amount of time that workers were required to be at the work site or at their work benches. With justices Harold Burton and Felix Frankfurter dissenting, the Court reversed and remanded the case, ordering the district court to determine how much time the complaining St. Clemens workers spent walking to and from their work benches and how much time they spent in preparations for work and – in keeping with all the new guidelines set out in its decision – to arrive at a proper compensatory award.[28]

Justice Harold Burton, similarly to Justice Frankfurter, believed in a philosophy of judicial restraint. But pragmatism seemed to mark his dissent in *Anderson v. Mt. Clements* more than any other approach. In his view, the Court should have affirmed the decision of the Sixth Circuit Court of Appeals to dismiss the case. In particular, he pointed out that the amounts of compensation at issue "might not average as much as five to ten minutes a day a person, and would not apply at all to many of the employees." More important, the decision of the majority, he argued, would impose costly and unjustified expenses for employers across the country: "The futility of requiring an employer to record these minutes, and the unfairness of penalizing him for failure to do a futile thing, by imposing arbitrary allowances for 'overtime' and liquidated damages is apparent." He conceded that, in certain industries, precise record keeping about "preliminary activities" or "walking time" may be appropriate. But, in the case at hand, he stressed "the obvious, long established, and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job." Justice Burton belabored the point that, with the passage of the FLSA, that Congress had not meant to redefine the meaning of "work week" or "to set aside long-established contracts or customs which had

[28] Ibid., 694; Karsten and Hall, *The Magic Mirror*, 334-335.

absorbed in the rate of pay of the respective jobs recognition of whatever preliminary activities might be required of the worker by that particular job." As well, Burton complained, the decision of the majority omitted to consider the disruptive and costly effects that it would certainly have on "hundreds of thousands of small business . . . where the recording of occasional minutes of preliminary activities and walking time would be highly impractical, and the penalties of liquidated damages for a neglect to do so would be unreasonable." He stressed, "such a universal requirement of recording would lead to innumerable unnecessary minor controversies between employers and employees."[29]

The leaders of organized labor perceived the decision in *Anderson v. Clemens Pottery* to be yet another New Deal victory. The leadership of the American Federation of Labor, which remained committed to maintaining workable labor-management relations, took the view that the new FLSA definition of "work week" should be carefully integrated into future collective bargaining efforts. Bosses of the somewhat more aggressive Congress of Industrial Organizations called for member unions to employ the new standard for calculating compensable work in class-action law suits for back wages. The managers of large corporations, as well as owners of smaller enterprises, responded powerfully to all these changes, which seemed to portend an avalanche of costly new book keeping procedures, management difficulties, worksite conflicts, and litigation. They mobilized rapidly to lobby the Congress after it came under Republican control in early 1947.

One of the consequences of having established an expansive commerce power to regulate employer-employee relations that New Deal operatives appear not to have fully anticipated was

[29] Ibid., 695-698.

its energetic employment by federal lawmakers and a president with more conservative bearings. The Republican Congress and President Harry Truman, indeed, passed signal legislation in response to the widespread calls among business leaders that something be done about the decision in *Anderson v. Clemens Pottery Co.* The response came in the form of the Portal-to-Portal Act, approved on May 14, 1947.[30] The title of the legislation was misleading, as it hardly represented confirmation of the principle that all time spent within the doors of a workplace was to be compensated under the FLSA. Section four of the act, in fact, made it quite clear that whether time spent in preliminary or post-liminary activities was compensable depended on contract, custom, or practice. To put it another way, the 1947 act declared that travel to work, walking to work areas on a job site, and time preparing for work were not compensable under the FLSA – *if* such had been the customary practice in an industry and if no new contract between management and labor of a company said otherwise. According to Richard Morgan, the Portal-to-Portal Act constituted "one of the harshest statutory rebuses ever directed to the Court."[31]

On June 23, 1947, business won another significant victory with the passage of the Taft-Hartley Act. After World War II, unions were released from their wartime promises not to strike and they quickly took advantage of their new freedom. In response, Congress passed the act, over President Truman's veto, to prohibit closed shops, in which being a union member was a condition of employment. The act also stipulated that unions had to abide by a sixty-day cooling off period before striking in order to allow employers or even the president time to negotiate a

[30] Federal Labor Standards Act Amendments of 1947, a.k.a. Portal-to-Portal Act, H.R. 2157, 80th Cong. 1st Sess. Pub. L. No. 49, May 14, 1947.
[31] Richard Morgan, "The Portal-to-Portal Pay Case," in C. H. Pritchett and Alan Westin, eds., *The Third Branch of Government: 8 Cases in Constitutional Politics* (New York : Harcourt, Brace & World, 1963), 68

settlement. [32] Formally named the Labor-Management Relations Act of 1947, the Taft-Hartley Act was sponsored by Ohio Senator Robert A. Taft and New Jersey Representative Fred A. Hartley, Jr. The bill was one of more than two-hundred bills dealing with labor unions introduced in Congress in 1947. The measure, however, worked a major amendment of the National Labor Relations Act of 1935. Grounded solidly in the commerce power, the broad purposes of the act were set out in its first section:

> [T]o promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. [33]

To say the least, the Taft-Hartley Act included a robust array of measures reflecting intense Cold War pressures. These undoubtedly included a list of prohibited activities advantageous to corporate capital. Duly banned were unfair labor practices on the part of labor unions (and now not only on the part of management); secondary boycotts; monetary donations by labor unions to federal political campaigns; jurisdictional strikes; "wildcat strikes"; and, perhaps most critically, "solidarity strikes," – that is, political strikes. The act also declared the right of states to pass right-to-work laws and of the federal executive branch to obtain strikebreaking injunctions from federal judges. More to the point, Section 9(h) of the Taft-Hatley

[32] Karsten and Hall, *The Magic Mirror*, 334 and Robert Higgs, "Truman's Attempt to Seize the Steel Industry," *Independent Institute*, accessed July 17, 2017, www.independent.org/publications/article.asp?id=1394
[33] 61 Stat. 136

Act required labor union officers to sign affidavits, and file them with the Department of Labor, declaring that they were not supporters of the Communist Party and were not affiliated with any organization that sought the "overthrow of the United States government by force or by any illegal or unconstitutional means." Such affidavits were made an unavoidable and absolute condition for labor union leaders to participate in NLRB proceedings. And any union having an officer who omitted to file the required affidavit would not enjoy the protection of the NLRA.[34]

The May 1950 decision of the United States Supreme Court in *American Communications Association v. Douds* arose directly from the actual implementation of Section 9(h) of the Taft-Hartley Act. American Communications Association leaders, most of whom were members of the Communist Party USA, refused to sign anti-communist affidavits. In October 1947, regional director of the National Labor Relations Board in New York City Charles Douds banned the ACA from a NLRB-supervised union organizing election. The union promptly sued, arguing that Section 9(h) of the Taft Hartley Act, which underwrote the action taken by Douds, was a violation of the First Amendment rights of its leadership. After little success in the Southern District Court of New York, the ACA appealed to the United States Supreme Court, where the labor union fared no better.

With a splintered set of opinions, a majority of the Supreme Court ultimately held that the anti-communist affidavit required by the Taft-Hartley Act did not violate the First Amendment or Article VI of the Constitution (which proscribes bills of attainder, *ex post facto* laws, "test oaths," and religious tests). Writing for the majority, Chief Justice Fred M. Vinson explained that a great deal of evidence had been presented to Congress to show that "Communist leaders of

[34] An Act to Amend the National Labor Relations Act of 1947, Pub. L. 80-101; 61 Stat. 136.

labor unions had in the past, and would continue in the future, to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government."[35] Justice Vinson took his stand with a rationale that privileged the protection of interstate commerce from communist-inspired general strikes over First Amendment rights:

> There can be no doubt that Congress may, under its constitutional power to regulate commerce among the several States, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce. We think it is clear, in addition, that the remedy provided by § 9(h) bears reasonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage, and that many persons who believe in overthrow of the Government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy.[36]

Hindsight surely might spur thoughtful persons to ponder the solemn certainties articulated by Justice Vinson, even if one agrees that international communism in 1950, indeed, posed a dire threat to free nations. The scathing dissent that Justice Hugo Black authored in *ACA v. Douds* registered the outrage of many civil libertarians. According to him, "No case cited by the Court provides the least vestige of support for thus holding that the Commerce Clause restricts the right to think." In his view, Section 9(h) amounted to an unconstitutional "test

[35] Ibid. 389.
[36] Chief Justice Vinson was joined by justices Stanley F. Reed and Harold H. Burton. Justice Felix Frankfurter concurred, except as to Part VII of the majority opinion; Justice Robert H. Jackson concurred in part and dissented in part, while Justice Hugo Black dissented. Ibid. 391-392.

oath."[37] Certainly his views portended the decision of the Court fifteen years later that eviscerated Section 9(h) by declaring it an unconstitutional bill of attainder.[38] But the majority opinion also presents an opportunity to reflect on the commerce power wrought by New Deal labor-management innovations. For the purposes of this study, the vexed decision in *ACA v. Douds* displays rather clearly how well-intended, highly-educated American legislators and jurists could employ a radically-expanded commerce power in ways that more than a few reasonable citizens deemed utterly inimical to cherished fundamental liberties. More important for present purposes, the decision demonstrates the vast extent to which Commerce Clause power had grown in little more than a decade—and the extent to which the highest echelon of the federal judiciary could expect the America public to acquiesce dutifully to its imperatives.[39]

One of the most contentious utilizations of Commerce Clause power in the period 1946-1963 was antitrust law, the benefits and demerits of which even policymakers who still clung to New Deal principles had conflicting views. Through the era of substantial New Deal reform, the prime statutes governing antitrust in the United States remained the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Federal Trade Commission Act of 1914.[40] The short-lived National Industrial Recovery Act of 1933 had promulgated controversial industrial codes for "fair competition" but, according to some analysts, actually promoted harmful

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[37] Ibid., 447.
[38] *United States v. Brown*, 381 U.S. 437 (1965).
[39] See Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (Carbondale: Southern Illinois University Press, 1999), 189; William M. Wiecek, *History of the Supreme Court of the United States: The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953* (New York: Macmillan, 2006), 547-549; Nagel, Robert F. Nagel, "How Useful Is Judicial Review in Free Speech Cases?" *Cornell Law Review*, Vol. 69 (January 1984):302, 335-336.
[40] Sherman Antitrust Act of 1890, 26 Stat. 209, approved July 2, 1890; Clayton Antitrust Act of 1914, Pub. L. 63-212, 38 Stat. 730, approved October 15, 1914; Federal Trade Commission Act of 1914, 38 Stat. 771, approved September 26, 1914.

monopolistic practices.[41] It would seem that, to New Deal architects, at least, the command and control power over wages, prices, and production levels, a hallmark of the typical holding company, was entirely salutary – as long as right-minded government officials were in charge. In any case, the New Deal Congress and President Roosevelt ultimately passed the Robinson-Putman Act of 1936, an antitrust statute with less ambitious designs – to shield independent retailers from competition from better capitalized retail stores with multiple locations – by making it illegal for such larger operators to lower the prices of their goods to customers.[42]

To fathom the peculiar ability of post-war liberal policymakers to discount the interest of ordinary Americans in enjoying reasonably priced commodities, one might peruse the dissenting opinion of Supreme Court Justice William O. Douglas in the 1948 decision *United States v. Columbia Steel Co*. In that case, the majority held, with moderate Justice Stanley Reed writing its opinion, that it was not a violation of the Sherman Act for United States Steel Corporation to acquire the assets of Consolidated Steel Corporation, the largest independent steel fabricator on the West Coast – because there was no statute or doctrine that forbade "*per se,* an expansion of facilities of an existing company to meet the needs of new markets . . . ."[43] Justice Douglas made it all too clear that the problem of accepting any kind of vertical integration was the inevitable, looming threat posed by concentrated private wealth.[44] According to him, a principle statutory purpose of the Sherman Act was to prohibit the use of power to control the marketplace.

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[41] Marc Allen Elsner, *Regulatory Politics in Transition*, 2nd ed. (Baltimore: The Johns Hopkins University Press, 2000), 85.
[42] National Industrial Recovery Act of 1933, Pub. L. 73-67; 48 Stat. 195; Robinson-Putnam Act of 1936, Pub. L. 74-692, 49 Stat. 1526.
[43] *United States v. Columbia Steel Co*., 334 U.S. 495, 572 (1948).
[44] There were at least five federal court decisions rendered in the period 1911-1920 that seemed to establish a persistent judicial intolerance of vertical integration. Perhaps the two most important ones were *United States v. American Tobacco Co.*, 164 Fed. 700, S.D.N.Y., 1908, reversed 221 U.S. 106 (1911) was the first Sherman Act case to deal with vertical integration.

> We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. The Curse of Bigness shows how size can become a menace--both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace. . . . In final analysis, size in steel is the measure of the power of a handful of men over our economy. . . . The philosophy of the Sherman Act is that it should not exist. . . . Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. . . . That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.[45]

By the early 1950s, "Chicago School" innovators had begun to promote effectively the idea that corporate bigness offered some substantial advantages: most prominently, efficiency and cost savings that primarily benefitted consumers. Judge Richard A. Posner, writing in 1979, said that distinctive antitrust views developed at the University of Chicago began gaining traction piecemeal, initially, because of the teaching of University of Chicago economist Aaron Director, whose ideas, beginning in the mid-1950s, were rapidly elaborated more comprehensively by his students and colleagues, including Ward S. Bowman, Robert H. Bork, John S. McGee, and Lester G. Telser.[46] A highly influential article published in 1956 on trade

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United States v. Corn Product Refining Co., 234 Fed. 964 (S.D.N.Y., 1916). Roger D. Blair and David L. Kaserman, *Law and Economics of Vertical Integration and Control* (New York and London: Academic Press, 1983), 140

[45] Dissenting opinion of Justice William O. Douglas in *United States v. Columbia Steel Co*., 334 U.S. 495, 535-36 (1948); Osmond K. Fraenkel, ed., *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (New York: The Viking Press, 1934).

[46] Richard A. Posner, "The Chicago School of Antitrust Analysis," *University of Pennsylvania Law Review*, Vol. 127 (1979): 925-948; Robert H. Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," Vol. 22, *U. Ch. L. Rev.* 157 (1954); Ward S. Bowman, Jr., "Tying Arrangements and the Leverage Problem," Vol. 67 *Yale L.J.* 19 (1957); John S. McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case," Vol. 1 *J.L. &*

regulation by Director and Dean of the University of Chicago School of Law and future United States Attorney General Edward H. Levi frontally attacked the supposed antitrust justification that monopolists frequently sought to spread their monopoly power to adjacent markets. While Chicago School proponents criticized judicial precedents that undercut mergers in unconcentrated markets, as Danial A. Crane puts it, "they saved their strongest fire for interventionist antitrust norms on unilateral exclusionary conduct such as tying, predatory pricing, and related practices." The heyday of Chicago School influence was yet to come. But the foundation had been laid for the wider impact of its various ideas concerning antitrust in the 1960s and 1970s and beyond, such as the publication of Judge Robert H. Bork's 1978 book *The Antitrust Paradox: A Policy at War with Itself*, which reiterated his argument that federal courts in the United States had been unwisely hostile toward vertical integration and vertical mergers since the advent of federal antitrust law.[47] The scholarly publications of numerous other influential economists and legal experts, such as Thomas Sowell, Milton Friedman, and Richard A. Posner by then, touted free market ideas that reoriented antitrust thinking to the best interests of consumers.[48]

Notwithstanding the challenge to antitrust orthodoxy posed by Chicago School "law and economics" theorists, a new Democrat Congress and President Harry S. Truman found common

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Econ. 137 (1958); Lester G. Telser, "Why should Manufacturers Want Fair Trade?" Vol. 3 *J. L. & Econ.* 86 (1960).

[47] Daniel A. Crane, "linkLine's Institutional Suspicions," *2008-2009 Cato Sup. Ct. Rev*. (2009): 111-132, 111-112; Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978); Roger D. Blair and David L. Kaserman, *Law and Economics of Vertical Integration and Control* (New York and London: Academic Press, 1983), 140.

[48] Thomas Sowell, *Classical Economics Reconsidered* (Princeton: Princeton University Press, 1974); Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962); idem, *Price Theory: A Provisional Text* (Chicago: Aldine, 1962); Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976).

ground to place some additional limitations on vertical mergers. This came with the Celler–Kefauver Act of 1950, also known as the "Anti-Merger Act." To this point, the United States government had no choice but to rely on the Sherman Antitrust Act to prosecute unlawful vertical mergers. The Celler-Kefauver amended the Clayton Act of 1914 to extend its ambit to vertical and conglomerate mergers. Under the terms of the new legislation, it was no longer legal for one company to take control of a market by simply acquiring the assets of its competitors – a commonly employed way for corporate owners to work around the Clayton Act ban on stock purchase mergers. And language of the Celler-Kefauver Act claimed that its implementation would prevent combinations and concentrated wealth that foreclosed competition to the detriment of the people.[49]

It should be kept in mind that, through the 1950s (and later), federal antitrust laws did not apply, in whole or in part, to several categories of industry, most notably professional sports teams, print and broadcast media companies, utilities, and banks. The rationale for these exemptions, which dated back decades through both Democrat and Republican periods of national dominance, was that exempted organizations required extraordinarily large amounts of capital and unusually careful management to sustain them. For corporations that provided critical public infrastructure, sometimes called "government franchises," unbridled competition was unfeasible, or at least, put the public interest at risk. As discussed in chapter one, the insurance industry was allowed extensive antitrust exemptions under the McCarran-Ferguson Act of 1945. But exemption from antitrust law came with a price, in most cases – heavy regulation, a subject

[49] Celler–Kefauver Act of 1950, Pub. L. 81-899; 64 Stat. 1125, amended Clayton Antitrust Act, effective December 29, 1950; Blair and Kaserman, *Law and Economics*, p. 142. The first case decided by the Supreme Court after Section 7 was amended involved du Pont's acquisition of General Motor's stock. *United States v. E.I. du Pont de Nemours & Co.* (General Motors), 353 586 (1957).

that increasingly divided those who feared concentrated private wealth and those who believed it provided valuable advantages to American society.[50]

United States Supreme Court decisions innovated seminal antitrust doctrines grounded in the commerce power from the end of World War II through the early 1960s (and at least for another decade thereafter).[51] The Court was deeply fractured between supporters of Justice Hugo Black (Rutledge, Douglas, and Murphy) and Justice Felix Frankfurter (Jackson, Burton, and sometimes Reed) when President Truman made Fred Vinson chief justice in July 1946. Notwithstanding the relatively conservative bearings of the new chief justice, he made efforts to find consensus among his colleagues. His replacement in fall 1953, Eisenhower-appointee Earl Warren, similarly dealt with a divided Court for the first eight years of his tenure. The members of the Court who coalesced around Justice Black were surely more willing than their more conservative counterparts to bring the full weight of antitrust law down on the heads of violators. The antitrust rulings of the Court dealt with several identifiable categories of problematic practices, most notably group boycotts of competitors, tacit collusion, vertical mergers, monopolization, exclusive dealing, tying products, and predatory pricing.[52] This array, of course,

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[50] McCarran-Ferguson Act of 1945, Pub. L. 79-15, 59 Stat. 33; *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944); Rudolph J. R. Peritz, *Competition Policy in America: History, Rhetoric, Law* (New York: Oxford University Press, 1996), 229-270; John E. Kwoka, Jr. and Lawrence J. White, eds., *The Antitrust Revolution: Economics, Competition, and Policy*, 6th ed. (Oxford and New York: Oxford University Press, 2014), "Introduction," 11-12; John E. Kwoka, Jr. and Lawrence J. White, eds., *The Antitrust Revolution: Economics, Competition, and Policy*, 6th ed. (Oxford and New York: Oxford University Press, 2014), "Introduction," 11-12.

[51] An important decision that identified practices deemed to be illegal *per se* was *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). But see *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

[52] Group boycotts of competitors: *Associated Press v. United States*, 326 U.S. 1 (1945). And see *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941). Tacit collusion: *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). Vertical mergers: *United States v. Columbia Steel Co.*, 334 U.S. 495

reflected as much the emerging challenges of a complex, rapidly-evolving post-war economy, federal antitrust statutes, and the prosecutorial agendas of the Department of Justice as the ideological preferences of Supreme Court justices.

Economically sound or not, the June 1947 decision of the Supreme Court in *United States v. Yellow Cab Co.* reflected persistent concerns among the justices with vertical integration. The Chicago-based Checker Cab Manufacturing Co. acquired control of the Yellow Cab Co. and several other taxi companies in Chicago, New York City, Pittsburgh and Minneapolis. Following the acquisitions, Checker required these subsidiaries to purchase their cabs from it. The Justice Department filed suit under the Sherman Act on the theory that Checker's actions illegally foreclosed a substantial fraction of the market for selling taxi cabs. The district court, however, sustained the motion of the defendants to dismiss the complaint. According to legal scholars Roger D. Blair and David L. Kaserman, "the lower court observed quite sensibly that such foreclosure was commonplace in vertically integrated firms."[53] But U.S. attorneys appealed the dismissal directly to the United States Supreme Court. All the litigants agreed that the selling of taxis by Checker to its subsidiaries amounted to "interstate commerce." According to Justice Frank Murphy, writing for the majority, "[b]y excluding all cab manufacturers other than [Checker] from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce." In his view, the "conspiracy" had the effect of excluding manufacturers of taxicabs

(1948). Monopolization: *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954). Exclusive dealing: *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). Tying products: *International Salt Co. v. United States*, 332 U.S. 392 (1947) [also predatory pricing]; *United States v. Paramount Pictures, Inc.*, 334 US 131 (1948); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

[53] Blair and Kaserman, *Law and Economics*, 141.

other than Checker from eighty-six percent of the Chicago market, fifteen percent of the New York market, one hundred percent of the Pittsburgh market, and fifty-eight percent of the Minneapolis market. As for the economic injustice resulting from the conspiracy, Judge Murphy could only say that "[t]he result allegedly is that these companies must pay more for cabs than they would otherwise pay, their other expenditures are increased unnecessarily, and the public is charged high rates for the transportation services rendered." The Court reversed and remanded the case.[54]

More important for the purposes of this study are several other Commerce Clause holdings in *Yellow Cab*, one of which declared a dubious signal expansion of the commerce power. In addition to the vertical integration charges, the case involved the prosecution of a conspiracy not to compete among two defendant taxi companies in Chicago (Yellow and Cab Sales) that were subsidiaries of defendant Checker and a third defendant taxi company in Chicago (Parmelee), also a subsidiary of Checker. Multiple non-competition contracts required Yellow and Cab Sales not to compete with Parmelee for contracts with Chicago railroads and railroad terminal associations to transport passengers and their luggage between the railroad stations. According to Justice Murphy in Part II of his opinion, "[t]he transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce." Justice Murphy conceded that the exclusive contracts the defendants sealed were not, in and of themselves, illegal. "But a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case, and it is a conspiracy of that type that runs afoul of the Sherman Act.[55] The only difficulty was that Justice Murphy and the

[54] *United States v. Yellow Cab Co.*, 332 U.S. 218, 225-226 (1947).
[55] Ibid., 229-230.

majority laid claimed to new Commerce Clause power under the guise of solid precedential authority when, in fact, there was very little.

The holding of the Court in *Yellow Cab* that taxi service between train terminals in a Chicago was "clearly a part of the stream of interstate commerce" amounted largely to judicial fiat, as the ruling was based on prior decisions of the Court dealing exclusively with the business of shipping goods and cattle. According to Justice Murphy in Part II of the decision, "[w]hen persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character."[56] But the prior decisions of the Court that Justice Murphy cited in support of this proposition did not, in fact, deal with the business of transporting passengers. One of two precedents to which he pointed was the 1870 decision *The Daniel Bell*. In that case, the Court held that the activities of river-going vessels that transported goods intrastate were within the commerce power of Congress if the goods were "destined for other states." "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction."[57] The other case upon which Justice Murphy relied was *Stafford v. Wallace* (1922), which held that the commerce power reached the business of intrastate transportation of cattle and their sale in a stockyard of the same state "with the expectation that they will end their transit, after purchase, in another. . . and when in effect they do so."[58]

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[56] Ibid.
[57] Ibid., 229; *The Daniel Ball*, 77 U.S. (10 Wall.) 566 (1870).
[58] *Yellow Cab Co.*, 332 U.S. 230; *Stafford v. Wallace*, 258 U.S. 495, 519 (1922).

It is difficult to imagine that Justice Murphy and the majority in *Yellow Cab* did not at least consider in this part of the decision the substantial differences between the business of shipping commodities and cattle and the business of local taxi service for train passengers. Surely it mattered at the most basic level of comparison that passengers were not insensible objects or beasts to be bought and sold, that the prime cash nexus in local taxi service was largely the fares paid by passengers to taxi operators, and that the economic policy implications of moving passengers from one train terminal to another were considerably different from those attendant on the transport of marketable freight and livestock. Perhaps Part II of *Yellow Cab* makes more sense if one considers, simply, the effort of the post-war Supreme Court to revitalize its "in-interstate commerce" or "stream of interstate commerce" rationales more generally. As discussed in chapter one, the conservative rulings in *Schechter Poultry* (1933) and *Carter Coal* (1936) had certainly undercut this approach. But in the decade and a half following the judicial revolution of 1937, the Court returned a series of "in-interstate commerce" decisions that, amid new regulatory schemes, granted Congress authority over the local sale of products intended to be transshipped for sale across state lines – or that were, in fact, transshipped for sale across state lines.[59]

Under the circumstances, one is left to parse carefully the final holding of the Court set out in Part III of *Yellow Cab* – which held that the commerce power was insufficient to justify a Sherman Act prosecution of a conspiracy based on contracts requiring Yellow and Cab Sales not to compete with Parmelee for the business of transporting interstate travelers and their luggage

[59] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Company*, 298 U.S. 238 (1936); *Currin v. Wallace*, 306 U.S. 1 (1939); *Mulford v. Smith*, 307 U.S. 38 (1939); Mitchell v. C. W. Vollmer & Co., 349 U.S. 427 (1955). But see *FTC v. Bunte Bros.*, 312 U.S. 349 (1941).

from their Chicago-area homes to the Chicago railroad stations and vice versa upon their return trips. In this connection, Justice Murphy was forthright in identifying the inexorable implications of his other holdings in the opinion.

> In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office, or hotel to travel to the railroad station, from which the journey is continued by train, and such a journey ends when he alights from a conveyance near the home, office, or hotel which constitutes his ultimate destination. Indeed, the terminal points of an interstate journey may be traced even further to the moment when the traveler leaves or enters his room or office and descends or ascends the building by elevator.[60]

But the Court resorted to time-tested approaches to make the necessary distinction. First, Justice Murphy said, "[I]nterstate commerce is an intensely practical concept drawn from the normal and accepted course of business.[61] Interstate journeys were to be identified by "the commonly accepted sense of the transportation concept."[62] In the view of the Court, "what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey." As one of several "practical considerations," Justice Murphy concluded "we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station, and that his journey ends when he disembarks at the station in the city of destination."[63] There was, however, no discussion of any evidence in the record that

[60] Ibid., 232.
[61] Ibid.; *Swift & Co. v. United States, 196 U.S. 375 (1905); North American Co. v. Securities & Exchange Comm'n, 327 U.S. 686* (1946).
[62] Ibid. 232, *United States v. Capital Transit Co., 325 U.S. 357* (1945).
[63] Ibid., 232.

might have shed light on the understandings of actual interstate travelers in Chicago or elsewhere about taxi rides from their homes to the train stations or vice versa.

The holding set out in Part III of *Yellow Cab* at least forestalled another expansion of Commerce Clause power. The Supreme Court held that intrastate taxi trips that immediately preceded or followed interstate train travel were "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act."[64] But the position of some of the justices on this holding hinted strongly at the ideological fault lines at work in the case. Justices Hugo Black and Wiley B. Rutledge dissented from this part of the decision without explanation, while Justice Harold H. Burton concurred with it, also without explanation, but otherwise took the position that the judgment of the district court to dismiss the case should be affirmed because "the complaint as a whole fails to state a cause of action." Justice William O. Douglas took no part in the decision.[65]

The Vinson Court steadily modulated its "commerce prohibiting approach" to extend the reach of federal regulatory power on behalf of consumers, albeit in ways increasingly complicated. In *United States v. Walsh*, decided in 1947, the Court sustained a statutory ban set out in the Food, Drug, and Cosmetic Act of 1938 on the making, by a manufacturer, of a false guaranty that a product was not misbranded or adulterated per the requirements of the act to "one engaged wholly or partly in an interstate business." According to the Court, the prohibition was a proper means to block interstate shipments of mislabeled medications because, absent the prohibition, the purchaser was "more likely to engage in interstate distribution without making an independent check of the product." In so doing, the Court upheld the statute even though

[64] Ibid., 230.
[65] Ibid., 235.

wrongful sales to be penalized might involve only intrastate transactions and that the statute did not require a showing that a purchaser had the intent to resell the mislabeled product out of state.[66] Consider also *United States v. Sullivan* (1948), handed down in 1948. In this case a Chicago laboratory had consigned a bottle of sulfathiazole tablets, labeled in accordance with the 1938 Food, Drug, and Cosmetic Act, to a distributer in Atlanta, Georgia – from whom Columbus, Georgia, pharmacist James Sullivan purchased a bottle of the pills. Sullivan, on two separate occasions, removed twelve tablets from the bottle, placed these in pill boxes for sale to customers, and "misbranded" them by affixing to each pill box a label that said "sulfathiazole" but which lacked the federally mandated directions for use and warnings. For this, Sullivan was prosecuted and convicted. On appeal, the Supreme Court did not address the question of whether pharmacists might be trusted orally to advise their customers as to the proper use and dangers of the medication or that customers might be entrusted to inform themselves in this regard. Upholding the conviction, the Supreme Court held that Congress, under the 1938 Food, Drug, and Cosmetic Act and its underlying commerce power, could impose a ban on intrastate relabeling of a medication required to be specifically labelled by the act even in the case of a licensed pharmacist who (1) had not been involved in the drug's interstate shipment; 2) had obtained the drugs in a purely intrastate purchase, and (3) had violated the law, not by removing the label from any container shipped across state lines but, instead, by failing to re-affix federally required label information to separate smaller containers used in repackaging the drug for retail sale.[67]

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[66] *United States v. Walsh*, 331 U.S. 432, 437-438 (1947); Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040.

[67] *United States v. Sullivan*, 332 U.S. 689, 698 (1948); Coenen, *Constitutional Law: The Commerce Clause*, 70-71.

Certainly, the Vinson Court was entirely capable of employing an expansive understanding of its "commerce prohibiting approach" to reach outcomes on behalf of mainstream understandings of law and order and what most Americans deemed common morality. An example of the Court's social conservatism, even while advancing Commerce Clause-based legislation, may be seen in *Cleveland v. United States*, decided in 1946.[68] At issue was a Mormon group that was attempting to take young women across state lines for the purposes of marriage in polygamous relationships. The government claimed that such action was a violation of the Mann Act, which stipulated that women could not be taken across state lines for immoral practices (like prostitution). The question was whether the Mann Act applied in this case and whether such an application was authorized by the commerce power. The Court declared that "[t]he fact that the regulation of marriage is a state matter does not, of course, make the Mann Act. . . unconstitutional" and that the commerce-prohibiting power "may be used to defeat what are deemed to be immoral practices" even if the means used "have 'the quality of police regulations.'"[69]

With its decision *Dean Milk Co. v. City of Madison*, the Vinson Court invoked the so-called "dormant commerce clause" to sustain further the expansion of federal regulatory power, this time, it would seem, at the expense of public health. Illinois milk producer Dean Milk filed suit against the city of Madison, Wisconsin, alleging the impropriety of its ordinance requiring all milk sold in the city be pasteurized at a facility within five miles of the municipality. According to the plaintiff, the purpose of the ordinance, ostensibly for the health of city residents, was, in fact, to protect local milk producers from non-local and out-of-state

[68] *Cleveland v. United States*, 239 U.S. 14 (1946).
[69] Coenen, *Constitutional Law: The Commerce Clause*, p. 69

competition. The decision of the Supreme Court, rendered in January 1951, overturned the ordinance. Justice Tom C. Clark, writing for the majority, explained the majority position:

> In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of the people, if reasonable nondiscriminatory alternatives. . . are available.

Congress had not yet attempted to legislate on the processes of local milk production. That the ordinance also discriminated against in-state producers was not germane to the decision. The majority further staked out the commerce power of Congress, but the alignment of the justices in the outcome does not suggest that either conservative federalism principles or the impulse to centralize power were determinative. Conservative justices Felix Frankfurter, Robert H. Jackson, and Harold H. Burton joined with the majority, along with Chief Justice Fred Vinson and Justice Stanley F. Reed. The more liberal justices, that is, Hugo Black and William O. Douglas, along with Sherman Minton, dissented. It may well be that, in the dissent, at least, public health concerns trumped the impulse to consolidate congressional commerce power. Justices Black, Douglas, and Minton argued that the imposition on interstate commerce by the Madison milk ordinance was insubstantial in comparison to the need of the city to insure safe milk for its residents without unduly burdening inspectors.[70]

As indicated, the post war years saw significant growth in federal regulation based upon Congress' power provided by the Commerce Clause. For example, the atomic energy acts of 1946 and 1954, the Federal Water Pollution Control Act of 1948, and the Federal Coal Mine Safety Act of 1952 all established new federal level bureaucracies and regulations that would

[70] *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951).

expand radically in the decades to come. Increasingly, these administrative bodies became a ubiquitous part of the American legal system. New Deal lawyers, most comfortable with the emerging regulatory state, often went into private practice where their expertise proved quite valuable to businesses burdened with new rules. "Washington lawyers" came to rival "Wall Street" lawyers for dominance in the legal system.[71]

Illustrative of the Court's determination to advance an enlarged administrative state are the two cases of *Securities and Exchange Commission v. Chenery* decided in 1943 and again in 1947. Due to the Public Utility Holding Act of 1935, public utility holding companies had to reorganize their corporate structures to limit them to single businesses rather than large trusts. The New Deal Securities and Exchange Commission (SEC), created in 1934, was given the task to approve the organization plans, but neither the law nor the SEC made specific standards about the reorganization plans. In its effort to reorganize and maintain control of its water utility company, the C. T. Chenery Corporation went to the open market to purchase preferred stock in its own company. However, the SEC disallowed Chenery from that action as it decided that it didn't want a company to purchase stock during a reorganization. As described by researcher Ronald Pestritto,

> This was not a prohibition that was part of any law, rule, or regulation when the Chenery Corporation made the purchase. Nor was it a prohibition that applied to any company other than Chenery. Nor was it a prohibition that the SEC ever employed again in the future. It was, instead, a standard that the SEC invented on the spot and applied retroactively to this one company."[72]

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[71] Atomic Energy Act of 1946, Pub. L. 79-585; 60 Stat. 755; Federal Water Pollution Control Act of 1948, Pub. L. 80-845, June 30, 1948, 62 Stat. 1155; Federal Coal Mine Safety Act of 1952, Pub. L. 82-552, 66 Stat. 692; Karsten and Hall, *The Magic Mirror*, 333

[72] Ronald Pestritto, "The Birth of the Administrative State: Where It Came from and What It Means for Limited Government," *Heritage.org* accessed July 16, 2017,

Chenery sued of course and in 1943 the Court agreed with the company that "before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency or government." [73]

By 1947, however, the composition of the Court had changed, even as past reluctance to accept administrative fiat dissipated. The case continued to be litigated on remand to the lower court with the SEC making charges on different grounds of its own making. On the Court's second review it found in favor of the SEC deciding that because the Commission had now created applicable standards, Chenery would have to abide by them. The majority (5-2) explained that *ad hoc* policy making in an administration was actually advantageous; "any rigid requirements," wrote Justice Frank Murphy "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise."[74] *Ad hoc*, expert, policy creation, in this case, was deemed superior to following a set rule of law.

Contributing to the rise of the administrative state and the use of the commerce clause to expand federal power came in the form of federal grants-in-aid programs. The federal grants-in-aid to state and local governments approach to shaping national policy arose in the early twentieth century. A number of scholars maintain that the Weeks Act of 1911, which dealt with agriculture, was the first modern grant-in-aid. This legislation, signed into law by President Theodore Roosevelt, contained features that would become common, including the conditioning of the receipt of federal monies on approval of state plans, mandatory matching state funds, and

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http://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited

[73] *Securities and Exchange Commission v. Chenery*, 318 U.S. 80 (1943), at 92-93.

[74] *Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947), at 202

an oversight role for unelected federal officials.[75] Through the 1920s, the federal government awarded grants for highway construction, vocational education, public health, and maternity care – largess and centralizing authority that the new federal income tax substantially enhanced, beginning in 1913.[76] Franklin Roosevelt's New Deal accelerated and transformed the federal grants approach. The Federal Emergency Relief Act of 1933, for example, was the first grant to the states for the express purpose of providing public relief.[77] More important for future policy making was the adoption of the so-called "categorical" grant, which Congress typically tailored for carefully-defined purposes.[78] During the Truman Administration, the federal government began to employ the grants- in-aid approach in several relatively new areas, including grants designed to improve public health and provide more public housing.[79] Consequent administrations and congresses have continued the trend to the point that there are very few areas in which the federal government cannot dictate how local governments can be run if those local governments wish to obtain federal tax dollars.

Besides the grants-in-aid expansion of federal control, Congress also used its commerce power to fight the growing problem of organized crime. Congress first passed the Anti-Racketeering Act in 1934.[80] The act stipulated heavy penalties for acts of robbery or extortion that could be found to affect interstate commerce. However, in the 1942 decision *United States*

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[75] Morton Grodzins, *The American System: A New View of Government in the United States* (Chicago: Rand McNally, 1966), 36.
[76] United States. Advisory Commission on Intergovernmental Relations, *The Condition of Contemporary Federalism: Conflicting Theories and Collapsing Constraints* (Washington, D.C.: Advisory Commission on Intergovernmental Relations, 1981), 68. The Sixteenth Amendment first authorized the personal income tax. David B. Walker, *The Rebirth of Federalism: Slouching Toward Washington*, 2nd ed. (New York: Chatham House Publishers, 2000), 33.
[77] Pub. L. 73-15; 48 Stat. 55, enacted May 12, 1933.
[78] Walker, *The Rebirth of Federalism*, 33.
[79] Ibid., 103.
[80] 18 U.S.C. § 371.

v. Teamsters Local 807 produced a loophole in the law.[81] The case involved a New York trucking union that used threats of force to make out-of-town truckers pay to enter its city. In return for the payments, the out of town truckers were to receive assistance from the union members, although no actual work was performed. While the case appeared to show a clear act of extortion, the Court found the payments demanded of the out-of-town truckers to be "wages" to the union members. Since wage payments were exempted under the act, the Court held that the law was inapplicable to the case at hand. In response to this surprising outcome, Congress immediately set forth to close the wage loophole that the Court created. The result was the Hobbs Anti-Racketeering Act of 1946, which amended the original act to eliminate the wage exception.[82] The legislation also removed language from the original act that instructed courts not to interpret the law in a manner that would "impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out" union objectives. The Hobbs Act remained in effect at least through the early twenty-first century, although the 1970 Racketeer Influenced and Corrupt Organizations Act (RICO Act) was, by the second decade of the twenty-first century, often employed to fight organized crime.[83]

As had been the case in the run up to the passage of the Taft-Hartley Act, Congress resorted to Commerce Clause power to deal with the growing public perception in the mid-to-late 1950s that something was deeply amiss with the nation's labor unions – the result of which was the Labor Management Reporting and Disclosure Act of 1959, also known as the Landrum-Griffin Act. Senate investigations had pointed to widespread racketeering, corruption, and other

[81] 315 U.S. 521
[82] Pub. L. 79-486, 60 Stat. 420
[83] Barry L. Johnson, "Hobbs Anti-Racketeering Act (1946)," accessed July 17, 2017, http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/hobbs-anti-racketeering-act-1946. RICO Act at 18 U.S.C. ch. 96 as 18 U.S.C. §§ 1961–1968.

serious criminality in the unions, especially among the leadership of the International Brotherhood of Teamsters, United Mine Workers, and International Longshoremen's Association. According to historian R. Alton Lee, business interests certainly advanced a campaign to curb the power of organized labor. But growing public distrust of the unions spurred national political leaders, such as John Kennedy, Lyndon Johnson, and Barry Goldwater, to join the movement. Southern conservatives and northern Republicans lent their support, even as Republican President Dwight Eisenhower drew on his widespread popular appeal, leadership, and managerial skills to mobilize legislative action. Co-sponsoring the first iteration of the bill were Democrat Representative Phil Landrum of Georgia and Republican Representative Robert P. Griffin of Michigan.[84] The act, which was approved in September 1959, applied to employees and unions covered by the National Labor Relations Act, as well as those in the railroad and airline industries. It required union officials to provide extensive financial reports and disclosures to the Department of Labor concerning their internal operations, especially the rules and safeguards for electing officers. The act required unions to hold secret elections. Barred from holding union offices were convicted felons and members of the Communist Party. The act tightened the Taft-Hartley prohibitions against secondary boycotts and authorized the general counsel of the NLRB to obtain an injunction against a union that, to obtain recognition, organized picketing of an employer for more than thirty days without filing a petition for representation with the agency.[85]

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[84] R. Alton Lee, *Eisenhower and Landrum-Griffin: A Study in Labor-Management Politics* (Lexington: University Press of Kentucky. 1990). See also Alan K. McAdams, *Power and Politics in Labor Legislation* (New York: Columbia University Press, 1964).

[85] Labor Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519, enacted September 14, 1959; Janice R. Bellace and Alan D. Berkowitz, *The Landrum-Griffin Act: Twenty Years of Federal Protection of Union Members' Rights* (1979); A. Cox, "Internal

As labor unions became mired in public mistrust, the regulatory regime of the Fair Labor Standards Act of 1938, which had put commerce power to work for non-unionized labor, became the site of growing contention among business owners, employees, and their respective representatives. After post-World War II inflation had subsided, advocates for labor in Congress pushed for an amended version of the 1938 FLSA, arguing that a raise in the federally mandated minimum wage would boost the purchasing power of workers and spur economic growth. Opponents, who were usually Republican legislators backed by lobbyists for agriculture and industry, employed a key line of argumentation that would recur for decades into the future. A federally-mandated minimum wage increase would compel companies to lay off employees and put small businesses in danger of insolvency. Debate was intense, the resulting legislation constituted a compromise, and President Truman signed the Fair Labor Standards Act Amendments of 1949 into law, effective January 24, 1950. The act raised the minimum wage from forty to seventy-five cents an hour for covered workers and added the specification that employees were covered by the FLSA only if they were "directly essential" to production of goods for interstate commerce. It also increased the earnings threshold for executive, administrative, and professional employees to be exempted from coverage.[86]

The 1949 FLSA amendments did little to improve the lot of a substantial number of working women on the low end of the pay scale. Vivien Hart shows that the FLSA of 1938

Affairs of Labor Unions under the Labor Reform Act of 1959." *Michigan Law Review*, Vol. 58, no. 6 (1960): 819-854.

[86] Fair Labor Standards Act Amendments of 1949, Pub. L. 63-910, 63 Stat. 910, enacted October 26, 1949; Milton C. Denbo, "The Fair Labor Standards Amendments of 1961—An Analysis," *Labor Law Journal*, Vol. 12 (1961): 731.

exempted from wage and hour coverage several occupational categories specific mostly to women, such as office secretary, retail clerk, and dairy processing operative -- creating a gendered division in the law that, on the face of the FLSA, appeared gender neutral. Suzanne B. Mettler similarly argues that the 1938 FLSA had ensured new commerce-clause-based rights for working men but left a disproportionate number of women under regimes of state law that were parochial and paternalistic – a species of gendered federalism. The 1949 FLSA amendments extended virtually all the wage and hour coverage exemptions set out in the original act but conspicuously added a new seemingly gender-neutral category: "any employee employed by an establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located." Here was yet another category of exempted worker whose members were far more likely to be women than men, given the gender prescriptions prevailing in the United States at the time. On the other hand, there was some hope for such workers under the 1949 FLSA. According to the act, whatever its impact, laundresses and seamstresses *were* covered by wage and hour rules if more than twenty-five percent of their employers' annual dollar volume of services was provided to customers engaged in the business of mining, manufacturing, transportation, or communications – at the time, largely NLRA-protected union labor dominated by men.[87]

[87] Fair Labor Standards Act Amendments of 1949, 63 Stat. 917, Sec. 13(a)(3). In 1942, Winifred C. Stanley, a Republican Representative from New York, introduced a bill prohibiting sex-based pay discrimination but it did not pass. Vivien Hart, "Minimum Wage Policy and Constitutional Inequality: The Paradox of the Fair Labor Standards Act of 1938," *Journal of Policy History,* Vol. 1, No. 3 (July 1989): 319-343; Suzanne B. Mettler, "Federalism, Gender, and the Fair Labor Standards Act of 1938," *Polity*, Vol. 26, No. 4 (April 1994): 635-654.

New federal criminal statutes adopted in the period 1946-1963 were enmeshed with several discordant institutional developments within the rapidly expanding federal criminal justice bureaucracy. Crime control in the period emphasized efficiency, technical expertise, and training, with the methods established by FBI Director J. Edgard Hoover serving as a model. Countervailing pressures came from the rising demand among jurists and criminal justice experts for fairness and due process, which were to serve as protection for the individual liberties of suspects and defendants, especially those who were members of racial minorities. Federal corrections officials had special difficulty deflecting charges of entrenched institutionalized racism as prison populations became increasingly Hispanic and African American.[88]

The war on organized crime the federal government waged in the period increasingly relied on the commerce power. Take, for example, the Wire Fraud Act of 1953, signed into law by President Eisenhower, which prohibited "interstate wire, radio, or television" transmissions to effectuate "any scheme or artifice to defraud."[89] Equally reliant on commerce power was the Narcotic Control Act of 1956, whose text recognized the growing interstate and international dynamics of the trafficking in addictive substances.[90] President John F. Kennedy, on the initiative of United States Attorney General Robert F. Kennedy, signed into law on September 13, 1961, the Interstate Wire Act of 1961, which targeted persons who "engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers."[91] According to Attorney General Robert F.

[88] Karsten and Hall, *The Magic Mirror*, 329, 331.
[89] July 16, 1952, 66 Stat. 722, amending the Communications Act of 1934, ch. 879, § 18(a), 66 Stat. 711 (1952).
[90] Narcotic Control Act of 1956, Pub. L. 728-627, 70 Stat. 567, approved July 18, 1956.
[91] Interstate Wire Act of 1961. Pub. L. 87-216, 75 Stat. 491, enacted September 13, 1961, amending 18 U.S.C. ch. 50 §1981, et seq.

Kennedy at the time, "It is quite evident that modern, organized, commercial gambling operations are so completely intertwined with the Nation's communications systems that denial of their use to the gambling fraternity would be a mortal blow to their operations."[92] Also on September 13, 1961, President Kennedy signed the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act, which targeted any interstate "business enterprise involving gambling, illegal liquor sales, trade in banned narcotics, and prostitution."[93] On the same day, he signed into law the Interstate Transportation of Wagering Paraphernalia Act of 1961, which penalized the transportation across state lines or in foreign commerce "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device" for bookmaking, "wagering pools with respect to a sporting event, or "numbers, policy, bolita, or similar game. . ." [94]

While Congress continued with its reshaping of the federal-state relationship via Commerce Clause legislation, the Supreme Court under Chief Justice Earl Warren dramatically changed its jurisprudence in this regard. Warren was nominated by President Eisenhower and was appointed on October 5, 1953 after Chief Justice Vinson died suddenly the previous month. Warren had been elected three times as governor of California and was the Republican vice-presidential nominee in Thomas Dewey's run in 1948. Eisenhower believed he would bring "integrity, uprightness, and courage" to the Court.[95]

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[92] Quoted in David Schwartz, "Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose." *Gaming Law Review and Economics*, Vol. 14, no. 7 (September 2010): 535, 533–540.
[93] Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprise Act, S. 1653, Pub. L. 87-228, 75 Stat. 498-2, enacted September 13, 1961, 18 U.S.C. § 1952.
[94] Interstate Transportation and Wagering Paraphernalia Act, S. 1657, Pub. L. 87-218, 75 Stat. 492-2, enacted September 13, 1961.
[95] Ed Cray, Chief Justice: A Biography of Earl Warren (New York: Simon and Schuster, 1997), 262.

The appointment by President Eisenhower of Earl Warren to the office of chief justice of the Supreme Court, which he assumed in October 1953, put in motion changes on the high bench that would ultimately shift the balance of power of the Court decisively in the direction of more liberal, instrumental decision making – and pave the wave for Congress to employ its commerce power in wholly unprecedented ways. Warren was deeply committed to the belief that the Court had a social responsibility to deal with the problems facing the United States at the time but did not have much faith in the capacity of democratic legislative processes to do so. The persistence of all white legislatures in the southern states seemed to portend the endless persistence of Jim Crow and other kinds of racial oppression in the South. Analysts commonly associate the work of the Warren Court with "substantive liberal jurisprudence," which harked back to the era of judicial realism, at least to the extent that it privileged outcomes over the processes from which they derived. And to this extent, Chief Justice Warren was at odds with associate justices Felix Frankfurter and Robert H. Jackson, although the chief justice had strong allies in justices Hugo Black and William O. Douglas.[96] The approach employed by Chief Justice Warren and his ideological brothers entailed also the belief in a "living Constitution," that is, the idea that the meaning of the foundational document had changed and was intended to change over time, through the deliberate power of judicial review, to meet the ever-changing exigencies of fundamental justice. According to Yale law professor Eugene Rostow, writing in January 1952, "[t]he power of judicial review stands. . . as an integral feature of the living constitution, long since established as a working part of the democratic political life of the nation."[97]

[96] Karsten and Hall, *The Magic Mirror*, 345.
[97] Eugene V. Rostow, "The Democratic Character of Judicial Review," *Harvard Law Review*, Vol. 66 (1952): 193.

Scholarship on the Supreme Court under the leadership of Chief Justice Earl Warren includes relatively little systematic discussion of its responses to the increasingly pervasive employment by Congress of the commerce power in the period 1954-1963. By and large, scholars cast the Warren Court as a powerful engine for progress – extending New Deal liberalism in numerous new directions. Morton J. Horwitz for example, details how, with landmark decisions such as *Brown v. Board of Education* (1954), the Court initiated a revolution in race relations and, among other things, expanded the constitutional guarantee of "equal protection of the laws.[98] Lucas A. Powe refutes the view that the decisions of the Warren Court were intended, simply, to protect vulnerable minorities. According to him, the Warren Court, at least in the 1960s, was, in fact, a partner in "Kennedy-Johnson liberalism" – imposing national liberal-elite values on groups he calls "outliers": rural populations, the white South, and areas of Roman Catholic dominance.[99] A collection of essays edited by Harry N. Scheiber suggest that the activism of the Warren Court spurred a reconsideration of the judicial role in many areas of the world – one that advanced substantive human rights.[100] Writing in 2004, Michal R. Belknap revisits the accomplishments of the Warren Court but explores with special care the highly controversial political and cultural effects of its rulings.[101]

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[98] Morton J. Horwitz, *The Warren Court and the Pursuit of Justice: A Critical Issue* (New York: Hill and Wang, 1998).
[99] Lucas A. Powe, *The Warren Court and American Politics* (Cambridge: Belknap Press of Harvard University Press, 2002).
[100] Harry N. Scheiber, ed., *Earl Warren and the Warren Court: The Legacy in American and Foreign Law* (Lanham: Lexington Books, 2006). See also Bernard Schwartz, ed., *The Warren Court: A Retrospective* (New York: Oxford University Press, 1996) and Mark Tushnet, ed., *The Warren Court in Historical and Political Perspective* (Charlottesville: University Press of Virginia, 1993).
[101] Michal R. Belknap, *The Supreme Court under Earl Warren, 1953-1969* (Columbia: University of South Carolina Press, 2004). Also see Coenen, *Constitutional Law: The Commerce Clause*, pp. 72-73 and Robert L. Stern, "The Commerce Clause Revisited—The Federalization of Intrastate Crime," *Arizona Law Review*, Vol. 15 (1973): 272, 275-276.

The judicial activism of the Warren Court that first appeared in *Brown v. Board of Education* (1954) took eight years to reach full strength. While the Supreme Court rendered the landmark decision on May 17, 1954, with a unanimous opinion – that result owed a great deal to the leadership and determination of its author, Chief Justice Warren. Justices Felix Frankfurter and Robert H. Jackson loathed racial segregation. But they, as well as Justice Stanley F. Reed, were convinced that "separate but equal" was not unconstitutional under the equal protection clause of the Fourteenth Amendment. And many liberal Court watchers were relieved and elated that Justice Reed agreed not to write a dissent to this effect.[102] The balance of power on the Court, from the perspective of its liberal justices, was not at all improved when President Eisenhower appointed John Marshal Harlan II, who took office in March 1955, to replace the retiring Justice Felix Frankfurter. Similarly to Frankfurter, Justice Harlan was a strong proponent of process jurisprudence and judicial restraint, routinely making it known that the Supreme Court ought not to do what only legislators were authorized to do.[103] Eisenhower appointee liberal Democrat William J. Brennan, Jr., who took office in October 1956, led the faction that included justices Hugo Black and William O. Douglas. Brennan complemented the leadership and consensus-building skills of the chief justice with a solid understanding of the constitutional jurisprudence pertinent to the issues that the liberal justices deemed most important. Appointments by President John F. Kennedy in his second year in office helped Chief Justice Warren undergird his approach to changing the law. Giving the liberal wing a solid 5-4 majority was the addition of former college football and NFL great, Rhodes Scholar, World War II hero,

[102] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Michael J. Klarmen, Brown v. Board of Education *and the Civil Rights Movement* (Oxford and New York: Oxford University Press, 2007), 67-68.
[103] Karsten and Hall, *The Magic Mirror*, 344. Karsten and Hall, *The Magic Mirror*, 344.

commercial lawyer, and Kennedy supporter Byron White, who replaced Charles Evans Whittaker in April 1962. In September of that year, the addition of labor union lawyer, Kennedy administration secretary of labor, and Democrat party wheel horse Arthur Goldberg reinforced the dominance of what Felix Frankfurter once dubbed "the liberal axis."[104]

Having established his winning coalition, Chief Justice Earl Warren spurred the Supreme Court to render another ruling, unrelated to commerce power, that combined with the 1954 Brown decision both further to alienate and, ultimately, placate a substantial segment of the white South. The May 1955 decision *Brown v. Board of Education*, dubbed "Brown II," reiterated Brown I and required racially segregated school districts to desegregate with "all deliberate speed."[105] But this vague mandate gave Jim Crow die-hards a bit of hope; recalcitrant southern political leaders and school authorities interpreted the ruling to mean that there was no urgency to include black children in their public schools. To the end of the Eisenhower administration, federal district courts bolstered this perception by refraining, with a few exceptions, from taking aggressive action. Strident reaction to Brown I and Brown II was limited largely to the Deep South.[106] According Lawrence A. Welsch, writing about his experience in the late 1950s, "Impeach Earl Warren" yard signs became increasingly visible as one traveled by car through Maryland, Virginia, North Carolina, South Carolina, and then into a bastion of the movement – Georgia.[107] Southern governors such as Orval Faubus of Arkansas in 1957 and George Wallace of Alabama in 1963 tapped into rising white anger against federal court ordered

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[104] Howard Ball, *Hugo Black: Cold Steel Warrior* (New York: Oxford University Press, 2008), 14.
[105] *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).
[106] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, et al., *Constitutional Law*, 6th ed., (New York: Aspen Publishers, 2009), 472.
[107] Lawrence A. Welsch, "Impeach Earl Warren," *Daily Kos*, Friday, June 29, 2007, <https://www.dailykos.com/stories/2007/6/29/351847/->, accessed August 10, 2017.

school desegregation to advance their political careers. But many Americans, including moderate southerners, approved cautious federal action to end racial injustice. And, according to historian David E. Kyvig, even those who did not approve such action generally believed that the Deep South campaign to impeach Earl Warren was "a little bizarre."[108]

Several other liberal Warren Court decisions unrelated to Commerce Clause power rendered in 1962 and 1963, it should be observed, roiled political waters. The decision in *Baker v. Carr* (1962), which made legislative apportionment, as between overrepresented rural districts and rapidly growing urban centers, a justiciable question was certainly controversial. Less contentious, but important, was the 1963 ruling of the Court in *Gideon v Wainwright*, which held that the Sixth Amendment required states to provide indigent criminal defendants with publicly funded counsel.[109] But most Americans, including many white southerners, did not immediately connect these rulings to the controversies surrounding racially segregated schools or the civil rights of black southerners. More than a few conservatives, in the South and elsewhere, were certainly disturbed or even angered by the 1962 First Amendment decision *Engel v. Vitale*, which outlawed mandatory school prayer, and the 1963 First Amendment ruling *Abington School District v. Schempp,* which imposed a total ban on prayer and Bible reading in public schools.[110] But the "school question" was not new, as it had arisen initially in the mid-nineteenth

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[108] David E. Kyvig, *The Age of Impeachment: American Constitutional Culture since 1960* (Lawrence: University Press of Kansas, 2008), 52.
[109] *Baker v. Carr*, 369 U.S. 186 (1962); Gideon v. Wainwright, 372 U.S. 335 (1963).
[110] *Engel v. Vitale*, 370 U.S. 421 (1962). In *Abington School District v. Schempp,* 374 U.S. 203 (1963), the Court decided, in an 8-1 vote, that Bible reading in public schools was unconstitutional. The decision relied on the 1947 decision of the Court in *Everson v. Board of Education*, 330 U.S. 1 (1947), handed down during the tenure of Chief Justice Fred M. Vinson, which declared that the due process clause of the Fourteenth Amendment had "incorporated" the First Amendment of the United States Constitution as a substantive limit on state power. See also *Epperson v. Arkansas*, 393 U.S. 97 (1968). Klaus H. Heberle, "From Gitlow to Near: Judicial 'Amendment' by Absent-Minded Incrementalism." *Journal of Politics*, Vol. 34, no. 2 (May

century, when massive Catholic immigration had swelled urban populations and began to make Protestant Bible reading in public schools a constitutional issue – under state constitution freedom and establishment of religion protections. Great respect for the First Amendment and its principles prompted thoughtful conservatives, at least initially, to react cautiously to the two Warren Court decisions.[111]

More than a few Warren Court decisions that underwrote an expanding commerce power were, to some extent, politically invisible because few Americans could disagree with their salutary policy objectives. Consider *United States v. Five Gambling Devices* (1953). In this case, the Court confronted a law in which Congress (1) outlawed cross-border shipments of gambling machines into states that had not specifically exempted themselves from the act's coverage; and (2) to effectuate this prohibition, also required all sellers of gambling devices to file monthly reports with federal authorities detailing each sale of a device.[112] One issue presented by the case was whether the reporting requirement extended to purely intrastate sales. In considering this question, four Justices were prepared to say that the reporting provision did apply to intrastate sales and that, thus applied, it was constitutional because it helped "make effective and enforceable the interstate shipment ban" by complicating efforts to evade the ban through "straw-man transactions. . . and the like."[113] Three Justices, however, argued that application of the law to purely intrastate transfers raised "serious constitutional questions" and accordingly

1972): 458-483; Robert Lowry Clinton, "Substantive Due Process, Selective Incorporation, and the Late-Nineteenth Century Overthrow of John Marshall's Constitutional Jurisprudence." *Journal of Law & Politics*, Vol. 5, no. 1 (Spring 1989): 499-549.

[111] Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (New York: Oxford University Press, 2008), 251-328.

[112] *United States v. Five Gambling Devices*, 346 U.S. 441, 445-448 (1953).

[113] Ibid., 459 (Justice Clark, dissenting).

interpreted the reporting requirement to apply only to interstate transfers.[114] The other two Justices did not speak to commerce-power issues because they focused instead on constitutional vagueness problems. Perhaps the most important implication of the decision was that it advanced the proposition that Congress had the power to regulate intrastate behavior involving any object that had previously crossed a state line. "Justice Clark, writing for the only four Justices who reached the commerce power issue, found it "clearly established" that "activities local in nature may be regulated . . . if local goods . . . were previously in interstate commerce."[115]

The Warren Court expanded the boundaries of FLSA coverage through the early 1960s (and later), particularly in the construction industry. In its 1955 decision *Mitchell v. Vollmer*, the Court overturned lower court decisions interpreting the FLSA to deny overtime pay to employees working on the Algiers Lock and Canal, in Orleans Parish, Louisiana, which was "new construction" and not yet physically connected to the Gulf Intracoastal Waterway. Defendant Vollmer had taken the position that its employees working on the Algiers Lock were, under the circumstances, not engaged in interstate commerce and, thus, not covered by the wage and hour provisions of the act. Justice William O. Douglas, writing for the majority, did not agree. In his view, "[t]he question whether an employee is engaged 'in commerce' within the meaning of the present Act is determined by practical considerations, not by technical

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[114] Ibid., 446-448 (plurality opinion of Justice Jackson).
[115] Donald H. Regan, "How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*." *Michigan Law Review*, Vol. 94 (1995): 554, 561; Coenen, *Constitutional Law: The Commerce Clause*, 72-73. See Comments, "Regulation of Gambling Devices in Interstate Commerce," DePaul Law Review, Vol. 4, no. 2 (Spring-Summer 1955): 256-266.

conceptions." According to him, "the test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." This ruling summarily dismissed earlier precedents to the contrary and constituted something of a breakthrough for extending the FLSA to virtually all interstate transportation-related construction.[116] In January 1959, the Court ruled on the disputed FLSA wage and hour claims demands brought by the nearly seventy employees of the architectural and consulting engineering firm Lublin, McGaughy, and Associates, which had offices in Norfolk, Virginia, and Washington, D.C., and which routinely contracted with the Department of Defense and had clients in multiple states. Writing for the majority was Chief Justice Warren, who, first, declared that the decision of Congress not to extend FLSA coverage to all employees whose work merely "affected interstate commerce" did not require the Court to narrowly circumscribe the key FLSA coverage rubric "engaged in commerce." According to him, "'the activities of the employees show clearly that they are 'engaged in commerce' and thus are eligible for the protections afforded by the Act."[117]

In a March 1959, the Warren Court rendered a decision that established rather clearly the growing power of the "dormant commerce clause." *Bibb v. Navajo Freight Lines* dealt with an Illinois statute requiring long-bed trucks to have a distinctive type of curved mudguard behind wheel wells, which the state insisted was safer than the straight ones that at multitude of other states required. Plaintiffs, who were multi-state trucking companies, objected to the inconvenience of having to change their equipment when entering Illinois. On appeal from several rulings against the plaintiffs, the only question for the Supreme Court was whether, in the

[116] *Mitchell v. C. W. Vollmer & Co., Inc*., 349 U.S. 427 (1955); David G. Davies, "Recent Decisions," *Michigan Law Review*, Vol. 59, No. 2 (December 1960): 316-320.
[117] *Mitchell v. Lublin, McGaughy & Assocs*., 358 U.S. 207, 211-212 (1959).

absence of a federal regulation, one state, Illinois in this case, could mandate irregular equipment standards consistent with the imperatives of the "dormant commerce clause." Writing for the majority, Justice William O. Douglas, declared that the Court could not sustain the Illinois statute unless it could conclude that "the total effect of the law as a safety measure in reducing accidents and casualties" outweighed "the national interest in keeping interstate commerce free from interferences which seriously impede it . . ." A unanimous Court held the statute unconstitutional. Most observers probably agreed that a uniform mudguard regulation was best. But the decision set an important precedent and, equally important, clearly signaled state governments that Congress would exercise considerable jurisdiction over the nation's increasingly busy highways and, especially, those comprising its emerging interstate highway system.[118]

Congress employed its commerce power innovatively to pass the Clean Air Act of 1955, raising some of the key issues that would help define the cultural and political conflicts powerfully marking the decades after 1963: industrial environmental degradation and the allocation of authority among local, state, and federal governments to address the problem. President Franklin D. Roosevelt, similarly to his cousin Theodore, had been deeply committed to conservation and promoted numerous federal program to advance this cause. After World War II, conservationists in the United States mobilized to thwart several industrial projects threatening to wilderness lands. In the mid-1940s, residents of Los Angeles began to complain of "smog," widely understood to be substantially produced by automobile emissions. In October 1948, a temperature inversion produced heavy smog in Donora, Pennsylvania, for five days, killing twenty people and making hundreds more seriously ill. Publicity surrounding this tragic

[118] *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 525 (1959).

event and other similar ones, in part, a consequence of industrial labor activism, substantially increased public concerns about atmospheric contamination.[119] On the heels of a National Air Pollution Symposium held at Stanford Research Institute in November 1949, congressional committees began crafting a complicated piece of legislation that would became the Clean Air Act of 1955. The Democrat-controlled Congress and President Eisenhower, however, ultimately employed an approach that quite gingerly deferred to the traditional sovereign authority of individual states. Passed on July 14th of that year, the preamble of the act declared that it was designed to "provide research and technical assistance relating to air pollution control," which the surgeon general of the United States would coordinate. It further declared that air pollution was a hazard to public health but reserved "the primary responsibilities and rights of the states and local government in controlling air pollution." Section 7 of the act, however, stipulated rather pointedly that none of the provisions of the act "shall . . . limit the authority of any department or agency of the United States to conduct or make grants-in-aid or contracts for research and experiments relating to air pollution under the authority of any other law."[120]

In April 1960, a notable Supreme Court decision articulated the federal preemption doctrine and dormant commerce power in ways that further pointed to the looming controversies over industrial environmental contamination and the competing claims of federal and state authorities to jurisdiction over the problem. In December 1955, the City of Detroit prosecuted the Huron Portland Cement Co. in its municipal Recorder's Court for violating the Detroit Smoke Abatement Act by allowing excessive boiler emissions from company ships during loading and

[119] Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985* (1989), 298; Neil M. Maher, *Nature's New Deal: The Civilian Conservation Corps and the Roots of the American Environmental Movement* (Oxford and New York: Oxford University Press, 2007).
[120] Air Pollution Control Act of 1955, Pub. L. 84-159, 69 Stat. 322, approved July 14, 1955.

unloading at its cement mill. The company sued in the state circuit court to enjoin the city from further prosecution and from otherwise enforcing the smoke ordinance against its vessels, "except where the emission of smoke is caused by the improper firing or the improper use of the equipment upon said vessels." The circuit court refused to grant relief, the Supreme Court of Michigan affirmed the refusal, and the cement company appealed the decision to the United States Supreme Court.[121] There, the appellants argued that, since their vessels and equipment had been federally inspected, approved, and licensed to operate in interstate commerce "in accordance with a comprehensive system of regulation enacted by Congress," the City of Detroit could not constitutionally legislate to impose "additional or inconsistent standards." In so doing, Huron Portland Cement invoked the long-established "preemption doctrine." Second, the company argued that, even if Congress had not expressly preempted the field of regulating air quality, the Smoke Abatement Act "materially affects interstate commerce in matters where uniformity is necessary" and that, under the "dormant commerce power," the ordinance could not stand.[122]

In *Huron Portland Cement Co. v. City of Detroit*, writing for the majority was Justice Potter Stewart, an Eisenhower appointee who replaced Justice Harold H. Burton and a moderate pragmatist who sometimes followed strict construction principles. The decision was one that necessarily had to allow that, as of early 1960, many Americans had grown deeply concerned about air pollution in the more populous industrial cities of the United States and that Congress had not yet ventured to impose clean air regulations on industry.[123]

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[121] *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).
[122] Ibid.,442- 443.
[123] *Joseph DiMento and Oshio, Kazuto, "Forgotten Paths to NEPA: A Historical Analysis of the Early Environmental Law in the 1960s United States," Journal of American & Canadian Studies, No. 27 (2009): 19-44; Keith M. Woodhouse, "The Politics of Ecology:*

> The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.[124]

Justice Stewart conceded that "[e]venhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action." In his view, however, no such preemption had occurred in this case; in his words, "such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." On the other hand, he seemed to leave the door open for new regulatory arrangements by saying that, in the exercise of its police power, "the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."[125]

The majority, it seems, more easily dismissed the argument of the appellants that "the Detroit ordinance, quite apart from the effect of federal legislation," imposed an undue burden on interstate commerce. The dormant commerce clause would have no place in the decision. According to the majority, this argument "needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." The judgment of the Supreme Court of Michigan was affirmed.[126]

Environmentalism and Liberalism in the 1960s," Journal of the Study of Radicalism, Vol. 2, No. 2 (September 2008): 53-84; John Dryzek, et al., Green States and Social Movements: Environmentalism in the United States, United Kingdom, Germany, and Norway (Oxford: Oxford University press, 2003), 160.

[124] *Huron Portland Cement*, 362 U.S. 443.

[125] Ibid. 444.

[126] Ibid. 449.

That the majority in *Huron Portland Cement* had found a way to sustain enforcement of the Detroit Smoke Abatement Act was entirely unacceptable to Justice William O. Douglas. Ensnared in the contradictions raised by commitments to clean air and the perceived need to expand federal regulatory authority, the champion of liberal causes appears to have decided it would be best to err on the side of centralizing power. In his dissent, which Justice Frankfurter joined, he declared that the ordinance was in direct conflict with the federal statute that had required inspection of the ships owned by Huron Portland Cement, indeed, with federal action that had, in fact, licensed them to operate on the waterways of the United States. Clearly, federal legislation had preempted the field of regulation into which the Smoke Abatement Code intruded. "Here, we have a criminal prosecution against a shipowner and officers of two of its vessels for using the very equipment on these vessels which the Federal Government says may be used." Justice Douglas was vehement in his view that the Detroit ordinance was "squarely in conflict with the federal statute." Allowing its enforcement would be "crippling" to the federal ship licensing apparatus. Harking back to an 1851 decision of the Court, Justice Douglas intoned: "What we do today is in disregard of the doctrine long accepted . . . 'No State law can hinder or obstruct the free use of a license granted under an act of Congress.'"[127]

The Clean Air Act of 1963, signed into law by President Lyndon Johnson in December of that year, increased considerably federal Commerce Clause authority to impose clean air standards. The act extended authorization for federal officials to cooperate with their state and local counterparts in the areas of research and technology; the act even reiterated the claim that "prevention and control of air pollution at its source is the primary responsibility of States and

[127] Ibid., 455, Justice Douglas citing *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 13 How. 518, 566 (1851).

local governments."[128] But the new legislation also announced that "urbanization, industrial development, and the increasing use of motor vehicles" had created air pollution in major urban areas that "generally cross the Boundary lines of local jurisdictions and often extend into two or more states." Air pollution that wafted across state lines was creating "mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation."[129] The act lent the power of the Justice Department to individual states and municipalities who could not, on their own, ensure clean air standards within their own jurisdictions. More important for the purposes of this discussion, was a new dispensation to deal with the problem of air contaminants released in one state that threatened the health of persons in one or more other states; upon the request of any governor or state or municipal pollution control authority in adversely affected jurisdictions, the secretary of the Department of Health, Education, and Welfare was "authorized to request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution" – at least after mandatory consultations with all interested state and local agencies and the failure of those having jurisdiction over violators to take recommended remedial action.[130] The process was cumbersome. When the next major revision of the Clean Air Act came on November 21, 1967, Johnson administration secretaries of HEW Anthony J. Celebrezze and John W. Garner had received only three requests for interstate pollution abatement. But they had instituted five

[128] James Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years*, 3rd ed. (Washington, D.C.: Brookings Institution, 1968), 355; Randall B. Ripley, "Congress and Clean Air" in Frederick N. Cleaveland, et al., eds., *Congress and Urban Problems* (Washington, D.C.: Brookings Institute, 1969).
[129] Section 1(a)(1-2), Clean Air Act of 1963, Pub. L. 88-206, 77 Stat. 393, approved December 17, 1963.
[130] Ibid., Section 5(C)(f)(1) and Section 5(C)(g).

such actions on their own recognizance.[131] And major amendments to the Clean Air Act of 1963, from 1965 through 1970, would ramp up substantially the power of HEW functionaries and the Department of Justice to impose unilaterally clean air standards on myriad industries and the manufacturers of motor vehicles.[132]

Portending the rise of culture war conflict no less than liberal Warren Court rulings and the advance of federal authority to impose environmental controls was the passage of the 1963 amendments to the Fair Labor Standards Act, also known as the Equal Pay Act. As discussed, the 1949 FLSA Amendments Act had exempted from wage and hour coverage numerous categories of employment in which women were far more likely to be included than men. But advocates for women's rights had not remained mute. During floor debate in the House, Democrat Representative from California Helen Gahagan Douglas declared that she was speaking for all women and that unless the act was amended to do away with sex-specific exemptions, "10,000 women will be uncovered." Historians have noted the hilarity this phraseology produced among her male colleagues on the scene and their unwillingness to abide by her admonitions. But such complaints would not go away. The 1955 FLSA, similarly to earlier revisions, continued to exempt categories in which women were substantially overrepresented[133] The 1961 FLSA amendments expanded the scope of the act by providing

[131] Arthur C. Stern, "History of Air Pollution Legislation in the United States," *Journal of the Air Pollution Control Association*, Vol. 31, no. 1 (1982): 52, 44-61.
[132] Motor Vehicle Control Act of 1965, Pub. L. 89-272, 79 Stat. 992; Air Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485. A 1970 amendment entailed a major enhancement of federal authority over air pollution control, indeed, an attempt to establish uniform national standards. See also Clean Air Act Extension of 1970, Pub. L. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2468.
[133] Pub. L. 381-861, 69 Stat. 711, approved August 12, 1955; Milton C. Denbo, "The Fair Labor Standards Amendments of 1961—An Analysis," *Labor Law Journal*, Vol. 12 (1961): 731.

"enterprise coverage" to all employees working for companies that grossed annually more than $500,000, while also extending coverage to those employed by schools, hospitals, and nursing homes. And it said nothing about the continued exemptions that affected women disproportionately or the problem of women receiving less compensation for the same kinds of employment than men.[134] But these were injustices that a new generation of feminists publicly decried in unrestrained terms and that President John Kennedy, accordingly, sought to repair.

By spring 1963, the legislative processes connected to amending the FLSA provided an important arena for competing interests to hash out its wage, hour, and coverage mandates. The voices of women's rights activists were heard – and in clarion tones. April 1963 hearings before the Senate Subcommittee on Labor featured the testimony of at least eight prominent women, including U.S. Senator of Oregon Maurine Neuberger, who was a member of President Kennedy's Commission on the Status of Women; Caroline Davis, director of the Women's Department of the UAW, and staff attorney for the ACLU Sonia Pressman. Assistant Secretary of Labor Esther Peterson commanded considerable attention on the first day of hearings by, as her first order of business, bluntly denouncing the injustice of unequal pay for women, especially those who were not members of unions. She offered written testimonials penned by ordinary women workers and statistical reports documenting inequitable pay scales and other kinds of sex discrimination in employment, including unequal initial hire pay and differential promotion practices.[135] President Kennedy signed the bill into law on June 10, 1963. According to the act,

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[134] Fair Labor Standards Act Amendments of 1961, Pub. L. 87-30, 75 Stat. 65, approved May 5, 1961; *To Amend the Fair Labor Standards Act, Hearings before Subcommittee on Labor*, H.R., 87th Cong., 2st sess. (1961); *Fair Labor Standards Act Amendments of 1961*, Report from the Committee on Labor and Public Welfare, 87th Cong., 1st sess., Rep. No. 145 (April 12, 1961).

[135] *Equal Pay Act of 1963, Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare on S. 882 and S. 910* (United States Senate, 84th Congress, 1st Session, April 2-3, 16, 1963), pp. 66-74; Phyllis Palmer, "Outside the Law: Agricultural and

Congress had concluded that sex discrimination depressed wages and living standards necessary for the health and efficiency of employees; had the effect of creating labor disputes, which adversely affected and obstructed commerce; otherwise burdened commerce and the free flow of goods; and constituted an unfair method of competition.[136]

Statute by statute, Congress pushed the commerce power envelope in the period 1946-1963, and the Supreme Court, through both Republican and Democratic administrations, generally ratified such innovations. Tensions in the Supreme Court between process jurisprudence and substantive liberal jurisprudence significantly modulated but did not thwart this powerful trajectory. Through the period, the Supreme Court continued to underwrite expanded employment of commerce power with no less enthusiasm than had the 1937 New Deal Court, notwithstanding that some measures appealed more or less to individual justices staked out along the ideological spectrum. Through the very height of the Cold War, the Supreme Court ratified wage and hour regulations and antitrust measures in ways that warmed the hearts of liberals, while sometimes approving measures that especially met the approval of conservatives, such as criminal statutes aimed at weakening organized labor and purging its leadership of communism. Congressional enactments that won the imprimatur of the Court sometimes took aim at national ills that Americans across the political spectrum could, to some extent, approve, such as food and drug regulations to protect consumers or those that empowered federal authorities to ferret out multistate organized crime. In any case, measures that, in novel ways,

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Domestic Workers under the Fair Labor Standards Act," *Journal of Policy History*, Vol. 7, No. 4 (October 1995): 416-440;Marlene Trestman, "Fair Labor: The Remarkable Life and Legal Career of Bessie Margolin (1909-1996)," *Journal of Supreme Court History*, Vol. 37, No. 1 (March 2012): 42-73.

[136] Fair Labor Standards Act Amendments of 1963, Pub. L. No. 88-38; 77 Stat. 56, approved June 10, 1963.

regulated local economic activity in the name of interstate commerce and imposed new costs on business most often raised the eyebrows of conservatives jealous of local power, regardless of the extent to which ordinary Americans understood such innovations as encroachments on their personal liberty.

Most informed commenters, by fall 1963, understood very well that President John F. Kennedy and the Warren Court were charting new liberal territory. Certainly, right-wing opponents railed against Kennedy and his politics.[137] Instrumental Warren Court decisions related to and unconnected to commerce power through 1963 were certainly sometimes controversial. New commerce power interventions on behalf of environmental protection and equal pay for women from 1960 through 1963 portended a sea change in federal relations. But they only hinted at the coming political and cultural tsunami that would owe much to a limited constitutional power that post-war lawmakers and judges could not resist employing as a general police power.

In the period 1946-1963, commerce power, more than any other constitutional authority, fueled the rise of a regulatory state that was far more voluminous and complex than in the pre-World War II era. Well-intended lawmakers and jurists set about this task on behalf of causes perceived variously by Americans as heroic, necessary, or reprehensible. But they did so in a time of affluence, when the problems of excessive deficit spending, crippling national debt, and the extensive socioeconomic and cultural costs of compliance with regulatory measures grounded in the commerce power remained largely unrecognized and unimagined.

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[137] Arthur M. Schlesinger, Jr., *A Thousand Days: John F. Kennedy in the White House* (1965; New York: Mariner Books, 2002), 753-754.

Chapter Three

Remaking the Country with a Virtual Police Power, 1964-1998

The "Great Society" programs of President Lyndon Johnson built upon the New Deal foundations that Franklin Roosevelt had established, and, in doing so, effectively tied an increasing number of individuals directly to the welfare and reform initiatives of the federal government. But such programs affected far more than the autonomy of impoverished unfortunates, the lives of struggling workers, and the civil rights of long-oppressed racial minorities. In the period 1964-1998, the rapidly growing volume of federal statutes, regulations, and administrative agencies produced among a substantial segment of American society a deep apprehension about an increasingly powerful central government both out of control and out of touch with ordinary people on numerous sensitive issues. Of no little consequence to the brewing culture wars was a growing bureaucracy of federal operatives, often with few or no personal ties to constituent communities. The rapid pace of elite-driven liberal-progressive reform spurred reaction among many Americans uneasy with the increasing size, expense, and intrusiveness of government into intimate relations, family matters, and local institutions, such as public elementary and secondary schools, previously deemed to be at least responsive to community preferences. Such dissatisfaction rose steadily as ever-more-aggressive law enforcement tactics advanced by conservatives spurred complaints, especially among African Americans, of an emerging police state. More than a few "from-the-top-down" reforms left families and communities feeling far away from the centers of state and federal power. Equally disturbing to such people were federal legislative and judicial encroachments on personal liberties, such as the right to bear arms and the thoroughgoing secularization of public schools.

Congressional legislation and resulting Supreme Court decisions that implicated commerce power and state-federal relations powerfully roiled the ideological conflicts constituting the "culture wars" from the beginning of the period under study in this chapter. Partisan pressures produced congressional legislation based on the Commerce Clause aimed at improving the rights of racial and ethnic minorities, as well as women of any race and members of the LGBT community. Other measures based on commerce power reconfigured customary individual liberties. In addition to enlarging the scope of New Deal measures aimed at raising the wages and limiting the hours of ordinary workers – new regulatory regimes also imposed increasing costs and regimentation on private businesses and whole industries to protect endangered species and reduce despoliation of the environment. Particularly controversial were the efforts of liberals in Congress to enlist commerce power to limit Second Amendment rights, especially the availability of handguns and so-called "assault rifles." Conservatives in Congress produced statutes designed to combat crime, especially to police more aggressively "controlled substances" and the growing traffic in narcotic drugs that increasingly spanned the borders of states and of the United States. Intensifying partisan conflict even more was conservative legislation based on commerce power that sought to impose limits on the availability of post-viability abortion.

For the most part, Congress and the Warren, Burger, and Rehnquist courts in the period 1964-1998 combined, in a dialectical fashion, to establish and sustain most Commerce Clause-based legislation that powerfully stoked political and cultural conflict. Some of the more contentious measures regulated or criminally penalized activities that bore no discernible connection to interstate commerce and seemed to encroach on the traditional criminal jurisdiction of the state governments. But the growing proportion of conservative justices on the

Court increasingly produced decisions that calibrated Commerce Clause-based measures to keep their mandates within the bounds of the New Federalism, which emerged full-blown during the tenure of Chief Justice William Rehnquist. While the Warren and Burger courts underwrote the seemingly open-ended "substantial effects test" first articulated in the New Deal Era, the Rehnquist Court refrained from further expanding the categorical scope of this potent source of centralizing power and, in keeping with New Federalism principles, rendered Commerce Clause decisions upholding the sovereign prerogative of the states to refuse to be "commandeered" into federal regulatory schemes.

Historical assessment of legislative and judicial development of Commerce Clause power so intense as to figure centrally in the "culture wars" is supported by an expansive body of scholarship. Numerous historians, such as Samuel P. Huntington and Michael Ignatieff, have investigated the noisy debates over difference, acceptable behavior, rights and privileges of citizenship, indeed, what it actually meant to be an American in the last few decades of the twentieth century and opening years of the twenty-first century.[1] Many of these debates were rooted in the civil rights movement, the resulting larger individual rights revolution, and the evolving rules that prescribed race, gender, and sexual orientations. Other contention arose over the renewal of unregulated illegal immigration during the 1980s and 1990s. Rapidly changing demography, in the context of an internet information revolution, produced competition over whose representations of American-ness were to be accepted and respected. Exacerbating such tensions were the increasing commitment of government agencies, including public schools, to

[1] Samuel P. Huntington, *Who are We?: The Challenges to America's National Identity* (New York: Simon & Schuster, 2004);
Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (New York: Farrar, Straus, and Giroux, 1994).

eliminating all references to religion – and the consequences of de-industrialization, an increase in lower-paying service jobs, and other changes brought on by post-Cold War "globalization." The scholarship of Martha Minow reveals carefully the many ways the American legal system dealt unfairly with people facing such changes because of race, gender, religion, ethnicity, age, and disability. Drawing on literary and feminist theories, as well as social history and anthropology, Minow identifies an array of unstated assumptions that tended to regenerate legal discrimination.[2] Her work also illuminates the myriad legalities bearing on explosive issues such as affirmative action, LGBT rights, racial segregation and redistricting, and "identity politics."[3]

Timothy J. Conlan argues that, from about 1970 through the early 1990s, Republican Party leaders launched several initiatives to reduce federal authority that liberal activists viewed as essential for progress. The Republican goal of advancing decentralization had divergent policy objectives and drew on diverse philosophical positions, but certainly rolling back the so-called "welfare state" and returning power to state and local governments was of critical important to the "new federalism" that such conservatives sought to advance.[4]

Steven Schier demonstrates how, after the close of the Cold War, the disintegration of the Democrat Party New Deal coalition and the growing strength of a Republican-forged alliance of social and business moderates fundamentally shaped the politics of the 1990s and early twenty-first centuries.[5] During the 1990s, the so-called "new Democrats," led by President Bill Clinton,

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[2] Martha Mino, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990).
[3] Martha Minow, *Not Only for Myself: Identity, Politics, and the Law* (New York: New Press, 1997)
[4] Timothy J. Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Washington, D.C.: Brookings Institution Press, 1998).
[5] Steven Schier, *Postmodern Presidency: Bill Clinton's Legacy in U.S. Politics* (Pittsburgh: University of Pittsburgh Press, 2000).

aimed to replace the older and shrinking industrial and agricultural ranks of their party with a new, if not unwieldy, coalition of women, racial and ethnic minorities, social liberals, and technological progressives, whose greatest concentrations were in the larger urban centers of the country. Both the Democratic and Republican parties paid their respects to older voters – but both parties strove energetically to improve their attraction to younger ones – anticipating the expected mass exodus of the "baby boomers" from public life. The work of Joseph E. Stiglitz demonstrates rather well how the leadership of both major parties in the United States at least purported to be interested in coming to terms with the various ways that globalization, the offshoring of jobs, and the decreasing availability of well-paying employment was reorganizing the contours of the economy, social relations, and domestic politics.[6]

Thomas Frank shows how, in 1994, Republicans captured control of Congress by promising a Republican "Contract with America" that suggested the Democrats in Congress had abandoned basic principles of moral and responsible government. Although Bill Clinton had won election in 1992 by stressing economic problems, "cultural issues," in fact, drove the political agendas of the two national parties – issues such as gun control, abortion, LGBT rights, rising urban crime rates and seemingly unlimited welfare program spending. The ensuing struggle between Clinton and the Republicans, indeed, the conflict giving rise to the popular usage of the phrase "culture wars," became so acrimonious that it even led to a brief shut down of the government in the winter of 1995-1996.[7] According to Matthew A. Crenson and Benjamin Ginsberg, during the Clinton administration, powerful currents reshaped the fundamental character of American politics and civil life – in particular, the continued decline of political party organization and of

[6] Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W. W. Norton, 2002).
[7] Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America* (2004).

longstanding civic institutions that had once helped to mediate political conflict. Equally problematic was the increasing dominance of an interconnected electronic media and professional political class that seemed, increasingly, to dominate elections and government policy making.[8]

James Davison Hunter introduced the expression "culture wars" in his 1991 publication *Culture Wars: The Struggle to Define America*. Hunter described what he saw as a dramatic realignment and polarization that had transformed American culture and politics. He argued that an increasing number of inflammatory issues powerfully generated two antagonistic political polarities. Among the most polarizing were divergent views regarding such explosive issues as abortion, gun ownership and violence, religious freedom, recreational drug use, and homosexuality. As well, maintains Hunter, American society had divided along these same lines to produce two warring camps of partisans who defined themselves primarily by ideological world views, rather than by nominal religion, ethnicity, social class, or even political party affiliation. Hunter defines the opposite poles of this polarity in terms of "progressivism" and "orthodoxy."[9]

According to Andrew Hartman, Pat Buchanan's 1992 speech at the Republican National Convention marked a high point in the growing cultural polarization. In 1990, Buchanan had launched a campaign for the Republican Party nomination for president against incumbent George H. W. Bush. His "prime time" televised address at the Republican convention gave the political trope "culture war" its most powerful impetus. According to Buchanan, "There is a

[8] Matthew A. Crenson and Benjamin Ginsberg, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* (Baltimore: Johns Hopkins University Press, 2004).
[9] James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991).

religious war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself." While giving due coverage to problems he identified with extremist forms of environmentalism and feminism, he cast the defining issue of the moment as, fundamentally, a crisis in public morality. The agenda [Bill] Clinton and [Hillary] Clinton would impose on America, he declared — "abortion on demand, a litmus test for the Supreme Court, homosexual rights, discrimination against religious schools, women in combat units—that's change, all right. But it is not the kind of change America wants. It is not the kind of change America needs. And it is not the kind of change we can tolerate in a nation that we still call God's country." A month later, Buchanan characterized the conflict as struggle over power and American society's definition of right and wrong.

But, of considerable importance for this study, Hartman argues that the origins of the culture wars lay in the upheavals of the 1960s. Far more than a contemporaneous political clash limited to the early 1990s, the culture wars constituted the "public face" of protracted struggle in the United States over changes in norms that had long governed American life, alterations that ushered in, over decades, an openness to different ideas, identities, and articulations of what it meant to be an American. The "hot button" issues of abortion, affirmative action, art, censorship, feminism, and gay and lesbian rights that dominated politics in the early 1990s were, in fact, symptoms of a larger struggle commenced in the Civil Rights movement, when conservative citizens gradually began to deal with—if initially through strident rejection—many fundamental transformations of American life.[10]

[10] Andrew Hartman, *A History of the Culture Wars, A War for the Soul of America* (Chicago: University of Chicago Press, 2015), 1-69; Patrick Buchanan, "The Cultural War for the Soul of America," Republican National Convention Speech, August 17, 1992.

Matthew C. Moen and Donna M. Binkiewicz demonstrate that "culture wars" contention over the national endowments for the arts and humanities had a significant impact on national politics in the late 1980s and early 1990s. Front page controversy plagued the NEA throughout the presidency of George H. W. Bush and that of Bill Clinton, as conservative critics publicized the work of NEA-funded artists that a substantial segment of the general public found distasteful, if not shocking in some instances. Perhaps the most controversial NEA-sponsored museum exhibitions were the "homoerotic" photographs of Robert Mapplethorpe and Andres Serrano's crucifix-in-urine photograph titled "Piss Christ." In 1990, after further public debates drawing into question the volume of federal tax dollars spent on what many conservatives deemed to be obscenity and blasphemy, Congress installed stricter procedures to exert more oversight. Critiques of the policies of the NEA grew louder in 1991. Conservative academics complained publicly about the threat that "political correctness" posed to their standing and the scholarly subject matter they researched and sought to teach. Conservative dissenters insisted that left-leaning academics were attempting totally to silence their voices by decrying conservative intellectual arguments and viewpoints as entirely outside the bounds of decent, acceptable debate. Conservatives charged that "multiculturalism," while reasonable and good when presented in the abstract, in academic practice, amounted to an attack on foundational ideas of the western literary and philosophical tradition, not to mention millennium-old ideas about marriage, sexuality, family, work, religion, and community life.[11]

[11] Matthew C. Moen, "Congress and the National Endowment of the Arts: Institutional Patterns and Arts Funding, 1965-1994," *Social Science Journal* 34 (1977): 185-200;
Donna M. Binkiewicz, *Federalizing the Muse: United States Arts Policy and the National Endowment for the Arts 1965-1980* (Chapel Hill: University of North Carolina Press, 2004).

Richard Jensen reveals how liberal-left partisans declared that 1994 was the year of the "angry white male" — responding, it seems, to the determined resistance of some to the excesses of increasingly aggressive efforts to eliminate the expression of conservative ideas. In the wake of several ambitious programs advanced by the Clinton administration, such as the controversial 1993 Health Security Bill, conservatives began to express the view loudly that Washington, D.C., had grown too culturally distant from the people residing outside "the beltway." The election swept into power an aggressive Republican majority led by university professor and House Minority Whip Newt Gingrich (R-GA), who boldly and publicly dedicated himself to instituting substantial cuts in federal spending. Gingrich, it seems, had few qualms about tying this campaign to a felt need among conservative Republicans to recover "fiscal sanity," downsize expensive and ineffective government bureaucracy, and, basically, bring the entrenched political elite to heel.[12]

Andrew Hartman, Eric Foner, Gary B Nash, and others show that the rhetoric of conservative culture warriors such as Gingrich and Republican control of Congress beginning in early 1994 spurred open debates over the development of national educational standards, including the question of whether the study of United States history should be advanced as a reasonable avenue to promoting a knowledgeable, loyal citizenry or in a fashion more "critical," that is, one that would give more attention, or even exclusive attention, to the oppressiveness of American slavery, racism, patriarchy, imperialism, capitalism, sexism, and homophobia.[13] As a

[12] Richard Jensen, "The Culture Wars, 1965-1995: A Historian's Map," *Journal of Social History*; Supplement, Vol. 29 (Fall 1995): 17-40.

[13] Andrew Hartman, *A War for the Soul of America: A History of the Culture Wars* (University of Chicago Press, 2015); Eric Foner, *Who Owns History: Rethinking the Past in a Changing World* (New York: Hill & Wang, 2002); Gary B. Nash, Charlotte Crabtree, and Ross E. Dunn,

consequence, the "culture wars" reached an unprecedented level of intensity in 1995 as the newly empowered Republicans in Congress set out to defund or privatize the National Endowment for the Humanities, the National Endowment for the Arts, and the Corporation for Public Broadcasting.

Philip N. Howard and Gary W. Selnow reveal how the "culture wars," by the turn of the new millennium, raged endlessly on 24/7 cable television, internet webpages, and blogs, and had become especially heated in election seasons. Through the presidency of George H. W. Bush, and for most of the presidency of Bill Clinton, Congress remained in the hands of the Republican Party – locked in a culture wars stalemate that, by the end of 1998, seemed, at times, to turn on the veracity of the charge that the president had permitted himself illicit sexual liberties with a White House aide.[14]

Mapping the steady legislative extension of Commerce Clause power to achieve dearly-held partisan goals, statute by statute, and case-by-case is unfeasible. Such a catalogue, even with the briefest of entries, could easily run on for hundreds of pages, if not thousands. But a description of the most contentious and well-known congressional legislation and Supreme Court decisions serves to illustrate the exponential growth and concentration of power by the federal government – a development that was central to growing political and cultural polarization in the period under study. However, it should be kept in mind that congressional statutes and federal court decisions treated specifically herein constituted but a fraction of similar initiatives giving rise to

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History on Trial: Culture Wars and the Teaching of the Past (New York: A.A. Knopf: Distributed by Random House, 1997).

[14] Philip N. Howard, *New Media Campaigns and the Managed Citizen* (Cambridge and New York: Cambridge University Press, 2006); Gary w. Selnow, *Electronic Whistle Stops: The Impact of the Internet on American Politics* (Westport: Praeger, 1998).

a massive federal regulatory apparatus, or "administrative state," a key point of partisan contention in the period. A progressive school of interpretation emphasizes that the administrative state, which had its beginnings as least as early as World War I, comported with democratic principles, was entirely consistent with the United States Constitution, and offered efficiency, scientific expertise, and an array of economic, health, and safety benefits to the American public.[15] But ordinary citizens with less faith in the mere mortals who wielded government power commonly begged to differ. Congress implemented myriad new regulatory schemes and created new administrative agencies, most of which employed summary proceedings without jury trials and standards of due process and proof thought to be unconstitutional; administrative agencies required only a preponderance of evidence to assign guilt and commonly imposed "civil penalties," which only those with law-school training could differentiate from fines traditionally levied for conviction of misdemeanor and felony offenses.[16] According to Kermit L. Hall and Peter Karsten, "[o]f the seventy-seven federal regulatory agencies existing in 1976, fifty had been created since 1960." Even after the onset of

[15] Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven and London: Yale University Press, 2012); Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940* (Oxford and New York: Oxford University Press, 2014); Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Cambridge: Harvard University Press, 2016); Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal* (New York: Cambridge University Press, 2012).

[16] Nancy Frank, "From Criminal to Civil Penalties in the History of Health and Safety Laws," *Social Problems*, Vol. 30, no. 5 (June 1983): 532-545; Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2015), 246, 441-492, 581; Dean Reuter and John Yoo, eds., *Liberty's Nemesis: The Unchecked Expansion of the State* (New York: Encounter Books, 2016); Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia: University of Missouri Press, 2017), 207-314.

"stagflation" in the 1970s and, after 1980, a continuously growing multi-trillion-dollar national debt, the administrative state extended its reach.[17]

Inaugurating the new era of contentious socioeconomic and political reordering via the instrumental deployment of commerce power was the Civil Rights Act of 1964, the culmination of the centuries-old struggle of African Americans for freedom and equality. President Kennedy initiated the act and President Johnson brought it to fruition. There had been an attempt to pass a civil rights law eighty years before--the Civil Rights Act of 1875--but the act was rarely enforced and when it was challenged, the Supreme Court ruled it unconstitutional.[18] The 1875 act had been based upon Section 1 of the Fourteenth Amendment, which says that no *state* may "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."[19] The Supreme Court ruled that the amendment applied only to state action, not discrimination by private individuals or groups. In the 1960s, therefore, Congress constructed new civil rights measures on its commerce power, along with the Fourteenth and Fifteenth Amendments.

The Civil Rights Act of 1964 outlawed discrimination based on race, color, religion, sex, or national origin.[20] Title I put an end to the unequal application of voter registration requirements. Title II, based on the Commerce Clause, prohibited discrimination in lodging facilities, restaurants or dining facilities, theaters or entertainment facility. Title III gave access to everyone in state and municipal public facilities. Title IV provided "carrots and sticks" for desegregating public schools. Title VII, based on the Commerce Clause, prevented discrimination in the

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[17] Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in American History*, 2nd ed. (New York and Oxford: Oxford University Press, 2009), 338.
[18] See, *The Civil Rights Cases*, 109 U.S 3, 11 (1883)
[19] U.S. Constitution, amend. 14, sec. 1.
[20] Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964.

workplace by employers, employment agencies, and labor organizations. Title VII also established the Equal Employment Opportunity Commission (EEOC). That body was charged with investigating complaints of unlawful employment practices. Under Section 706 of Title VII, a state or federal court, upon finding that a respondent was or had been intentionally engaging in an unlawful employment practice, was authorized to "enjoin the respondent from engaging in such unlawful employment practice, and order such *affirmative action* [emphasis added] as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ."[21]

Notwithstanding its thoroughly democratic and high moral purpose, the 1964 Civil Rights Act made it clear to all that champions of equality in the United States intended to use commerce power in a way far beyond the understanding of the Framers and of the most liberal-minded New Deal legislators. The 1964 Civil Rights Act produced a long-overdue and direly-needed reform, and it garnered approval among most liberals and moderates and, more than a few conservatives. But its key provisions relied on Commerce Clause power to skirt the state action limitations of the Fourteenth Amendment. The objective of Title II and Title VII of the act was not primarily to regulate interstate commerce but rather to provide equal rights for African Americans in privately-owned "public accommodations" and in the private employment sector. In passing Title II and Title VII, at least, Congress ceded, all at once, an unprecedented measure of fidelity to original understandings of Article I, Section 8 of the Constitution to achieve an unprecedented

[21] Section 706 (g) and Section 707, Title VII, Civil Rights Act of 1964 (Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964).

purpose strenuously demanded by a sizable and vocal segment of the electorate – securing the equal status and rights of an oppressed minority.[22]

In 1965, President Lyndon B. Johnson signed Executive Order 11246, which established requirements for non-discriminatory practices in hiring and employment on the part of United States government contractors, with a primary concern being the amelioration of racial discrimination in employment. The order required contractors with fifty-one or more employees and contracts of $50,000 or more to implement affirmative action plans to increase the participation of racial minorities in the workplace if a workforce analysis demonstrated their under-representation. Federal regulations adopted pursuant to the order required affirmative action plans to include an equal opportunity policy statement to identify deficiencies in the composition of the workforce and provide the informational means to implement ameliorating employment practices.[23]

Congress, by passage of Title VII, strongly encouraged employers, labor organizations, and other persons "to act on a voluntary basis to modify racially discriminatory employment practices and systems which constituted barriers to equal employment opportunity." The Equal Employment Opportunity Act of 1972 expanded Title VII jurisdiction to include employee-employer relations in local, state and federal agencies, a change that brought ten million more persons within its ambit.[24] Title VII established conciliation and persuasion as the primary

[22] *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964). See concurrence of Justice Arthur Goldberg at 279-291 and concurrence of Justice Hugo Black at 291-293; Gregg Evers and David Kalb, "Congressional Power to Establish and Enforce Social Rights after *United States v. Morrison*," pp. 11-26, in Colton C. Campbell and John F. Stack, Jr., eds., *Congress and the Politics of Emerging Rights* (Lanham: Rowman & Littlefield, 2001), 22.
[23] President Lyndon B. Johnson, Executive Order No. 11246, September 24, 1965.
[24] Amendment to Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e).

processes for amelioration, which was reaffirmed in 1972. But federal courts, the EEOC, the Department of Labor, and the Department of Justice soon became quite active in enforcing affirmative action guidelines in cases where voluntary action had not taken place and conciliation had failed.[25] This activity on behalf of race-based affirmative action spurred contention in the political arena almost immediately.[26]

Signed into law by Lyndon B. Johnson on the heels of the assassination of the Reverend Dr. Martin Luther King, Jr., Title VIII of the Fair Housing Act of 1968, based on the commerce power, provided for equal housing opportunities regardless of race, creed, or national origin. The 1966 Chicago Open Housing Movement, the passage of the 1963 Rumford Fair Housing Act in California, and the 1967 fair housing campaigns in Milwaukee were also powerful spurs to the passage of the act. Title VIII prohibited 1) the refusal to sell or rent a dwelling to any person because of her or his race, color, religion, or national origin; 2) discrimination against another on such bases in the terms or conditions of the sale or rental of a dwelling; 3) advertising for the sale or rental of a dwelling so as to indicate a preference based on race, color, religion, or national origin; and 4) and interference with a person's enjoyment or exercise of house rights for discriminatory reasons or retaliated against a person or organization that aids or encourages the exercise or enjoyment of fair housing rights. A victim of discrimination in the context of

[25] Title 29 Labor, Subtitle B, Chapter XIV, § 1608.1 [Statement of purpose], *Code of Federal Regulations.*

[26] Raymond F. Gregory, (2014). *The Civil Rights Act and the Battle to End Workplace Discrimination: A Fifty Year History* (Lanham: Rowman and Littlefield, 2014); Terry H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (New York and Oxford: Oxford University Press, 2004).

attempting to purchase or rent a residence was also authorized to bring a civil action to obtain redress.[27]

A series of amendments to the Fair Labor Standards Act in the period 1974-1986 featured ever-widening federal control of minimum wage, maximum hour, and overtime pay standards, as well as growing conservative resistance in Congress on behalf of business owners who resented these mandatory increased payroll expenditures. The 1974 amendments extended coverage to domestic workers, while the 1985 amendments permitted state and local governments to pay their employees a higher wage for overtime work. In 1986, however, Congress and President Ronald Reagan amended the Fair Labor Standards Act to allow the secretary of labor to issue special certificates allowing employers to pay less than the minimum wage to persons with "productive capacity" limited by age, physical or mental deficiency, or injury. In 1989, Congress passed a bill raising the minimum wage to $4.55 per hour, but President George H.W. Bush vetoed the increase, declaring it "excessive." Republican senators agreed to a revised bill with a lower minimum wage. The president ultimately signed the revised bill, notwithstanding the unsuccessful efforts of Republican senators to have included in it minimum-wage exemptions for small businesses and farmers who employed migrant workers.[28]

Returning to the administration of President Johnson, his "War on Poverty," with forty programs that aimed to improve living conditions and help impoverished people lift themselves

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[27] Title VIII, Civil Rights Act of 1968, Pub. L. 90-184, 82 Stat. 73; Matthew J. Termine, "Promoting Residential Integration Through the Fair Housing Act," *Fordham law Review*, Vol. 79 (2011): 1367.

[28] Pub. L. 75-718, ch. 676; 52 Stat. 1060, enacted June 25, 1938; U.S.C. Title 29, Chapter 8 Fair Labor Standards, §§ 201-219; Jay P. Lechner, "The New FLSA White-Collar Regulation—Analysis of Changes." *Florida Bar Journal*, Vol. 79, no. 2 (2005): 20; Suzanne b. Mettler, "Federalism, Gender, & the Fair Labor Standards Act of 1938." *Polity*, Vol. 26, no. 4 (1994): 635-654.

out of poverty, took the Constitution's meaning of "promote the General Welfare" far outside of what the founders had in mind 1789. The Food Stamp Act of 1964, the Housing and Urban Development Act of 1965, The Child Nutrition Act of 1966, and others have all had only the most tenuous connection to interstate commerce; however, none has been found to be an unconstitutional exercise of Congress' Commerce power by the Supreme Court.[29] However, the "war" has certainly proved to be controversial.

Johnson's welfare programs that promoted the hope of eliminating poverty, such as Aid to Families with Dependent Children and the Food Stamp Program, led to claims by conservative economists such as Walter Williams and Thomas Sowell that the programs were, in fact, detrimental to poor black families and kept them in poverty. Williams' and Sowell's reasoning was that, since welfare extended to a single mother and, thus, without the assistance of a wage-earning husband, the institution of marriage broke down in poor black communities; single-mother birth rates skyrocketed, matched by accelerating crime, since black youngsters grew up without the sustained and coordinated residential guidance of both a father and a mother.[30] The liberal-progressive side of the argument held invariably that the root of crime was poverty and, once poverty was no longer a concern, crime would diminish; therefore, welfare programs were deemed to be entirely necessary to alleviate the conditions of poverty, and, hence, criminal activity would be reduced as well.

In 1965 Congress legislated the Elementary and Secondary Education Act. As part of his "Great Society" legislation, President Johnson hoped to improve the plight of economically

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[29] "Major Great Society Programs," accessed January 23, 2017, http://www.colorado.edu/AmStudies/lewis/2010/gresoc.htm

[30] John Perazzo, "How the Liberal Welfare State Destroyed Black America," *FrontpageMag*, accessed January 24, 2017, https://www.frontpagemag.com/fpm/262726/how-liberal-welfare-state-destroyed-black-america-john-perazzo

disadvantaged students while fighting the Cold War as well.[31] Since it was deemed that the level of education in the population has a significant effect upon the nation's commerce, Congress could again use its constitutional power as justification for passing the Elementary and Secondary Education Act. President Johnson succeeded in achieving passage of the law rather easily because Democrats had significantly increased their numbers in Congress during a landslide win in 1964 and no one wished to vote against education and fighting the Cold War. In the House, Democrats outnumbered Republicans 295 to 140, while in the Senate the margin was 62 to 38; the legislation cleared both houses with substantial Republican support.[32]

Although the Act's efficacy has been criticized, its constitutionality has never been questioned in the Supreme Court based upon Commerce Clause related grounds.[33] This is a rather significant result when considered, as Georgetown historian Lawrence J. McAndrews did, that "President Johnson and the Eighty-ninth Congress had all but rewritten the Constitution,

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[31] The 1965 act was presaged by the National Defense Education Act of 1958, but that act was based upon Congress' power to provide for the national defense. See John F. Jennings, ed., *National Issues in Education: Elementary and Secondary Education Act* (Washington, D.C., 1995), xv.

[32] Thirty-five Republican representatives and eighteen Republican senators voted for the law. See Lawrence J. McAndrews, *The Era of Education: The President and the Schools, 1965-2001* (Urbana and Chicago, Illinois: University of Illinois Press, 2006), 7-9.
The 1965 Elementary and Secondary Education Act has since been amended and reauthorized numerous times since 1965; its latest version is the No Child Left Behind Act of 2001. Margaret A. Jorgensen and Jenny Hoffmann, *History of the No Child Left Behind Act* of *2001 (NCLB)* (New York: Pearson Education, Inc., 2003), accessed April 11, 2016 http://www.pearsonassessments.com/NR/rdonlyres/D8E33AAE-BED1-4743-98A1-BDF4D49D7274/0/HistoryofNCLB.pdf

[33] The Act was challenged on First Amendment grounds, however, in *Aguilar v. Felton,* 473 U.S. 402 (1985), which was overturned by *Agostini v. Felton* 501 U.S. 203(1997). The challenge was whether or not use of public school teachers, teaching non-religious matters, in religious schools constituted excessive religious entanglement. The second case ruled that such use of public school teachers was not a violation of the establishment clause and further illustrates the changing views of the Court outside of Commerce Clause considerations.

elevating elementary and secondary schools to a permanent place at the table of Washington politics and policy."[34]

The serviceability of the Commerce Clause to the crime control agendas of conservative federal lawmakers after 1964 is impressive. Amid growing turmoil over the Vietnam War and unruly civil rights protests, the Commerce Clause came to the aid of law enforcement officials and federal prosecutors who were eager to clamp down on what conservatives deemed to be a virtual explosion of urban criminality and white-collar crime. Congress, in tandem with state legislatures, radically expanded criminal legislation designed to deal with the challenge of rising crime, or at least reports of its rapidly increasing incidence, especially in the turbulent inner cities of the nation. In 1965, Congress expanded the role of the FBI in criminal law enforcement with the establishment of the Office of Law Enforcement Assistance and, in 1968, with the passage of the Omnibus Crime Control and Safe Streets Act.[35] By this time, heightened judicial concerns for providing criminal justice free of racism gave way to the impulse to reassert "law and order," a campaign that reached its zenith early in the administration of Richard M. Nixon, who, in 1970, signed into law the Controlled Substances Act, which established federal drug policy with myriad measures regulating the importation, manufacture, possession, and distribution of illegal drugs set out in five "schedules."[36] President Nixon also established the Drug Enforcement Administration three years later.[37]

The turmoil of the 1960s, the political crisis attendant on the political demise of President Richard M. Nixon, and a national economy by the mid-1970s beset by "stagflation" did not deter

[34] McAndrews, *Era of Education*, 9,
[35] Enacted June 19, 1968, Pub. L. 90-351; 82 Stat. 197; 42 U.S.C. § 3711.
[36] Pub. L. 91-513; 84 Stat. 1236; 21 U.S.C. Ch. 13 § 801 et seq.; Karsten and Hall, *The Magic Mirror*, 332-333.
[37] President Richard M. Nixon, Reorganization Plan No. 2, July 28, 1973.

political activism aimed at spurring congressional action. An array of federal enactments relied on Commerce Clause authority to advance causes that liberal-minded Americans believed to be for the benefit of all. Such measures ranged from the Wholesome Meat Act of 1967 to the Magnuson-Moss Warranty and Federal Trade Commission Improvements Act of 1968, which established the Consumer Product Safety Commission, a producer of regulations that rather rapidly compelled substantial retooling among many, if not most, major American manufacturers of consumer products. [38] By the 1970s, Congress employed the Commerce Clause to protect people from themselves and the environment from people. There was, for example, the National Highway Traffic Safety Administration (NHTSA), created by President Jimmy Carter in 1977, which called for passenger restraint devices on all automobiles in the United States by 1984. The sources of congressional power exerted in the pursuit of environmental protection, in the view of some, derived from treaty rights and obligations. But a substantial number of federal environmental laws adopted in the 1970s were based exclusively on the Commerce Clause.[39] One such measure was the Surface Mining Control and Reclamation Act of 1977, which, essentially, dictated mining practices for open-space mining and required restoration of damaged surface soil and flora after mining operations were concluded on a site.[40]

Numerous congressional enactments based on Commerce Clause power spurred controversy in the 1980s amid rising public concerns about environmental threats to health. The Low Level Radioactive Waste Policy Act of 1980, for example, declared that each state was responsible for safely disposing of radioactive waste, typically the spent fuel of nuclear power reactors. But state

[38] Thomas Lundmark, *Power & Rights in U.S. Constitutional Law*, 2nd ed. (Oxford University Press, 2008), 35.
[39] Karsten and Hall, *The Magic Mirror*, 335-339.
[40] Lundmark, *Power & Rights*, 35.

governments were slow to form the required multi-state compacts, or consortiums, or start construction of disposal sites. Consequently, they failed to take steps ensuring compliance with a 1986 federal deadline. This failure was a direct response to growing public trepidation about complex multi-state projects that sent eighteen-wheel tanker trucks full of radioactive waste hurtling across the interstate highway system in search of dumping grounds. Multi-state compact leaders had planned to commence excluding radioactive waste from outside their respective regions when Congress approved their charters. But more populous and wealthy states outside of the authorized seven regions worked effectively to prevent congressional approval of such exclusionary plans. Consequently, compact states failed to obtain congressional permission to refuse to receive out-of-region radioactive waste. The states of Nevada, Washington, and South Carolina threatened to close their sites unless Congress granted them increased control. To deal with the problem, Congress legislated the Low Level Radioactive Waste Policy Amendments Act of 1985, which proved to be an unwieldy solution at best. The act sought to create federal incentives for states to comply with the 1980 plan, allowing compact states to gradually increase surcharges for waste received from other states; allowing compact states to deny access to noncomplying states; and requiring states to "take title" and assume liability for radioactive waste generated within their borders if they failed to comply. The 1985 act authorized the three then-existing disposal sites to continue operations until the end of 1992, after which time they could lawfully exclude radioactive waste originating from outside their respective compact areas.[41]

[41] Low Level Radioactive Waste Policy Act of 1980, Pub. L. 96-573; Low-level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240.

Passed by Congress and President Jimmy Carter in December 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, a.k.a. the Superfund Act) was designed to facilitate the cleanup of hazardous waste sites. The act, which Congress based on its commerce power, targeted those that posed an immediate threat to safety and health. Its myriad provisions were designed to ensure that polluters were held financially responsible for cleanup operations. CERCLA granted the president broad powers to command the remediation of hazardous waste sites, although the EPA was designated to oversee routine cleanup operations. Under the statute and its 1986 revision, the EPA was authorized to clean up hazardous waste sites, obtain reimbursement for such operations, or compel responsible parties to remediate such sites. The Superfund Amendments and Reauthorization Act of 1986 (SARA) also authorized companies compelled to ameliorate their hazardous waste sites to sue state governments to obtain reimbursement for their role in creating waste sites required to be cleaned up under the act.[42]

Returning to the era of the Great Society, Congressional civil rights reforms based on the Commerce Clause were certainly not limited to improving the lives of African Americans. As discussed, the Equal Pay Act of 1963 proscribed wage disparities based on sex difference alone. After 1964, Congress and various presidents enlisted Commerce Clause power more frequently to bolster the status and rights of women and increase employment opportunities for them. Inspired by the civil rights movement, and backed by the Civil Rights Act of 1964, women's rights activists fought for equal employment opportunities. Title VII of the Civil Rights Act of

[42] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. 96-510, 94 Stat. 2767, approved December 11, 1980. CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, October 17, 1986. See *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

1964, which prohibited discrimination in hiring and promotion based on race, also included discriminatory employment practices based on sex.[43] Quite similarly, the Equal Employment Opportunity Commission (EEOC), established by Title VII, charged the agency with investigating complaints of unlawful employment practices targeting women, authorizing such victims, when mediation between female employees and employers failed, to bring a civil action for relief. The Equal Employment Opportunity Act of 1972 expanded Title VII jurisdiction to include employee-employer relations in local, state and federal agencies included within its scope women who had been subjected to employment discrimination based on their sex. Also in 1972, Congress expanded the coverage of the 1963 Equal Pay Act, which had amended the Fair Labor Standards Act, to include professionals and other white color employees, thus extending the sex discrimination protections of the 1963 legislation to women in the upper echelons of employment.[44]

Federal courts, the EEOC, and the departments of Labor and Justice combined to advance vigorously the application of affirmative action guidelines for women in cases where "voluntary" compliance had failed.[45] This activity spurred no less political controversy than federal government support of race-based affirmative action.[46] Such programs shook the *status quo* of the roles and traditional duties of men and women that had seemed to work for humans

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[43] For a discussion of Title VII and the Equal Pay Act, see Peter Avery, Comment, "The Diluted Equal Pay Act," *Rutgers L. Rev.* Vol. 56 (Spring 2004): 849, 852.

[44] See Anna M. Perez-Arrieta, Comment, "*Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring 'Equal Work' and 'Any Other Factor Other Than Sex' in the Faculty Context*," *J.C. & U.L.* Vol. 31 (2005): 393, 397.

[45] Title 29 Labor, Subtitle B, Chapter XIV, § 1608.1 [Statement of purpose], *Code of Federal Regulations*.

[46] Jo Freeman, "How 'Sex' Got into Title VII: Persistent Opportunism as a Maker of Public Policy" *Law and Inequality: A Journal of Theory and Practice*, Vol. 9, no. 2 (March 1991): 163–184; Raymond F. Gregory, (2014).

throughout recorded history. Support of such changes was bolstered by the feminist argument that men weren't needed in a home anyway. As Gloria Steinem famously put it, "A woman needs a man like a fish needs a bicycle."[47] Women pressed successfully for a widening scope of rights equal to those enjoyed by men. They gained athletic scholarship opportunities on college campuses through Title IX of the Higher Education Act of 1965.[48]

Commerce Clause-based legislation steadily brought to bear federal jurisdiction on an array of previously unaddressed problems that women's rights activists identified as particularly intolerable for them. The Pregnancy Discrimination Act of 1978 amended Title VII of the Civil Rights Act of 1964 to "prohibit sex discrimination on the basis of pregnancy," defined as a temporary non-occupational disability, at least in the case of businesses that employed fifteen or more persons.[49] The Child Support Recovery Act of 1992, signed by President George H.W. Bush, made it possible for women to obtain relief against the fathers of their children who had evaded child support obligations by absconding across state lines. Willful failure to pay past due support was made punishable by six months in prison and a subsequent violation by imprisonment for up to two years. Authorized to investigate were agents of the F.B.I. and special agents of the Inspector General of the United States Department of Health and Human Services.[50] Signed into law by President Bill Clinton on February 5, 1993, was the Family and Medical Leave Act (FMLA), applicable to businesses with fifty or more employees, which granted up to four months of leave from employment to care for infants, sick children, or aged parents. Some advocates of women's rights, however, disputed the advantages supposed by

[47] According to Steinem, the phrase was actually coined by Australian politician Irina Dunn. "Letters," *Time*, September 16, 2000.
[48] 79 Stat. 1219
[49] Pub. L. 95-555
[50] Pub. L. 102-521, enacted October 25, 1992; 18 U.S.C. § 228

many to accrue to women under the FMLA, given the domestic work disparities that persisted in household arrangements between men and women.[51]

Some of the most expansive deployments of commerce power on behalf of national crime control to date were set out in the 1994 Violent Crime Control and Law Enforcement Act, drafted by Senator Joe Biden of Delaware and signed by President Bill Clinton on September 13, 1994.[52] This measure was, in fact, the lengthiest crime bill in the history of the United States, which came in response to intense partisan pressure produced by the mass San Francisco shooting in July 1993 committed by Gian Luigi Ferri; the deadly April 1993 federal siege of Branch Davidians at Waco; and growing concerns about urban youth crime committed by a supposed new generation of what First Lady Hillary Rodham Clinton called "super-predators."[53] The act enlisted the Commerce Clause inventively to penalize an array of undoubtedly dangerous violent criminality – but heretofore understood to be exclusively within the scope of state police power and criminal codes. Targeted criminality ranged from drunk driving, possession of assault weapons, youth violence, criminal street gangs, child pornography, and crimes against children, provisions regarding the last of which included the creation of a sexually violent offender registry. More contentious was a section that required the United States Sentencing Commission to increase the penalties for anyone convicted of a "hate crime," defined as "a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the

[51] Karsten and Hall, *The Magic Mirror*, 374; Joanna Grossman, "Job Security Without Equality: The Family and Medical Leave Act of 1993." *Journal of Law and Policy*, Vol. 15 (April 2004): 17–63; Deborah Anthony, "The Hidden Harms of the Family and Medical Leave Act: Gender Neutral versus Gender Equal." *Journal of Gender Social Policy and the Law*, Vol. 16 (2008): 4.
[52] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796.
[53] William S. Bush. *Who Gets a Childhood? Race and Juvenile Justice in Twentieth-Century Texas* (Athens: University of Georgia Press, 2010), 3, 203, 208-210, 253; John J. Dilulio, Jr., "The Coming of the Super-Predators," *Weekly Standard*, November 27, 1995.

object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[54] No less controversial, as will be discussed further in a subsequent chapter, was "Title IV – Violence Against Women," commonly called the Violence Against Women Act. This measure established the Office on Violence Against Women within the Department of Justice, provided $1.6 billion for the investigation and prosecution of violent crimes against women and established mandatory restitution for victims. The act also established a civil action for damages against suspects whom United States attorneys refrained from criminally prosecuting.[55]

No piece of congressional action in the 1990s spurred more widespread partisan controversy than the Health Care Security Bill advanced by President Bill Clinton beginning in September 1993, a proposal that promised to catapult Commerce Clause power to a whole new level. Taking charge of the plan's advancement, almost from the beginning, was First Lady Hillary Clinton, for whom the bill was soon dubbed "Hillarycare." The Clinton health care plan was a complicated proposal over 1,000 pages in length, and it constituted nothing less than a sweeping reform of the entire health care system of the United States, replete with state-run agencies called "regional alliances" that would, in each state, hold a monopoly on the brokering of health insurance policies. Mandates set out in the plan required sizable employers to purchase health insurance for their employees and individuals earning sufficient incomes to purchase health care insurance for themselves and their dependents if such were not provided by an employer. Government subsidies would provide coverage for the impoverished. The Clinton health care plan also specified what types of coverage all health insurance policies were to provide and

[54] § 280003, Title XXVIII, Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 2096.
[55] Title IV, VCCLEA, 108 Stat. 1902-1955, Pub. L. 103-322; 42 U.S.C., §§ 13701-14040.

denied health insurance companies the right to decline coverage of individuals with pre-existing health conditions.[56] While the bill left methods of insuring compliance by individuals up to the discretion of the "regional alliances," the measure almost immediately set off a firestorm.[57] Conservative commentator William Kristol and his think tank Project for the Republican Future led fierce opposition. Conservatives, libertarians, and representatives of the health insurance industry insisted that there was, in fact, no health care crisis. They howled publicly at the prospect of a top-heavy, command-and-control government bureaucracy, including "death panels," on the verge of sending the United States pell-mell into the clutches of socialism. Democrat Senate Majority Leader George J. Mitchell of Maine, notwithstanding his strenuous efforts to secure votes for a palatable revised bill, declared the plan dead in August 1994. The national elections in the fall of that year became nothing less than a full-fledge culture wars referendum on "big government."[58]

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[56] H.R.3600, Health Security Act, 103rd Congress (1993-1994), introduced on November 20, 1993 by Democrat Representative Rep. Richard A. Gephardt of Missouri.

[57] Title I, Subtitle A, Universal Coverage and Individual Responsibility, Section 1002(a) was written as follows: "In General. – In accordance with this Act, each eligible individual (other than a Medicare-eligible individual) – (1) must enroll in an applicable health plan for the individual, and (2) must pay any premium required, consistent with this Act, with respect to such enrollment."

Title I, Subtitle D, Health Alliances, Section 1323(a) was written as follows: "In General. – Each regional alliance shall assure that each regional alliance eligible individual who resides in the alliance area is enrolled in a regional alliance health plan and shall establish and maintain methods and procedures, consistent with this section, sufficient to assure such enrollment. Such methods and procedures shall assure the enrollment of alliance eligible individuals at the time they first become eligible enrollees in the alliance area, including individuals at the time of birth, at the time they move into the alliance area, and at the time of reaching the age of individual eligibility as an eligible enrollee (and not merely as a family member). Each regional alliance shall establish procedures, consistent with subtitle A, for the selection of a single health plan in which all members of a family are enrolled."

[58] Robert Moffit, "A Guide to the Clinton Health Plan," Heritage Foundation, November 19, 1993; Derek Bok, "Political Leadership in the Great Health Care Debate of 1993-1994," pp. 96-

Likewise, growing demands by liberal activists for the regulation of handguns, in the face of strenuous opposition by conservative Second Amendment stalwarts, spurred acute controversy over Commerce Clause-based gun legislation in the 1990s. In addition to placing limits on the availability of handguns, the Gun Control Act of 1968 made it a crime for anyone who had been convicted of domestic violence to "'possess in or affecting commerce, any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The federalization of domestic violence in this way was somewhat unprecedented. But the flood of federal criminal legislation in the late 1960s made it difficult for those favoring gun ownership rights to coordinate their criticism of the relatively ancillary provision of the Gun Control Act, especially since it benefitted a newly-identified and now protected minority.[59] As will be discussed at length in a subsequent chapter, causing no little contention was the Gun-Free School Zones Act of 1990, signed into law by President George H. W. Bush in November of that year. Introduced in the Senate by Democrat Joseph R. Biden, and originally passed as a section of the Crime Control act of 1990, the act prohibited any unauthorized person from possessing a firearm in an elementary or secondary school zone. Those convicted were to be fined not more than $5,000 and imprisoned not more than five years or both. As well, anyone convicted was to be

105, in *Public Discourse in America: Conversation and Community in the Twenty-First Century*, eds. Stephen P. Steinberg and Judith Rodin (Philadelphia: University of Pennsylvania Press, 2003); Kant Pantel and Mark Rushefsky, *Politics, Power, and Policy Making: The Case of Health Care Reform in the 1990s* (London and New York: Routledge, 1998).

[59] Pub. L. 90-618; 82 Stat. 1213; 18 U.S.C. Section 922 (a) (2); Thomas Lundmark, *Power & Rights in U.S. Constitutional Law*, 2nd ed. (Oxford University Press, 2008), 36.

classified as a "prohibited person" under the Gun Control Act of 1968, barring her or him from owning a fire arm for the rest of his or her life.[60]

Stoking the ire of Second Amendment adherents even more was the Brady Handgun Violence Prevention Act of 1993, a measure commonly called "the Brady Act," grounded squarely in Commerce Clause authority. First introduced into the Congress in February 1987, the bill was titled in honor of Press Secretary to President Ronald Reagan, James S. Brady, who had been shot and severely wounded by John Hinckley, Jr., during his attempt to assassinate the president in March 1981. President Bill Clinton signed the bill into law in November 1993 with the vocal support of Sarah Brady, the wife of James Brady, President Reagan himself, and organizations such as the Center to Prevent Handgun Violence and Handgun Control, Inc. The act required that background checks be conducted on an individual before she or he was permitted to purchase a firearm from a federally licensed dealer, manufacturer or importer. Spurring objections from organizations such as the National Rifle Association, among other complaints, was the extensive list of disqualifications from purchasing a firearm, which ranged from being a fugitive from justice to having been the subject of a court order restraining one from harassing an intimate partner. N.R.A. opposition to the bill ultimately spurred a final version of the legislation providing that, no later than 1998, the mandatory five-day waiting period for the purchase of a firearm would be replaced by an instant computerized background check, which was subsequently facilitated by the establishment of the National Instant Criminal Background Check System (NICS), a database maintained by the F.B.I.[61]

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[60] Section 1702 of the Crime Control Act of 1990; Pub. L. 101-647; 104 Stat. 4789; 18 U.S.C. § 922(q); Robert A. Martinez, "S.O.S.—Saving Our Schools: The Constitutionality of the Gun-Free School Zones Act of 1990." *Am J. Crim. L.*, Vol. 22 (1994-1995): 512.

[61] Pub. L. 103-159; 107 Stat. 1536; 18 U.S.C. §§ 921-922; Ronald Reagan, "Why I'm for the Brady Bill, *The New York Times*, March 29, 1991; Sarah Brady with Merrill McLoughlin, *A*

Perhaps the most contentious instance in which conservative Republicans in Congress sought to employ its commerce power in novel ways was the Partial-Birth Abortion Ban Bill of 1995. The act defined a "partial-birth abortion" as one in which a person partially delivered a living "fetus" before killing it and then fully extracting the remains. The act, among other things, would subject any physician who knowingly performed a partial-birth abortion "in or affecting interstate or foreign commerce" to a fine or imprisonment for not more than two years or both, except where such an abortion was necessary to save the life of a mother endangered by a physical disorder, illness, or injury, and provided that no other medical procedure would suffice to eliminate the threat to the mother.[62]

Strenuous opposition by women's rights activists and Democrat party leaders focused not on the Commerce Clause jurisdictional element of the Partial-Birth Abortion Ban Bill, but, rather on the question of whether the bill, if passed, would infringe on the right of a woman to obtain an abortion, as set out initially in *Roe v. Wade* (1973).[63] Indeed, heated culture wars contention over the bill seemed to obscure almost entirely the constitutional issue of whether commerce power could reach the thoroughly intrastate activity of providing or obtaining a partial-birth abortion. In any case, the Partial-Birth Abortion Ban Bill passed both houses of Congress, President Bill Clinton vetoed the measure, and the House overrode the veto in September 1996. But the Senate fell eight votes short of the required two-thirds to override the veto. Conservatives in Congress,

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Good Fight (New York: Public Affairs, 2002); Osha Gray Davidson, *Under Fire: The NRA and the Battle for Gun Control* (New York: H. Holt, 1993).

[62] *Roe v. Wade*, 410 U.S. 113 (1973)

[63] *Roe v. Wade* declared that a right to privacy under the due process clause of the Fourteenth Amendment extended to the decision of an expectant mother to have an abortion. The constitutionality of a state abortion statute turned on a balancing test weighing the interest of the state in protecting the potentiality of human life and protecting the health of a mother, a rationale that permitted states to limit substantially legal abortion in the third trimester of pregnancy. Ibid.

however, persisted, and with success seven years later. Partisan ideological acrimony on the question of abortion rights continued to grow.[64]

The role of federal judges in the culture wars that emerged after 1963 was substantial, given the judicial activism that increasingly interspersed the work of the Supreme Court. For better or worse, the justices of the United States Supreme Court determined the winners and losers, or at least this was the way their decisions were understood.[65] Indeed, as has been shown, the balance of federal to state power had been steadily tipping towards Washington throughout the Twentieth Century. Because decisions made at the federal level affected every state and locality, nearly any issue, policy, legislation, or court case had the potential to become a highly contentious national contest.

The Warren Court was at the forefront of these contests as so much national legislation was being contested at the time. Beginning in about 1964, the rulings of the Warren Court appear to have produced a more widespread conservative reaction, one that reached much further than the

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[64] A similar bill, also grounded in Commerce Clause power, was later passed in 2003 as the Partial-Birth Abortion Ban Act, which was signed by President George W. Bush. And, on April 18, 2007, the Supreme Court, ruled 5-4, in *Gonzales v. Carhart*, 550 U.S. 124 (2007) that the act did not violate the Constitution, distinguishing the case at hand from the state statute upon which the Court ruled in *Stenberg v. Carhart*, 530 U.S. 914 (2000). In that decision, the Court struck down a Nebraska partial-birth abortion statute, because it did not properly consider the health needs of an expectant mother and authorized the state to revoke the medical licenses of physicians who performed partial-birth abortion, all of which was held to violate the due process clause of the Fourteenth Amendment.
Linda Greenhouse, "Justices Back Ban on Method of Abortion," April 19, 2007, *New York Times*; N.E.H. Hull and Pater Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History*, 2nd ed. (Lawrence: University of Kansas Press, 2010), 272-293;
John O. Shimabukuro, *Abortion: Judicial History and Legislative Response* (Washington, D.C.: Congressional Research Service, 2014).

[65] Bradley C. S. Watson, ed., *Courts and the Culture Wars* (Lanham, Maryland: Lexington Books, 2002), ix-xxv.

white South and its decade old strident objection to federal court-ordered school desegregation based on *Brown v. Board of Education* (1954) and its follow-up, *Brown II* (1955)–indeed, a popular national response emerged that figured critically in growing "culture wars" polarization.[66]

After its passage on July 2, 1964, the Civil Rights Act of 1964 was immediately challenged in the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States.*[67] The case revolved around Heart of Atlanta Motel owner Moreton Rolleston, who refused to rent rooms to black patrons – in defiance of Title II of the act. Title II declared that no discrimination or segregation based upon "race color or national origin" may be allowed in any "public accommodation . . . if its operations affect commerce, or if discrimination or segregation is supported by State action."[68] Rolleston argued that his actions were local in nature so Title II did not apply to him. In addition, he argued that his Fifth Amendment property rights gave him the right to choose his customers and that forcing him to do otherwise without due process was an unauthorized taking by the federal government.[69] Finally, Rolleston argued that by forcing him to operate a motel against his wishes, the government was putting him a position of servitude in violation of the Thirteenth Amendment.[70]

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[66] 347 U.S 483 and 349 U.S. 294

[67] *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, (1964) in Jonathan D. Varat, William Cohen, and Vikram D. Amar, *Constitutional Law,* Thirteenth ed. (New York: Thomson Routers/Foundation Press, 2009), 173.

[68] *Ibid*., 174.

[69] No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[70] Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.

In a 9-0 ruling, with Justice Tom C. Clark writing for the Court, it determined that the movement, or travel, of persons certainly qualified as commerce. (Commerce was defined as "intercourse" in *Gibbons*.) The Court also determined that the commerce in question was not simply "local" but reasoned instead, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[71] According to Justice Clark, "the determinative test of the exercise of power by the Congress under the Commerce Clause was simply whether the activity sought to be regulated was 'commerce which concerns more States than one' and has a real and substantial relation to the national interest."[72] As well, he said, the fact "[t]hat Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid."[73] Reflecting the growing frequency with which the Court explicitly relied on its multi-tiered standard of review calculus, Justice Clark held that the only question was "whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and . . . if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."[74] The prime holding of the Court was that "the power of Congress to promote interstate commerce also includes the power to regulate. . . local activities

[71] *Ibid*, 176, quoting *United States v. Women's Sportswear Mfrs. Assn*., 336 U.S. 460, 464 (1949).
[72] Ibid., 255.
[73] Ibid., 257.
[74] Ibid., 258. The so-called "rational basis test," commonly employed in the review of economic legislation, was first overtly employed by the United States Supreme Court in *Nebbia v. New York*, 291 U.S. 502 (1934), in which the Court decided that the state of New York could regulate the price of milk for dairy farmers, dealers, and retailers. As discussed, the Court began to employ standards of heightened scrutiny for legislation targeting "discrete and insular minorities" after the articulation of this standard in Footnote 4 of *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[75]

Upholding Title II of the act, the Court made it clear that federal laws aimed at racial discrimination were constitutional when applied to lodging facilities. In addition, the Court did not find the Fifth Amendment defense compelling; finding instead that the increased number of potential patrons would not likely cause a financial burden to Rolleston.[76] Likewise, the Court dispensed with the Thirteenth Amendment argument noting that the Civil Rights Act was an attempt to undo the evils of slavery in America.[77] Justice Douglas, who concurred with the judgement but wrote a separate concurrence, wanted the decision to be based upon the Fourteenth Amendment's section five which states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." He reasoned that basing the decision on the Commerce Clause would hamstring the Court into finding a connection with interstate commerce in future Title II cases while the Fourteenth Amendment basis "would put an end to all obstructionist strategies, and finally close one door on a bitter chapter in American history."[78]

While the Court ruled on the *Heart of Atlanta* case, it was also reviewing the matter of racial discrimination in restaurants and reached a similar conclusion. In *Katzenbach v. McClung*, also decided on December 14, 1964, a restaurant owner in Birmingham, Alabama, Ollie McClung, Sr., refused to serve black patrons in defiance of the new civil rights act. He objected to the expansive employment by Congress of its commerce power. McClung claimed that his business was of a strictly intrastate nature since he purchased locally the ingredients, including about

[75] Ibid., 258.
[76] *Ibid*., 260
[77] *Ibid.*, 261
[78] *Ibid*., 280

$70,000 worth of meat a year, for the dishes he served.[79] In addition, the Government, at trial, had made no claim that interstate travelers frequented Ollie's Barbecue. However, the Supreme Court ruled that it was in the power of Congress to prohibit racial discrimination at local restaurants, in part, because such discrimination discouraged travel by African Americans and, in part, because such discrimination, taken in the aggregate, could reasonably be expected to affect purchases of food and supplies from states other than Alabama.[80] Justice Tom Clark expressed his view on this point with characteristic candor:

> It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*, "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[81]

Since McClung purchased meat from a local supplier who purchased his meat from out of state, the transactions and the operation of the restaurant itself fell within the legislative domain of interstate commerce. The Court was saying, in effect, that Congress had the prerogative of reasonably determining what kinds of regulation under the Commerce Clause were constitutional. With this calibrated iteration of the substantial effects test, the Court only wanted to see that Congress had a rational basis for creating the legislation it had crafted.

While the Supreme Court in *Heart of Atlanta Motel* and *McClung* certainly marked a watershed in Commerce Clause jurisprudence, these decisions, alone, did not spur the partisan

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[79] *Katzenbach v. McClung*, 379 U.S. 294 (1964) in Jonathan D. Varat, William Cohen, and Vikram D. Amar, *Constitutional Law,* Thirteenth ed. (New York: Thomson Routers/Foundation Press, 2009), 176-77.
[80] Ibid., 300.
[81] *Katzenbach*, 300-301; *Wickard v. Filburn*, 317 U.S. at 111.

polarization shaping the decades to come. One of the major decisions outside not hinging upon the Commerce Clause was *Reynolds v. Sims*, decided in that big year of change, 1964.[82] This case revolved around how state legislative districts were apportioned. Many states had not changed their house or senate borders in decades even through their populations may have changed significantly. Indeed, several states mirrored the United States Constitution by providing a state senator for each county. However, the growth of manufacturing in the nineteenth and twentieth centuries led to many more people living in cities than in rural areas. In the case, residents of Birmingham, Alabama sought to reapportion the state senatorial districts more equally since their county only had one state senator even though their county far outnumbered others in Alabama. The Warren Court agreed in an eight to one decision. The Chief Justice wrote, "The weight of a citizen's vote cannot be made to depend on where he lives. This is the clear and strong command of our Constitution's Equal Protection Clause." However, Associate Justice John Marshall Harland made the point that even at the federal level the "one person one vote" principal is not practiced. United States Senators are voted into their positions by greatly varying numbers of people depending upon the size of their respective states. Indeed, in *Wesberry v. Sanders*, decided (7-2) only months previously, the Court ruled that United States Representative Districts had to be redrawn to represent equally-sized populations so that each person's vote would have an equal impact.[83] The United States Senate, however, remained unaffected since the Constitution specifies that two senators will represent each state.

The results of these cases were significant and filled with controversy. Cities gained a great deal more influence over the rural areas of states and hence urban concerns shot to the forefront

[82] 377 U.S. 533
[83] 376 U.S 1

of budgets and legislative concerns. Likewise, the decision was advantageous to many blacks who had moved to cities from rural areas and desired greater representation. In response to the ruling, an attempt was made to pass a constitutional amendment that would expressly allow for unequal apportionment for rural areas to maintain influence; however, the attempt never gained the momentum to achieve a two thirds majority.[84] The results of the decision are apparent in the continuing culture wars as rural people in many ways feel that their needs and values are squashed under the weight of the political power of the major population centers.

Three other Warren Court cases are critical to the Genesis of the culture wars as well. In 1966, the Court issued its decision in *Miranda v. Arizona*.[85] The ruling charged law enforcement officials to explain to a person being interrogated their rights, including the right to remain silent and have an attorney, now known as a "Miranda warning." Alternatively, in 1968 in the case of *Terry v. Ohio*, police officers were given the authority to stop and frisk a suspect they believed to be carrying weapons.[86] Outside of law enforcement, the case of *Griswold v. Connecticut* resulted in a ruling which stated that a state could not outlaw the use of contraceptives because such a law would violate the "right to marital privacy."[87] *Griswold v. Connecticut* would open the Pandora's Box to the sexual revolution that would overturn state laws outlawing the purchase of birth control by unmarried people, abortion, the practice of sodomy, and homosexual marriage.[88]

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[84] Alex McBride, "Expanding Civil Rights, Landmark Cases, *Reynolds v. Simms*" accessed July 20, 2017 http://www.pbs.org/wnet/supremecourt/rights/landmark_reynolds.html
[85] 384 U.S. 436
[86] 392 U.S. 1
[87] 381 U.S. 479 and at 486
[88] *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), *Lawrence v. Texas*, 539 U.S. 55 (2003), and *Obergefell v. Hodges*, 576 U.S. ___ (2015), respectively.

Meanwhile, further expansion of Congress' commerce power continued under the Warren Court in its decisions dealing with employee-employer relationships. The Fair Labor Standards Act of 1938 allowed the federal government to set national minimum wage and maximum work hours for employees involved in the production of goods affecting interstate commerce. As discussed, the 1961 FLSA amendment established "enterprise coverage" to non-manufacturing employees for companies grossing over $500,000 and widened the law to include the employees of state and local government schools and hospitals. A 1966 FLSA amendment modified the definition of "employer" to remove the exemption of state and local governments with respect to employees of such government institutions.[89] In 1968 twenty-eight states and a school district sued the government and argued that the extension of FLSA coverage to the employees of state hospitals and schools was beyond Congress' commerce power since they were neither manufacturing products or engaged in commerce. Indeed, they argued that new FLSA language permitting such employees to sue in federal court conflicted with the Eleventh Amendment, which declared the sovereign immunity of the states from such actions. The ruling in the case, *Maryland v. Wirtz,* was authored by Justice John Marshall Harlan who wrote that labor conditions in state institutions could still affect commerce and thus fell under Congress' commerce power. State sovereign immunity questions under the Eleventh Amendment, the Court held, were best reserved for "appropriate concrete cases."[90]

Justice Harlan also asserted, with no apparent ground, a categorical rule purporting to deny the federal courts the authority to declare that Congress had, in any given case, cast its

[89] Fair Labor Standards Act Amendments of 1961, Pub. L. 87-30, 75 Stat. 65, approved May 5, 1961; Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830, approved Sept. 23, 1966.

[90] *Maryland v. Wirtz,* 392 U.S. 188-201 (1968).

commerce power too wide in establishing a class of activities to be regulated under a comprehensive regulatory scheme. In holding that state hospitals and schools were not to be, as a class, excluded from the larger class of organizations to be affected by FLSA enterprise coverage, Justice Harlan pointed out that *United States v. Darby* had established unequivocally the power of Congress to declare that "an entire class of activities affects commerce." This left to the courts only the question of "whether the class is 'within the reach of the federal power.'" But then, relying foremost on *Wickard v. Filburn*, he announced that "[t]he contention in Commerce Clause cases, the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest."[91] The prime difficulty here is that *Wickard* made no such holding. In that decision, with Justice Robert H. Jackson writing for the majority, the Supreme Court, in fact, made a carefully reasoned independent determination that Congress had "properly" considered that the activity of growing wheat only for consumption, if excised from the reach of the AAA, would defeat the purposes of that comprehensive regulatory scheme.[92] According to Justice Jackson, the only deference owed by the federal courts to Congress in such cases was to allow it to decide who should benefit economically from a regulatory scheme:

> It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated, and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation, we have nothing to do.[93]

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[91] *Wirtz*, 192-193, citing *Wickard v. Filburn*, 317 U.S. at 127-128; *Polish National Alliance v. Labor Board*, 322 U. S. 643, 648 (1944); *Katzenbach v. McClung*, 370 U.S. at 301.
[92] *Wickard*, 128-129.
[93] Ibid., 129.

None of the other Supreme Court decisions that Justice Harlan referenced in *Wirtz* even suggested that the federal courts were powerless to make an independent judgment as to whether an individual instance or several instances constituting a discreet class of activities might be excised from a larger class of activities declared by Congress to be subject to a comprehensive regulatory scheme under the commerce power. And, certainly, neither Article I nor Article III of the Constitution declared such powerlessness.[94]

Substantial changes in the personnel of the United Supreme Court beginning in 1968 set the stage for the entry of the Court into the thicket of the "culture wars." By 1968, the Vietnam War had exhausted President Lyndon Johnson and he decided not to run for office again. In a definite gesture of public intent, Richard Nixon was elected based primarily upon his promise to honorably end the war in Vietnam. During his campaign, Nixon also argued that the justices of the Supreme Court had strayed from the original intents of the Constitution; instead, he believed that the justices were in fact practicing judicial activism in support of liberal causes. Nixon promised to appoint judges who were more likely to practice judicial restraint than some of the justices currently on the bench, and he also pledged to propose legislation to correct three recent

[94] In *Polish National Alliance v. Labor Board*, the Supreme Court found, simply, that the National Labor Relations Board was not unjustified in finding that the cultural and fraternal activities of National Polish Alliance did not withdraw the organization from the effect of the Wagner Act. *Polish National Alliance v. Labor Board,* 322 U. S. 643, 322 U. S. 648 (1944). In *Katzenbach v. McClung*, the Supreme Court held only that testimony given in congressional hearings constituted an "ample basis" for Congress to conclude that racial discrimination by restaurant owners obstructed interstate commerce and that there was no ground for the Court to excise this class of discriminatory activities from the larger class of activities to be regulated by Title II of the 1964 Civil Rights Act. *Katzenbach v. McClung*, 379 U. S. 294, 301 (1964), referencing *Wickard,* 217 U.S. at 111.

Court decisions that Nixon felt were encouraging crime.[95] He stated, "[s]ome of our courts have gone too far in weakening our peace forces as against our criminal forces."[96] In the summer prior to Nixon's election, the Chief Justice of the Supreme Court, Earl Warren, hinted that he was ready to retire, and he wished to do so before Nixon was elected so that President Johnson might replace him with a like-minded justice. However, Johnson's pick, Associate Justice Abe Fortas, was not well-received by the Senate in his confirmation hearings and in the end, newly-elected President Nixon was able to place conservative-minded federal appellate judge Warren Burger into the critical position of Chief Justice.[97]

In addition to replacing the Chief Justice, President Nixon was also able to appoint three new conservative associate justices to the Court in his first term. In 1970, he replaced the liberal Abe Fortas with Harry Blackmun, who proved to be more liberal over time. In 1971, Nixon made two additional appointments: moderate Lewis Powell and conservative William Rehnquist replaced Hugo Black and John Marshall Harlan, respectively. In addition to these appointments, after Nixon resigned in 1974, President Gerald Ford replaced William Douglas, a 1937 Roosevelt appointee, with the moderately conservative John Paul Stevens. Thus, the Court evolved from one comprised of six liberal justices, three moderates, and no conservatives to one having a more balanced mix.[98]

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[95] Nixon made it his goal during the midterm elections to gain a Republican majority in the Senate, perhaps to be able to ensure his nominations for the Court. He recruited House incumbents to run for Senate seats, thus risking the House to a greater Democratic majority. The gamble failed, and Democrats maintained control in both the House and Senate. Michael Barone, "The Seventies Shift," *Wilson Quarterly*, vol. 33, issue 4 (Oct 1, 2010).

[96] Robert B. Semple, Jr., "Nixon Withholds his Peace Ideas," *The New York Times*, March 11, 1968.

[97] Fred P. Graham, "Burger Approved By Senate Panel," *The New York Times*, June 4, 1969.

[98] Thomas R. Hensley, *The Rehnquist Court: Justices, Rulings, and Legacy* (Santa Barbara, California; Denver, Colorado; and Oxford, England: ABC-CLIO, 2006), 8.

During President Nixon's time in office, he introduced a new term to political phraseology—"New Federalism." Unlike his Democratic predecessors who had used large federal bureaucracies and regulations to administer funds for federal projects, Nixon proposed providing block grants of federal funds to states so that the states might determine the best use of the money within federal restraints. Nixon's idea of New Federalism was, particularly, a response to the Great Society of President Johnson. Nixon wasn't especially opposed to the growing welfare state; indeed, there was a steady increase in welfare funding during the late 1970's. However, he did believe that states were more efficient in their use of funds than the federal government. The idea appealed to conservative voters, especially in the South, who had long maintained their regard for states' rights. Nixon used the idea when campaigning in the south during the midterm elections. One writer likened Nixon's idea of New Federalism to "a pursuit of Hamiltonian ends by Jeffersonian means."[99] The term would come to be used in a more all-encompassing manner a decade later by President Reagan and the conservative movement that became prominent in the 1980s.

Although President Nixon succeeded in making the Supreme Court a more conservative tribunal, the Watergate debacle and the president's subsequent resignation was devastating to the Republican Party and the nation. As discussed, President Ford succeeded in appointing John Paul Stevens to the Court, but Ford was rather moderate himself and as an unelected President, he was somewhat obliged to offer a non-controversial nominee.[100] After Stevens was appointed, the Court's composition would not be changed again until 1981.

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[99] Timothy Conlan, *The New Federalism: Intergovernmental Reform from Nixon to Reagan* (Washington, D. C., Brookings Institution, 1988), xvi.

[100] Lesley Oelsner, "Ford Chooses a Chicagoan for Supreme Court Seat; Nominee is Appeals Judge," *The New York Times*, November 29, 1975.

After President Ford completed President Nixon's term, Ford ran again for the Presidency in 1976 but was defeated in a narrow victory by Jimmy Carter. Carter won the South as a southerner and as a Democrat, but the solid Democratic South was evolving. One historian noted that through the 1970s, Mississippi conservatives (and by extension, those in several other southern states) began to slowly but surely dump the Democratic Party, which had mostly sided with the civil rights movement but seemed to lack support in religious issues, and instead began to back the Republican Party, which was evolving into the more conservative party and as the party that reflected their religious values. In response to federal civil rights rulings on school integration, white Mississippians were at the forefront of establishing religion-based schools. Some of the schools were simply a retreat from forced integration; others were sincere attempts to include a Christian worldview that liberal educational doctrines had severely discounted. As religion-based schools became more commonplace in Mississippi and across the South, it was inevitable that the federal government would check to ensure that the schools receiving federal funds were not racially exclusive. The Internal Revenue Service as well as the Department of Health, Education, and Welfare began to intrude on religion-based schools until Christian families, who had fought to isolate themselves from the government, now became activists to maintain their prerogatives. These activists' legacy and influence can be seen in such recent Republican Party leaders as Trent Lott and Haley Barbour, both from Mississippi.[101] The movement's impact can also be seen in the rise of the religious right on a nationwide level.

After observing the phenomenon in the state of Mississippi, it becomes obvious that one segment of the population had grown tired of federal government intervention. Many people

[101] Joseph Crespino *In Search of Another Country: Mississippi and the Conservative Counterrevolution* (Princeton, New Jersey and Oxford: Princeton University Press, 2007).

began to feel as if they had no control over their lives or their property, as federal government agencies and courts dictated everything from not allowing prayer in schools to whether a farmer could drain a swamp to grow crops. Instead, many people desired to return to the federalism of the pre-New Deal years, or at least a "New Federalism" where they would have more local control over government intervention.

Amid a period of growing dissatisfaction with an intrusive, ever-expanding federal government, a majority of the electorate voted Ronald Reagan into office. President Carter's years as president had resulted in a recession, high inflation, and nine percent unemployment in 1975, as well as an inconclusive hostage crisis in Iran that served to break national morale.[102] Combined with the perceived excesses of the federal government, many people were ready to follow Reagan's free market policies and defense-oriented prescriptions into the 1980s.

In President Reagan's initial year in office, he had the chance to make his first impact on the Supreme Court. Potter Stewart was a moderate Republican who was appointed by President Eisenhower and retired in 1981. As his replacement, President Reagan appointed the first woman to the Court, Sandra Day O'Connor, a conservative-libertarian from Arizona. Once O'Connor was in place, Justices William J. Brennan and Thurgood Marshall were the only liberal remnants from the Warren Court, while Justices Blackmun and Stevens evolved into more liberal voters over time. Justice Lewis Powell was the Court's swing voter. The Court might be said to have had a 4-1-4 ratio of conservatives, moderates, and liberals, respectively. But that ratio would only last for five years.

[102] Robert M. Collins, *Transforming America: Politics and Culture During the Reagan Years* (New York: Columbia University Press, 2007), 8.

The position of the Supreme Court on the scope of commerce power during the tenure of Chief Justice Warren Burger (1969-1986) largely comports with the early scholarly assessment of it – a mildly conservative tribunal that served as something of a transition between the liberal constitutionalism of the Warren Court and the more conservative Court presided over by Chief Justice William Rehnquist. In this interpretation, Burger symbolized the policy of "retrenchment" favored by Republican President Richard M. Nixon. According to Albert Alschuler, the jurisprudence of the Warren Court persisted, although its rulings in areas of due process and criminal law were sometimes less generous.[103] Quite similarly, Russell Galloway, Jr., concludes that the Burger Court shifted to the right after the seating of Nixon appointees Harry Blackmun, Lewis Powell, and William Rehnquist; Ford appointee John Paul Stevens; and Reagan appointee Sandra Day O'Conner. But the rightward shift he describes is complicated. Justices Brennan, Marshall, and Douglas generally took liberal positions. After replacing Justice Douglas in 1975, Justice Stevens, along with justices Stewart and White, commonly staked out centrist positions, and justices Rehnquist and Powell, and, to some extent, Chief Justice Burger, made up the conservative bloc of the court. Justice Blackmun, however, shifted from the right towards the center, allowing liberals to claim more victories in the 1970s. But the conservative bloc of the court grew stronger in 1981 when Justice Stewart was replaced by the more conservative Justice O'Connor.[104]

Several scholarly works indicate the nuanced transformation in the economic policies of the Burger Court that correlated to its ideologically dizzying personnel changes. Craig R. Ducat and

[103] Albert Alschuler, "Failed Pragmatism: Reflections on the Burger Court Commentaries." *Harvard Law Review*, Vol. 100 (1986): 1436.
[104] Russell Galloway, "The Burger Court (1969-1986)." *Santa Clara Law Review*, Vol. 27, no. 1 (January 1987): 31-59.

Robert L. Dudley suggest that, on the whole, the Court became increasingly concerned with federalism issues and less concerned with contending liberal and conservative views on regulation of the economy and the scope of administrative agency authority.[105] Timothy M. Hagle and Harold J. Spaeth similarly maintain that the more ideologically-mixed composition of the Court produced outcomes in cases involving economic questions no longer predictably liberal, that is, categorically supportive of regulation.[106]

More recent scholarship suggests far less agreement on the ideological bearings of the Burger Court. Michael J. Graetz and Linda Greenhouse, for example, challenge the thesis that the Burger court was moderate or transitional. According to them, the Court rendered numerous landmark decisions; and it was usually conservative, veering to the right in numerous areas, such as criminal law, civil rights and desegregation, and the influence of money on politics. In this interpretation, the Court reinforced the power of corporations and the presidency itself, although helping to bring down Richard Nixon. But Graetz and Greenhouse do allow that the Burger Court returned important decisions that balanced conservative and liberal views in complex ways, such as in the controversial abortion case *Roe v. Wade* (1973) and the foundational affirmative action ruling in *Regents of the University of California v. Bakke* (1976).[107]

The Burger court was certainly more conservative than its processor and the cases which it had to decide, amid a growing rights consciousness, meant that the outcomes were going to be

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[105] Craig R. Ducat and Robert L. Dudley, "Dimensions Underlying Economic Policymaking in the Early and Later Burger Courts," *Journal of Politics*, Vol. 49, no. 2 (May 1987): 521-539.
[106] Timothy M. Hagle and Harold J. Spaeth, "Ideological Patterns in the Justices' Voting in the Burger Court's Business Cases," *Journal of Politics*, Vol. 55, no. 2 (May 1993): 492-506. See also Charles M. Lamb and Stephen C. Halpern, eds., *The Burger Court: Political and Judicial Profiles* (Urbana: University of Illinois Press, 1991).
[107] Michael J. Graetz and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right* (New York: Simon & Schuster, 2016).

contentious in whatever manner it ruled. There were, for example, a string of decisions that further articulated the limits of public support of religion in elementary and secondary schools, including the question of school prayer, beginning with *Lemon v. Kurtzman* (1971), which established what has come to be known as the "Lemon Test." This standard came to be applied to any government action. The test held that, for a law to be considered constitutional in terms of complying with the Establishment Clause of the First Amendment, it must 1) have a legitimate secular purpose, 2) the law's primary effect must not be to advance or inhibit religion, and 3) the law must not result in "excessive entanglement of government and religion."[108] Lemon would not be the last religious conflict case of course; nor was the Lemon Test always straightforward. In 1984 the Court decided *Lynch v. Donnelly* in which the city of Pawtucket, Rhode Island had a Christmas display including a nativity scene located in its shopping district as it had done for over forty years. One of the city's citizens, Daniel Donnelly sued Mayor Dennis Lynch over the display. The Burger Court found in a 5-4 decision that the display was constitutional following the Lemon Test noting that the display merely conveyed the historical reason for the holiday, that the display did not pose a danger of establishing a state religion, and stating that it was "far too late in the day to impose a crabbed reading of the [Establishment] Clause on the country." [109]

[108] Lemon v. Kurtzman, 403 U.S. 602 (1971). See also *Stone v. Graham*, 449 U.S. 39 (1980); *Mueller v. Allen*, 463 U.S. 388 (1983); *Aguilar v. Felton*, 473 U.S. 402 (1985); and *Wallace v. Jaffree*, 472 U.S. 38 (1985).

[109] *Lynch v. Donnelly*, 465 U.S. 668 (1985); Terry Eastland, ed., *Religious Liberty in the Supreme Court: The Cases That Define the Debate over Church and State* (Washington, D.C.: Ethics and Public Policy Center, 1993), 307; Vincent Phillip Munoz, *Religious Liberty and the American Supreme Court: The Essential Cases and Documents Updated Edition* (Lanham: Rowman & Littlefield, 2013), 97-311.

With justices William O. Douglas, Harry Blackmun, Lewis Powell close to but not yet in retirement, the Burger Court that rendered its April 1971 decision in *Perez v. United States* remained a predominantly liberal tribunal. In that 8-1 decision, the Court expanded the scope of its substantial effects test and commerce power Necessary and Proper Clause jurisprudence in a manner that was unsettling to at least one of its more conservative justices. Under Title II of the Consumer Credit Protection Act of 1968 (CCPA), the Court upheld the criminal conviction of Alcides Perez of New York City for extortionate credit transactions, defined as the use of violence or the threat of violence or other criminal means to enforce the repayment of high-interest, short term loans, commonly referred to as "loansharking."[110] Appellant contended that Title II was unconstitutional "in prohibiting all extortionate credit transactions, without requiring a showing in a particular case of effect on interstate commerce. . . ."[111] With a majority opinion authored by Justice William O. Douglas, the Court upheld the conviction and Title II. First, the Court drew on its decisions dealing with enforcement of non-criminal comprehensive regulatory regimes – that is, *Darby*, *Wickard*, and *Wrightwood Diary* – to conclude that Congress could have reasonably concluded that intrastate loansharking, taken as a class of activities, had a substantial effect on interstate commerce.[112] Next, Justice Douglas invoked *Maryland v. Wirtz*, which dealt with enforcement of the FLSA, another non-criminal regulatory regime, to declare that "[w]here the *class of activities* is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." As had been the case when the Warren Court issued its decision in *Wirtz*, this proposition was bereft of

[110] *Perez v. United States*, 402 U.S. 146 (1971); Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, also known as the Truth in Lending Act, approved May 29, 1968; *Darby*, 312 U.S. at 120-121.
[111] *United States v. Alcides Perez*, 426 F.2d 1073, 1075 2d Cir. (1970).
[112] *Perez v. United States* at 152-153.

reasoned explanation or grounding in any holding of the Court.[113] The lone dissent of Justice Potter Stewart conveyed a palpable uneasiness with the majority opinion:

> Congress surely has power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those intrastate activities that have a demonstrably substantial effect on interstate commerce. But, under the statute before us, a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.[114]

In *United States v. Bass* (1971), handed down nine months after *Perez*, the Supreme Court reviewed a criminal conviction based on the newly-created federal crime of firearm possession by a felon, set out in § 1202(a)(1) Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. In *Bass*, with the composition of the Court unchanged since its ruling in *Perez*, it held that, when Congress passed a criminal statute penalizing misconduct customarily within the jurisdiction of the states, the statute could only be upheld under the commerce power if it included a statutory jurisdictional element identifying a nexus of the offense to interstate commerce with "in commerce" or "affecting commerce" language. With this provision, the federal courts were to make an independent judgment of whether a conviction and the statute could be upheld, on a case-by-case basis, as a valid exercise of Commerce Clause power.[115]

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[113] *Perez*, 154; *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968), citing *Wickard v. Filburn*, 317 U.S. at 127-128; *Polish National Alliance v. Labor Board*, 322 U. S. 643, 648 (1944); *Katzenbach v. McClung*, 370 U.S. at 301.

[114] *Perez*, 157.

[115] *United States v. Bass*, 404 U.S. 336 (1971). Proof that a possessed firearm previously traveled in interstate commerce was held sufficient to satisfy the statutorily required nexus between

The Commerce Clause decisions of the more fully assembled Burger Court were sometimes caught up in the conservative reaction to the federal regulatory state that arose powerfully during the Johnson and Nixon administrations. Strong reaction to new regulatory regime imposed upon the coal mining industry produced a veritable uprising amongst an association of Virginia coal producers, who challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977.[116] In the case of *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981),[117] the Association argued that the mining law, which stipulated that mined land on "steep slopes" must be returned to its former contour after mining, did not fall under the commerce power of congress to legislate, that the law was an unconstitutional taking of property, and that it did not comport with the Tenth Amendment insofar as the law overstepped its federal bounds. However, the Burger Court, in a unanimous decision (with Justice Rehnquist concurring separately), returned on June 15, 1981, upheld the SMCRA. The Court emphasized that that Congress had held hearings and had a rational basis to pass the law to ease environmental impacts in industries that affected interstate commerce.

> Here, Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity. This congressional finding is sufficient to sustain the Act as a valid exercise of Congress' power under the Commerce Clause.[118]

With Justice Thurgood Marshall authoring the majority opinion, the Court held that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of

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possession and commerce. *Scarborough v. United States*, 431 U.S. 563 (1977). See Seth J. Safra, "The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains," *Duke Law Journal*, Vol. 50, no. 2 (November 2000): 637-662, 646.

[116] 91 Stat. 447, 30 U.S.C. § 1201 *et seq.* (1976 ed., Supp. III)

[117] 452 U.S. 264 (1981)

[118] Ibid., 281.

activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."[119] Among those hazards were intrastate activities that adversely affected "public welfare" by "creating hazards dangerous to life and . . . degrading the quality of life in local communities," such as environmental despoliation that "reduced recreational values. . ."[120] As well, relying on *Darby*, the Court held that interstate commerce was not to be made the instrument of competition injurious to it.[121] According to the Court, the SMCRA was also well grounded in the commerce power because surface mining and reclamation standards were essential to insure competition among sellers of coal produced in different states would not be used to undermine the ability of states that followed mandates set out in the act "to improve and maintain adequate standards on coal mining operations within their borders."[122] The Court also held that the Tenth Amendment argument didn't apply, said the Court, because the law didn't interrupt state actions and the law was not an unconstitutional taking since the suit was a pre-enforcement challenge which occurred before any fines had been assessed; thus, the case was not ripe for such a challenge.[123]

Akenhead maintains that the decision in *Hodel v. Virginia Surface Mining* and a related decision the Court handed down the same day, *Hodel v. Indiana,* further identified the kinds of intrastate activity Congress could regulate as a part of a comprehensive regulatory scheme.[124] *Hodel v. Indiana*, like its companion case, dealt with an array of constitutional challenges to the SMCRA of 1977, with the specific provisions at issue being those sections mandating special

[119] *Hodel v. Virginia Surface Mining*, 452 U.S. 282, Footnote 21.
[120] Ibid., 277-280.
[121] Ibid., 282, citing *Darby* at 312 U.S. 115.
[122] Ibid., 281-282.
[123] Ibid., 266.
[124] Akenhead, "Federal Regulations," 330; *Hodel v. Indiana*, 452 U.S. 314 (1981).

requirements, such as the promulgation to administrators of advance mining and reclamation plans, for surface mining on land deemed to be prime farmland.[125] With Justice Marshall again writing for the majority, the Court upheld the statute, this time with a holding that declared the power of Congress extended to all activities affecting interstate commerce no matter "how great or small."[126] As well, the Court reiterated its broad holding in *Hodel v. Virginia Surface Mining* that Congress had, consistent with its commerce power, passed the SMCRA to ensure that surface mining for interstate commerce did not occur at the expense of agriculture, the environment, or public health and safety – and that the act reflected "the congressional goal of protecting mine operators in States adhering to high performance and reclamation standards from disadvantageous competition with operators in States with less rigorous regulatory programs."[127]

Also addressing environmental concerns, in *National Association of Homebuilders v. Babbitt* (1997), the D.C. Circuit Court upheld the Endangered Species Act. In a 2-1 ruling, the D. C. Circuit Court found that the U.S. Fish and Wildlife Service could stop the construction of an intersection giving emergency access to a hospital because the road would affect a colony of Delhi Sands Flower-Loving Flies, which the FWS had placed on its endangered species list. The court reasoned that protecting the fly was an effort "to keep the channels of interstate commerce free from immoral or injurious uses."[128] In 1998, the Supreme Court refused to hear the case.[129]

As illustrated, after the 1942 ruling in *Wickard v. Filburn*, there had been no significant attempt by the United States Supreme Court to restrain Congress' power to legislate on matters

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[125] Ibid., 317-318.
[126] Ibid., 324, with Justice Marshall citing *NLRB v. Fainblatt,* 306 U. S. 601, 606 (1939).
[127] Ibid., 329.
[128] Ibid., 1046.
[129] *National Association of Homebuilders v. Babbitt,* 130 F.3d 1041 (D.C. Cir, 1997), cert. denied, 118 S. Ct. 2340 (1998)

pertaining to commerce for the next thirty-four years. However, one issue continued to be fought over in the Court several times with the Justices divided on the issue. In 1968 the Warren Court decided that the Fair Labor Standards Act of 1938 was applicable to state school and hospital employees even though they were not involved in private enterprises. In 1974 Congress amended the act to include virtually all employees of states and their political subdivisions. Several states subsequently sued and in 1976 the court delivered its opinion, written by William Rehnquist, in *National League of Cities v. Usery*. This time the majority ruled that Congress had overstepped its bounds by interfering with the "traditional" functioning of state governments in contravention to the Tenth Amendment and the commerce power. The decision temporarily overturned *Maryland v. Wirtz*, but *League of Cities v. Usery* was not the last word on the issue.[130]

In 1985, a year before the end of Burger's term as Chief Justice, the Court reversed itself a second time. In 1979 Joe Garcia, an employee of the San Antonio Metropolitan Transit Authority (SAMTA), sued his employer for failing to give him overtime pay in accordance with the Fair Labor Standards Act. SAMTA argued that, since it served a "traditional" government function, the ruling in *League of Cities* applied. However, two justices, Blackmun and White, switched their votes and the 5-4 majority concluded that the idea of differentiating "traditional government functions" from non-traditional functions (like schools or hospitals) was not practical. The 5-4 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, written by Blackmun, established that the federal government could dictate employer-employee relations to state and local governments.[131] This case certainly proved to be one of the most expansive uses

[130] *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Maryland v. Wirtz*, 392 U.S. 183 (1968).
[131] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)

of commerce clause power, firmly tipping the state and federal balance of power toward the federal government. Justice Lewis F. Powell wrote a strong dissent, concurred with by Chief Justice Burger and Justices Sandra Day O'Connor and William Rehnquist, in which he castigated the majority not recognizing any limits on federal power posed by the Tenth Amendment. He Wrote, "The State's role in our system of government is a matter of Constitutional law, not legislative grace."[132] His sentiments would be echoed in many ways by many others who believed that federal power was growing out of control.

Affirmative action was one of those areas in which perceived out of control federal power manifested itself. Based upon Title VII of the Civil Rights Act, the Kaiser Aluminum and Chemical Corporation along with the United Steelworkers of America formulated a training program in which the classes would be composed of an equal number of white and black workers. However, there were far more white applicants and when Brian Weber, a white worker, was passed over for the training he sued for reverse discrimination. His case, *United Steelworkers of America v. Weber*, was decided by a 5-2 margin against him.[133] Justice William J. Brennan wrote for the majority and held that since the program, as well as the law, was intended to cure the evils of past discrimination then the selection process was constitutional. Justice Rehnquist, joined by Chief Justice Burger, found little to support the majority's opinion, writing, "Thus, by a tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language . . . and uniform

[132] Ibid.; David Scott Louk, "Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court." *Yale Law Journal*, Vol. 125 (2016): 682.
[133] 443 U.S. 193 (1979)

precedent in concluding that employers are, after all, permitted to consider race in making employment decisions."[134]

Civil rights continued to be an issue with the Burger Court in the 1986 case *Meritor Savings Bank, FSB v. Vinson*.[135] In this case the Court answered the question of whether sexual harassment in the workplace was a violation of Title VII. Mechelle Vinson was a teller for four years at the Meritor Savings Bank. Her supervisor, Sydney Taylor, coerced her into having sexual relations with him, demanded sexual favors on the job, exposed himself to her, touched her in public, and forcibly raped her several times. When she was relieved of her job she sued the bank for "creating a hostile work environment." The Justices had to decide whether discrimination under Title VII only resulted when there were economic disparities, lost wages, or other such things or is discrimination more encompassing. Justice Rehnquist wrote for the unanimous majority that indeed Title VII was not limited to lost earnings, finding instead that the intention of Congress was "to strike at the entire spectrum of disparate treatment of men and women" in employment relations.[136]

As the culture wars became more heated, social conservatives cheered a victory in the 1986 case of *Bowers v. Hardwick*, which upheld the constitutionality of a Georgia statute that criminalized oral and anal sex between consenting adults.[137] Justice Byron White authored the 5-4 opinion noting that while the Court attempted to discover rights not specifically noted in the Constitution from previous cases, history, or tradition it found no "fundamental right upon homosexuals to engage in sodomy." He noted that "Sodomy was a criminal offense at common

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[134] *Ibid.*, 222.
[135] *Meritor Savings Bank v. Vinson*, 477 US 57 (1986)
[136] *Ibid.*, 64.
[137] *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." Justices Blackmun and Stevens wrote dissents. Stevens questioned how the decision could stand since it only upheld the power of Georgia to punish homosexual sodomy since *Griswold v. Connecticut* provided a right to marital privacy and *Eisenstadt v. Baird* allowed the same for unmarried couples.[138] Indeed, Hardwick would be overturned in 2003 in the case *Lawrence v. Texas.*[139]

In the same year as the Hardwick case, President Reagan made his second input into the Court's composition when Chief Justice Burger resigned. In response, President Reagan promoted Associate Justice Rehnquist to the chief justice's position and added Antonin Scalia to the Court as an associate justice to fill Justice Rehnquist's spot.

Chief Justice Rehnquist's confirmation was the closest one in the nation's history, 65-33. The Democratically-controlled Senate was concerned with the Justice's opposition to the ruling in *Roe v. Wade* as well as a memo Rehnquist wrote while still a law clerk for Justice Robert Jackson, in which Rehnquist argued for maintaining the "separate but equal" doctrine established in *Plessy v. Ferguson.*[140] Rehnquist explained that he wrote the memo at the request of his boss, but several in the Senate were skeptical. In the end, Rehnquist was confirmed. Interestingly, Justice Scalia was confirmed by a unanimous vote since members of the Senate deemed him qualified and believed his addition would not upset the 4-1-4 balance of the Court.[141]

Given the service of William Rehnquist in the Justice Department (1969-1971) and as an associate justice of the Supreme Court (1971-1986), most jurists, commentators, and politicians

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[138] 478 U.S. 179.
[139] *Lawrence v. Texas,* 539 U.S. 558 (2003)
[140] *Roe v. Wade,* 410 U.S. 113 (1973), *Plessy v. Ferguson,* 163 U.S. 537 (1896).
[141] Hensley, *The Rehnquist Court,* 13.

were familiar with the conservative judicial philosophy he brought to his work as chief justice. To some extent it, reflected the influence of the "process jurisprudence" that emerged after World War II, that is, a certain distain for judicial realism and a professed commitment to the importance of precedents, the authority of legislative texts, and of the Constitution itself. Principles of "judicial restraint" he embraced included also deciding cases on the narrowest possible grounds and avoiding deciding cases on constitutional grounds when possible. Of course, intimately related to the New Federalism that commentators rightly associated with Rehnquist was his belief that the Constitution prescribed a distinctive federal structure, distributing power between the states and the general government, while also placing important limitations on governmental powers. His understanding of judicial review entailed, it seems, a faithfulness to the text of the Constitution and the meanings it had in historical context.[142]

In 1987, however, Associate Justice Powell chose to retire. As the historic swing voter on the Court, his replacement by a conservative would have had a significant impact on the Court. President Reagan's nominee, Federal Circuit Court Judge Robert Bork, was certainly not perceived as a moderate of any sort. His approach to constitutional law was one he called "original understanding;" the Constitution's verbiage would be interpreted as it was generally understood when the framers crafted the document. The fight in the Senate over Judge Bork's nomination was intense; and, in the end, he was defeated by a 58-42 vote. The search for a

[142] Robert E. Riggs and Thomas D. Proffitt, "The Judicial Philosophy of Justice Rehnquist," *Akron Law Review*, Vol. 16, no. 4 (Spring 1983): 555-604, 565-567; David L. Hudson, *The Rehnquist Court: Understanding Its Impact and Legacy* (New York: Praeger Publishers, 2006); Schwartz, Herman Schwartz, *The Rehnquist Court: Judicial Activism on the Right* (New York: Hill and Wang, 2003); Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton Co., 2005). See also William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: William Morrow & Co (1987).

conservative appointee would continue. President Reagan's next nominee was Harvard law professor Douglas Ginsburg, but it was discovered that the professor had smoked marijuana with his law school students and the Senate rejected him. The Senate finally settled unanimously on Circuit Court Judge Anthony Kennedy in 1988. The court now had a 5-4 conservative-liberal ratio and had the potential to readdress some of the Warren Court's decisions on abortion, civil rights, and criminal procedure.[143]

In the election of 1988, George H. W. Bush defeated his democratic challenger, Michael Dukakis, on a pledge of "no new taxes," prayer in schools, gun rights, and capital punishment. The message appealed to the electorate and he won the popular vote by a comfortable 54% to 46% margin.[144] In 1990, Justice William Brennan announced his retirement, so President Bush nominated former New Hampshire Supreme Court Justice David Souter to the Bench. Souter's views were relatively unknown and the Senate confirmed him with a vote of 90-9. In his first year on the Court, he tended to vote considerably more conservatively than his predecessor, but over time he became more liberal in his decisions. In 1991, Justice Marshall decided to retire as well. President Bush nominated U.S. District Court of Appeals Judge Clarence Thomas to replace Justice Marshall. Like Judge Bork's nomination, Judge Thomas' was critical to the composition of the Court. Justice Marshall was one of the most liberal voters on the Court and Judge Thomas was well known for his conservative views. After a contentious nomination process, Judge Thomas was confirmed by a slim margin of 52-48.[145]

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[143] Hensley, *The Rehnquist Court,* 13-15.
[144] "On this Day, November 9, 1988, Bush Wins with 'No New Taxes' Promise'" *BBC News,* accessed January 20, 2012 http://news.bbc.co.uk/onthisday/hi/dates/stories/november/9/newsid_3655000/3655368.stm
[145] Hensley, *The Rehnquist Court,* 18-19.

In the election of 1992, the electorate showed its disapproval of George H.W. Bush's broken promise to not raise taxes. President Bush's broken promise, in fact, opened the door for the independent candidate, Ross Perot, to make a significant bid for the presidency. Perot based his candidacy on a promise to reduce the national debt, which in 1992 exceeded $4 trillion.[146] Bill Clinton won the election, but with only 43% of the popular vote; the remainder of the tally was divided between President Bush and Mr. Perot. Clearly, the nation was still in a fiscally conservative state of mind while concerned about the economy, but significant numbers of voters were also excited about the prospects of a youthful president once again occupying the White House, just as John F. Kennedy had done thirty years prior.[147] Also significant, both houses of Congress remained in Democratic hands after the 1992 election.

With the Senate controlled by the Democratic Party, President Clinton succeeded in having Ruth Bader Ginsburg appointed to the Court when Justice White decided to retire in 1993. Ginsburg had served on the U.S. Court of Appeals for the District of Columbia Circuit; she was also a professor at both Rutgers and Columbia Law Schools, and she had been a leader in the American Civil Liberties Union Women's Rights Project in the 1970s. Her confirmation was a forgone conclusion; she received a 96-3 vote in her favor. The following year, Justice Blackmun retired and President Clinton nominated former U.S. Court of Appeals judge and Harvard law professor Stephen Breyer.[148] Both of President Clinton's appointees have proven to be moderately liberal voters. However, given the justices whom they replaced, their impact did not

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[146] Historical Debt Outstanding - Annual 1950 – 1999, U. S. Department of the Treasury accessed January 20, 2012
http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo4.htm

[147] Lance Morrow, *Time* Person of the Year, 1992, William Jefferson Clinton, *Time Magazine*, January 2, 1993.

[148] Hensley, *The Rehnquist Court,* 22-24.

change the balance of the Court significantly. During the years 1995 to 2005, the justices settled into their roles and evolved in their voting; the court was composed of roughly four conservatives (Rehnquist, Scalia, Kennedy, and Thomas), one swing voter with conservative tendencies (O'Connor), and four more liberal justices (Souter, Ginsburg, Breyer, and Stevens).

The Rehnquist Court may be characterized, in part, for decisions that, when viewed collectively, refined prior doctrines to be more inclusive of religion into public life than in the previous decades. Among the always contentious issues the Court faced were government-sponsored religious displays,[149] religion in public education,[150] prayer in public schools,[151] governmental aid to church-related schools, including the question of school vouchers,[152] and free exercise of religion in public education.[153]

Other contentious culture war cases concerned defining the limits on civil rights legislation. An example of this could be seen in *Patterson v. McLean Credit Union*, (1988). In the case, Brenda Patterson, a black woman, attempted to sue for damages caused by racial harassment under Section 1981 of the 1866 Civil Rights Act. She asserted that her white supervisor stared at her often, gave her more work than white employees, and passed her over for promotion. However, Section 1981 merely stated that all persons shall have the right to make and enforce

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[149] *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). See also *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

[150] *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

[151] *Lee v. Weisman*, 505 U.S. 577 (1992). See also *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

[152] *Zobrest v. Catalina Foothills School District*, 590 U.S. 1 (1993). See also *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[153] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

contracts—it said nothing about harassment after the contract was agreed to. Why then rely on the 1866 Act? Because Title VII of the 1964 Civil Rights act explicitly required a showing that racial harassment had caused a loss of wages. Neither law was precisely applicable, nor was the Court willing to contort the 1866 law to make it apply to what appeared to be unfair treatment.[154]

Equally controversial was the more highly-publicized decision of *City of Richmond v. J.A. Croson Co.* (1989). The City of Richmond put into place an affirmative action program to set aside thirty percent of city construction contracts to minority business enterprises (MBEs). In a 6-3 plurality decision with the majority opinion written by Justice O'Connor, the Court declared that the city's program ran counter to the Fourteenth Amendment:

> To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for *every* disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on *inherently unmeasurable* claims of past wrongs.[155]

Not all Affirmative Action programs were found unconstitutional of course. In *Grutter v. Bollinger* (2003) the Court upheld the University of Michigan Law School's enrollment policy that had an affirmative action element. Again, in an opinion written by Justice O'Connor, the Court decided (5-4) that the school had a compelling interest in having a diverse student body and the policy of including race as part of the candidate evaluation process would stand as long no quotas were established. This upheld the previous decision in *Regents of the University of California v. Bakke* (1978). Why then the dissents by Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas and Chief Justice Rehnquist? According to the Chief Justice, the

[154] *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

[155] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

"plus system" employed at the law school was, in fact, "a thinly veiled and unconstitutional quota system."[156]

The Court's efforts to deal with the most explosive issues of the era, the legal parameters of abortion and LGBT rights, quite similarly, produced nuanced and sometimes contradictory results that, in some quarters, earned extraordinarily low marks for the justices. Take, for example, *Planned Parenthood v. Casey* (1992), which upheld the constitutional right of a woman to have an abortion established in *Roe v. Wade* (1973) – but with a less stringent standard of review, giving state legislatures more leeway to place restrictions on the procedure in some circumstances.[157] In *Romer v. Evans* (1996), in a 6-3 decision, the Court held that a state constitutional amendment in Colorado that prohibited protected status based upon homosexuality or bisexuality was impermissible under the equal protection clause of the Fourteenth Amendment.[158] Far less publicized was *Lawrence v. Texas* (2003), a 5-3 decision, in which the Court overturned *Bowers v. Hardwick* (1986), which had upheld state statutes criminalizing gay sexual behaviors.[159]

At least five major Commerce Clause decisions of the Rehnquist Court engaged substantially the expanding scope of Title VII protections against employment discrimination based on race and sex. In *Johnson v. Transportation Agency* (1987), the Court dealt with the complaint of Paul Johnson, a Santa Clara Transportation Agency employee, who had been passed over for promotion in favor of Diane Joyce, who, he claimed, was less qualified. Joyce had been promoted, furthermore, in accordance with the affirmative action plan of the agency. By a vote

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[156] *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
[157] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[158] *Romer v. Evans*, 517 U.S. 620 (1996).
[159] *Lawrence v. Texas*, 539 U.S. 558 (2003).

of 6-3, the Supreme Court upheld the plan under the test set out in initially in *United Steelworkers v. Weber* (1979), requiring that such a plan must be aimed at eliminating clear imbalances in traditionally segregated job categories. As well, the plan must not "unnecessarily trammel the interests of" male employees and be temporary. Justice Scalia authored a dissent, which was joined by justices Rehnquist and White. In the view of Scalia, "The Court today completes the process of converting [Title VII] from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*."[160]

A month later, the Court dealt with a Title VII case involving allegations of discrimination based on race, in one of the more controversial cases involving the "disparate impact" of employment practices on a person belonging to a minority – *Wards Cove Packing Co. v. Antonio* (1989). A group of cannery workers in Alaska, who identified as "nonwhite," complained that the Wards Cove Packing Company, which operated several salmon canneries, had employed discriminatory hiring practices that had the effect of awarding skilled permanent jobs, which did not involve actual canning, mostly to white employees. Wards Cove argued that its selection of non-cannery jobs turned on the business necessity of employing only individuals with suitable education and skill for such positions. The Ninth Circuit Court of Appeals ruled that the nonwhite cannery workers had made out a *prima facie* case of race discrimination, a decision based on data showing a higher percentage of nonwhite workers in the cannery jobs and a lower percentage of nonwhite workers in the non-cannery, skilled positions. In a 5-4 decision, with Justice White writing for the majority, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, the Court concluded that the Court of Appeals had erred. The Court

[160] *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United Steelworkers of America v. Weber*, 433 U.S. 193 (1979).

declared, particularly, that the Court of Appeals should have based its decision on a comparison of the percentage of nonwhite workers in non-cannery, skilled jobs with the percentage of the available labor pool that were nonwhite and possessed of the appropriate skills to perform such jobs.[161]

In *Price Waterhouse v. Hopkins* (1989), the Court dealt with the issue of "prescriptive sex discrimination" in a complaint brought by a female employee under Title VII of the Civil Rights Act of 1964. Plaintiff Anne Hopkins sued Price Waterhouse, her former employer, alleging that the firm denied her partnership because of sex discrimination, particularly alleging that the partners took the view that she did not dress, adorn herself, and behave in a feminine manner. Price Waterhouse insisted that, under Title VII, Hopkins was required to prove that the firm gave "decisive consideration to an employee's gender, race, national origin, or religion" in making its partnership decision for it to be held liable. Hopkins maintained that the use by Price Waterhouse of any discriminatory considerations based on her sex was sufficient to warrant a finding of liability. In early May 1989, the Supreme Court rendered a 6-3 decision in favor of Hopkins, constituted by a plurality opinion authored by Justice Brennan, joined by justices Marshall, Blackmun, and Stevens, and a concurring opinion by Justice White. The Court fashioned a compromise rule. According to the majority, an employer in the position of Price Waterhouse could only escape liability under Title VII if it proved that it would have made the same employment decision had sex discrimination not played any role in the process. Under this rule, the burden of proving that sex discrimination had not been the decisive factor in the employment decision, by a "preponderance of the evidence," shifted to the employer after the complainant

[161] *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

had proved that sex discrimination had, in fact, figured into the employment decision to some extent.[162]

President George H.W. Bush signed into law the Civil Rights Act of 1991, championed by liberal Republican Senator John Danforth of Missouri, on November 21st of that year in response to the decisions of the United States Supreme Court in *Wards Cove Packing* and *Price Waterhouse*. Among other provisions, the statute, which amended Title VII of the 1964 Civil Rights Act, made it possible for an employee to prove a case of sex (as well as race) discrimination by showing that an employment hiring or promotion practice resulted in "a disparate impact" on women (or persons of color) – if the respondent-employer failed to demonstrate that such practice was required by business necessity. The act also made it possible for women employees to recover not only compensatory damages in a civil suit against their employers for discrimination based on sex, but also punitive damages for emotional distress resulting from such mistreatment, although the amendment placed a cap on such punitive damages. As well, it permitted women plaintiffs to recover attorney fees when able, at trial, to prove that sex discrimination had played some role in an adverse employment decision, even if defendants proved that the adverse decision would have been made without the sex discrimination.[163]

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[162] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); Leslie Goldstein. "Gender Stereotyping and the Workplace: Price Waterhouse v. Hopkins," in *The Constitutional and Legal Rights of Women*, 3rd ed. (Los Angeles: Roxbury, 2006,) 167-75; Nancy Levit, *The Gender Line: Men, Women, and the Law* (New York University Press, 1998), 212.

[163] Pub. L. 102-166; U.S.C. 42, 1981, et seq. The Civil Rights Act of 1991 was passed in response to two Supreme Court decisions limiting the ability of a female employee who had sued her employer for discrimination to make her case on the ground of "disparate impact" of hiring and promotion policies. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). The provision of the act allowing a female plaintiff attorney fees, even when a defendant proved that sex discrimination considerations had not been

Even one of the most conservative justices ever to serve on the Supreme Court, it seems, had little difficulty by 1998 to supporting Title VII guidelines for cases involving employment discrimination based on sex – and expanding the application of the law to meet new exigencies. The 1998 decision in *Oncale v. Sundowner Offshore Services* arose out of a Title VII discrimination case brought by Joseph Oncale, who alleged that, while employed by Sundowner Offshore Services as a roustabout on a Gulf of Mexico oil rig, he was sexually abused by several of his fellow workers. In his complaint, Oncale alleged that his co-workers had called him disparaging names because of his presumed homosexuality, sodomized him with a bar of soap, humiliated him openly, and threatened him with rape. Both a federal district court and court of appeals declared that Title VII provided him no cause of action. The Supreme Court thought otherwise. Justice Scalia, who wrote for a unanimous court (Justice Thomas concurred), reversed the decision of the district court and remanded the case for further proceedings. The opinion included the instruction that, under Title VII, a male can be discriminated against by members of the same sex, establishing an important precedent for same-sex employment discrimination. Certainly, in 1998, Title VII said nothing about employment discrimination based on gender or sexual orientation. But, in the view of the Court, any discrimination "based on sex" was actionable if it placed the victim in an objectively disadvantageous working condition. And the sex of either the victim or the abuser was immaterial.[164]

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decisive in an adverse employment decision was a congressional response to the ruling of the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[164] *Oncale v. Sundowner Offshore Services, Inc.*, 534 U.S. 75 (1998). In 2015, the Equal Employment Opportunity Commission, relying on *Oncale*, declared that employment discrimination based on "sexual orientation" violated Title VII of the Civil Rights Act of 1964. See *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015).

In 1992, the conservative justices of the Rehnquist Court scored a major victory for the New Federalism and, in doing so, made a powerful statement on behalf of state sovereignty. In *New York v. United States* (1992), the Court dealt with the problematic Low Level Radioactive Waste Policy Amendments Act of 1985 – in particular, the so-called "take title" provision intended by Congress as an incentive for states to comply with the mandates of the Low Level Radioactive Waste Policy Act of 1980. The State of New York had made strenuous efforts to negotiate a regional, multi-state compact with neighboring states. But public protests and demonstrations against the establishment of any storage site, a consequence of the extraordinarily large volume of radioactive waste produced by New York, spurred the governor to abandon further efforts. New York challenged the "take title" provision of the 1985 act, which would have required the state, because of its firm noncompliance, to take ownership and responsibility for all its low-level radioactive waste, as a violation of state sovereignty. With Justice Sandra Day O'Connor, writing for the majority, the Court found that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act, indeed, had exceeded Congress's power under the Commerce Clause. After noting the constitutionality of the first two incentives, Justice O'Connor characterized the "take title" incentive as an attempt to "commandeer" the state governments by directly compelling them to participate in the federal regulatory program. According to her, Congress had "crossed the line distinguishing encouragement from coercion." Such coercion, she insisted, would be inconsistent with the federal structure of government, in which a "core of state sovereignty" is enshrined in the Tenth Amendment. The Court did, however, declare that the "take title" provision was severable, allowing the rest of the act to stand.[165]

[165] *New York v. United States*, 505 U.S. 144 (1992).

Strenuous, high profile complaints by gun owners and Second Amendment enthusiasts succeeded in having the Supreme Court grind down at least one of the hard edges of the Brady Handgun Violence Prevention Act of 1993. The National Rifle Association organized and helped to fund lawsuits in Arizona, Louisiana, Mississippi, Montana, New Mexico, North Carolina, Texas, Vermont and Wyoming to have the legislation declared unconstitutional. The challenges reached the Supreme Court in *Printz v. United States* (1997). The main issue was that part of the act requiring local law enforcement officers to examine and verify mandatory background checks for each firearm purchase, that is, before the completion of the National Instant Criminal Background Check System (NICS) to be made available to firearm sellers at the point of purchase. Writing for the majority in a 5-4 decision was Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Anthony Kennedy, and Clarence Thomas. Justice Scalia conceded that no constitutional text dealt with the precise question. The solution to the problem could only be found "in historical understanding and practice, the structure of the Constitution, and in the jurisprudence of this Court." And, in this view, the interim provision commanding the "chief law enforcement officer" of each local jurisdiction to verify the detailed information contained in the completed "Brady form" required for each firearm sale, was far too burdensome to impose on state officials, in a word, unconstitutional as a violation of state sovereignty.[166]

In the three decades following the advent of the Great Society, all socioeconomic and political relations in the United States came under scrutiny for instances of unequal treatment—and unequal outcomes. Racial tensions continued as African Americans, Native Americans,

[166] *Printz v. United States*, 521 U.S. 898 (1997).

Hispanic peoples, and members of other racial and ethnic groups struggled to ensure they were the beneficiaries of social and economic progress, which some increasingly associated with the redistributive politics of "social justice."[167] New generations of women insisted upon respect and equal opportunities in all fields of endeavor. As to intimate relations, the idea of culturally constructed gender roles gained traction and legal effect. Congressional legislation and Supreme Court rulings made many controversial issues national and, thus, the stakes at election times became a "winner takes all" proposition. With the capacity of central power to spur change clearly established, victory seemed imperative for partisan combatants; many believed that moving from one region or state to another would, ultimately, make little difference. Due to the enormous implications of most policy questions central to culture wars conflict, the vitriol between conservatives and liberals grew so intense as to produce the perception that very little common ground remained.

More than any other constitutional authority in the period 1964-1998, the commerce power served the purpose of rapidly reordering socioeconomic and political relations in the United States – and its deployment was central to intensifying political and cultural conflict. Certain that theirs was the correct and most moral vision of America, partisan political operatives sought to actualize their visions with the most effective tool available – central government power. Commencing with the instrumental use of Commerce Clause authority to ameliorate the racial

[167] Peter Corning, *The Fair Society: The Science of Human Nature and the Pursuit of Social Justice* (Chicago and London: Chicago University Press, 2011), ix-xiii; A.B. Atkinson, *Social Justice and Public Policy* (Cambridge: MIT Press, 1983), 3-14, 109-114; Friedrich A. von Hayek, *Law, Legislation, and Liberty: The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 62-100.

injustice that African Americans had suffered for centuries, well-intended federal lawmakers and judges resorted increasingly to this potent instrument of change. Supported vigorously by a largely liberal academy and mass print and electronic media – new legislation, administrative agencies, and federal courts underwrote Commerce Clause power to raise wages and limit the hours of workers, ensure equity in hiring and promotion for women and minority members with affirmative action directives, and end the sex-based harassment of women and members of the LGBT community in the work place. The rapid deployment of federal authority on behalf of liberal understandings of progress entailed the imposition of new regulatory regimes that took aim at environmental hazards, unsafe products, and threats to endangered species. The increasing reliance on commerce power to limit the availability of post-viability abortion, crack down on "super predators," restrain drug-cartel trafficking, and restrict gun ownership exponentially intensified partisan conflict. Many business owners and consumers, however, resented deeply the rising costs of regulation, while others simply wanted to be free of federal government dictates and regimentation they deemed both unnecessary and in violation of fundamental freedoms.

Congress and the Supreme Court interacted dialectically to generate Commerce Clause-based law that steadily re-arranged the balance of power between states and the federal government. Some of the more controversial measures regulated or criminally penalized activities that bore no clear relationship to interstate commerce and seemed to invade the customary and, indeed, constitutionally reserved criminal jurisdiction of the states. These developments spurred deep trepidation among many "outside the beltway" that federal authority knew no bounds and that the capacity of state and local governments to manage their affairs in keeping with the preferences of constituents was fast becoming a thing of the past. A provision of the Constitution

originally intended to bring the states together, by the mid-1990s, in the view of some, seemed to be tearing many communities apart.

As indicated, the period 1964-1998 saw the rapid proliferation of comprehensive regulatory schemes based on the commerce power. More explicitly than ever before, the Warren and Burger courts held that Congress could regulate or entirely suppress an intrastate activity if Congress had reasonably concluded that such regulation was necessary to uphold such a scheme. This was so even if an activity, taken in the aggregate, did not have a substantial effect on interstate commerce. In the case of a comprehensive regulatory regime, Congress could employ the commerce power to regulate intrastate activities no matter "how great or small" – and even ban intrastate activities if necessary to uphold such a regime. As well, Congress could pass criminal statutes based on commerce power if the language of such statutes contained a jurisdictional element identifying a nexus of the offense, in each case, to interstate commerce. Such a linkage permitted a federal court to decide, on a case-by-case basis, if the statute met Commerce Clause muster for the purposes of enforcement.

On the other hand, the growing number of conservative justices appointed to the Supreme Court increasingly generated decisions that refrained from enlarging the scope of the substantial effects test and in other ways calibrated Commerce Clause-based measures to contain them within the limits of the New Federalism, which gathered something of a critical mass during the tenure of Chief Justice William Rehnquist. In this connection, the Rehnquist Court produced Commerce Clause decisions that assertively staked out the sovereign prerogative of the states to refuse to be "commandeered" into federal regulatory schemes.

Chapter Four

Stop Sign: Gun-Free School Zones and

United States v. Lopez (1995)

On March 10, 1992 Alphonso Lopez, Jr. was arrested in his San Antonio High School; he had been caught carrying a .38 caliber revolver to the institution. The initial arrest was conducted by the San Antonio Police Department and was based upon violations of Texas state law. Later, those charges were dropped and Lopez was handed over to federal authorities to be indicted under the Gun-Free Schools Zone Act of 1990 (GFSZA).[1] The District Court in San Antonio denied his motion to dismiss the indictment based upon Lopez's claim that the law was an unconstitutional use of Congress' commerce power. The Fifth Circuit Court of Appeals reversed that decision and agreed with the defendant. The Supreme Court agreed with the Fifth Circuit's ruling; for the first time in nearly sixty years, the Court struck down a law based upon the Commerce Clause of the Constitution.

First among the four Rehnquist Court decisions that had, among hopeful conservatives, raised the question of whether that tribunal might revamp the scope of commerce power to produce a "constitutional revolution" similar to that of 1937 was *United States v. Lopez*. That decision raised the hopes of constitutional originalists and gave concern to those who viewed the document more expansively.[2] Lopez and others convicted under the GFSZA had their

[1] 18 U.S.C. Sec. 922 (q).

[2] See for example, Richard A. Epstein, "Constitutional Faith and the Commerce Clause," *Notre Dame Law Review*, vol. 71 (1996), 167-193 for the originalist view and Mollie Lee, "Environmental Economics: A Market Failure Approach to the Commerce Clause," *The Yale*

convictions reversed, while defense attorneys nationwide now found a new avenue to defend their clients.[3] Other suits, based on the argument that Congress had no power to use the Commerce Clause to legislate in non-commercial and non-economic areas raised the question of just how influential the ruling in *Lopez* would be. Congress responded by rewriting the law to make it less vulnerable to legal assaults.

A significant number of scholars commented about the impact of *Lopez* in its immediate aftermath. But relatively little systematic study has been conducted of the evolution of the GFSZA or the related proceedings of the case in the lower federal courts and the sociocultural and political contexts of the case. This chapter examines, first, the history of federal gun control laws in the twentieth century, the legislative processes and motivations for passing the Gun-Free School Zones Act of 1990 and its subsequent amendments. Next, it will explain the impact of the GFSZA on an average citizen, Alfonso Lopez, Jr., as his case moves from the federal district court, through the federal appeals court, and finally to the United States Supreme Court. Equally important, discussion throughout will gauge the GFSZA and the decision in *Lopez* for their constitutional import and relationship to the culture wars conflict that intensified in the mid-1990s.

While the ruling in *Lopez* was a surprise because Commerce Clause-based legislation had not been ruled unconstitutional since 1936, the ruling did not overturn any precedent. The Gun-Free School Zones Act of 1990 was a previously unchallenged use of the Commerce Clause, in which intrastate criminal activity was brought under federal jurisdiction. The Court was ruling on an

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Law Journal, Vol. 116, No. 2 (Nov. 2006): 456-492 and "Focus on Federal Power," *New York Times*, May 24, 1995, pp. A1 for the more expansive view.

[3] A successful challenge to Commerce Clause-based criminal legislation came in *United States v. Morrison*, 529 U.S. 598 (2000) discussed in Chapter Six.

area of federal law that it had never been ruled upon before—a case of first impression with no previous decisions precisely on point to bind it.[4] The case became notable as much because of its uniqueness as its actual impact. Notwithstanding this, the Lopez decision sent shock waves among Court-watchers. Since no law based upon Congress' commerce power had been struck down in over sixty years, the surprise was understandable, as was the resulting focus on the case in the legal literature. Some authors clearly, but cautiously, hoped that the case indicated the beginnings of a return to pre-1937 commerce jurisprudence, while others feared such a return. Many were hesitant to view the ruling as a "constitutional revolution" and instead saw that it was merely the response to a poorly written law or perhaps a symbolic statement by a prickly Court that Congress needed to better justify its rationale when writing future laws.

As is true of the writings about many cases decided by the Supreme Court, idealism abounds in the legal literature about *Lopez.* Originalists hoped to overturn the precedents that had dominated the Court's rulings since 1937 and return to a view of the Commerce Clause that limited the federal government's intrusiveness into what they perceived to be the domains of the individual states. Conversely, progressive thinkers hoped to maintain and build a stronger centralized government with laws that could be standardized across the United States. As a result, *Lopez* was often perceived, initially at least, as either a hopeful beginning or the commencement of a national catastrophe.

Looking back to the roots of federal gun legislation, the federal government did not concern itself significantly in gun control until the twentieth century. State and local communities certainly maintained the power to place all kinds of stipulations on gun ownership and use, but

[4] *United States v. Lopez,* 2 F.3d 1342, 1345 (5th Cir. 1993), 3.

the Second Amendment was seen as a barrier to the federal government from such legislation.[5] The first such endeavors to control firearms at the federal level was based not on the Commerce Clause, but instead on Congress' other enumerated powers; it was only later that congress used the power of the Commerce Clause to support federal gun legislation.[6]

In 1919, as part of a larger War Revenue Act, a ten percent manufacturers' excise tax was placed on firearms. The legislative history of the act indicates that the primary motive of the legislation was to generate revenue, but a secondary motive was a concern over handguns as a public safety problem. Although the rationale for the tax was financing America's expenses in World War I, the tax survived and Congress has since amended the law several times. Proceeds from the current eleven-percent tax on firearms, bows, crossbows, and accessories are used to finance state wildlife preservation programs. The act also established the Treasury Department as the primary federal authority over firearms issues.[7]

Even though guns as a public safety issue had not become an issue addressed by the federal government, there was certainly concern at the state level. Also, one of the characteristics that arose along with America's increasing industrialization and interconnection in the latter half of the nineteenth century was the desire for standardization. Indeed, by 1892 several states sent delegations of attorneys to meet and attempt to standardize state laws at the first annual meeting

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[5] See for example William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill and London: University of North Carolina Press, 1996) 47, 57 and Franklin E. Zimring, "Firearms and Federal Law: The Gun Control Act of 1968," *The Journal of Legal Studies,* Vol. 4, No. 1 (Jan. 1975), 135.

[6] U.S. Const., Art. I, Sec. 8.

[7] Franklin E. Zimring, Firearms and Federal Law: The Gun Control Act of 1968, The Journal of Legal Studies, Vol. 4, No. 1 (Jan. 1975), 135; Federal Aid in Wildlife Restoration Act of September 2, 1937, 16 U.S.C 669-669i; 50 Stat 917, *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*. http://www.fws.gov/laws/lawsdigest/FAWILD.HTML (accessed January 13, 2012).

of the National Conference of Commissioners on Uniform State Laws. By 1912, all existing U.S. states and territories were represented.[8] One of the ideas of the organization was to draft uniform laws in areas "where Congress had no jurisdiction," and as a result, the primary emphasis of gun control advocates during the 1920s was standardizing state and local laws.[9] The focus of those efforts at that time was the regulation, possession, and use of concealable "pistols;" i.e., any gun with a barrel less than twelve inches in length, and specifically revolvers and sawed-off shotguns. The United States Revolver Association, hoping to preempt the actions of the National Conference of Commissioners on Uniform State Laws, presented a draft for a uniform revolver law in 1923. The resultant "Uniform Firearms Act" was adopted by the conference of commissioners in 1926 and included among other stipulations: provisions outlawing the carrying of a "pistol" without a license (no license was required if the weapon remained on its owner's property or business), additional penalties for crimes committed with the use of a "pistol," a required forty-eight hour waiting period to purchase a handgun, and prohibitions on sales to "drug addicts, habitual drunkards and minors under eighteen." The substance of the act was adopted by seventeen states, including California, North Dakota, New Hampshire, and Pennsylvania; Congress then adopted the measure for the District of Columbia in 1932. Other states considered the proposed law either too restrictive or too lenient. The Governor of Arizona vetoed the law as too restrictive, for example, while Franklin Roosevelt,

[8] Kim Quaile Hill and Patricia A. Hurley, "Uniform State Law Adoptions in the American States: An Explanatory Analysis," *Publius,* Vol. 18, No. 1 (Winter, 1988), 117.
[9] Allison Dunham, "A History of the National Conference of Commissioners on Uniform State Laws," *Law and Contemporary Problems,* Vol. 30, No. 2 (Spring, 1965), 237.

governor of New York, (the state with the most restrictive gun laws in the nation at the time) vetoed the version of the bill placed before him and instead advocated for federal regulation.[10]

Not addressed by the Uniform Firearms Act was the issue of machine guns. When the act was first conceived in the early 1920s, only handguns and sawed-off shotguns were of interest. But as the decade progressed and the effects of prohibition spread, the "the infant industry of racketeering grew to monstrous size," and semi-automatic pistols and machine guns replaced revolvers and sawed-off shotguns as the most feared firearms in America.[11] In response, the National Conference of Commissioners on Uniform State Laws introduced the Uniform Machine Gun Act in 1932. The proposed legislation made it a crime to possess or use a machine gun for an offensive purpose. Therefore, possession was not allowed except on premises owned or rented by the gun's possessor or user. Unnaturalized citizens or persons previously convicted of a violent crime were not allowed to own or possess the weapons; the registration of some types of machine guns was required as well. Eventually, federal law would come to supersede the need for the Uniform Machine Gun Act, although a few states did legislate some forms of the act.[12]

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[10] W. H., Legislation: The Uniform Firearms Act," *Virginia Law Review,* 18 (1932), 904. John Brabner-Smith, "Firearm Regulation," *Law and Contemporary Problems,* 1 (1933-34), 401. "Governor Vetoes Gun Law Changes," The *New York Times,* March 29, 1932, 4. Michael A. Bellesiles, "Firearms Regulation: A Historical Overview," *Crime and Justice*, Vol. 28 (2001), 172.

[11] National Conference of Commissioners on Uniform State Laws, Uniform Machine Gun Act of 1932, Prefatory Note.

[12] Brabner-Smith, "Firearm Regulation," 405.

In 1927, Congress passed its first law aimed at controlling guns by prohibiting the shipment of concealable firearms to private individuals through the U.S. postal system.[13] This was an effort to curtail the proliferation of handguns and sawed-off shotguns. It was also designed to thwart the efforts of citizens denied the ability to purchase firearms in one state from buying them from another state. Of course, sellers and buyers could easily thwart the law by utilizing private shippers for their commerce.[14] Just four years later, by the time Franklin Roosevelt was elected in 1932, during the depths of the Great Depression, there were increasing calls for federal solutions to what had previously been considered local problems. In 1934, Congress passed the National Firearms Act to control "gangster-type" weapons like machine guns, sawed-off shotguns, and silencers.[15] Organized crime expanded dramatically during the prohibition era and Hollywood was seen as exacerbating the problem with sensationalized violence in movies such as *Little Caesar* (1930), *The Public Enemy* (1931), and *Scarface* (1932).[16] Congress and the President responded by trying to curb the use of the specific weapons that were considered most effective and spectacular, those weapons used by mobsters in their unlawful actions. Congress again used its power to "lay and collect taxes" to place a $200 tax on transfers of the offending weapons.[17] Although President Roosevelt's first Attorney General, Homer Cummings, had wanted a provision for handgun registration in the bill, he could not sell Congress on the idea.

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[13] James B. Jacobs, *Can Gun Control Work?* (Oxford: Oxford University Press, 2002), 20. This law remained in effect until passage of the Gun Control Act of 1968, Zimring, "Firearms and Federal Law,"136.

[14] Franklin E. Zimring and Gordon Hawkins, *The Citizen's Guide to Gun Control* (New York: MacMillan Publishing Company, 1987), 132.

[15] National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. Sec. 5801-5872 (1988 & Supp. V. 1993)). See also Zimring and Hawkins, *The Citizen's Guide*, 132-133.

[16] Michael A. Bellesiles, "Firearms Regulation," 174.

[17] U.S. Const., Art. I, Sec. 8, cl.1.

However, Congress did provide for registration of all weapons covered in the act—even if illegally owned! That aspect of the act stood as written until the 1968 case of *Haynes v. United States,* when the Supreme Court decided that the law infringed upon the right not to incriminate oneself.[18] Also, the act provided for the defining and annual federal registration of firearm importers, manufacturers, dealers, and pawnbrokers. At the time it was being considered, legislators decided that basing the law on Congress' taxing power was preferable to using its commerce power for three reasons: first, it would provide revenue; second, through registration for tax purposes, the federal government would eventually be able to amass the identifications of legal owners of the affected firearms and be able to punish those in illegal possession if they were arrested for some other crime; third, there was a precedent of similar legislation regarding narcotics that had been upheld by the Supreme Court.[19]

Four years after the National Firearms Act was passed, Congress followed up with the Federal Firearms Act of 1938.[20] This was the first gun control law based upon Congress' expanded commerce powers in the wake of the Court rulings from 1937. Now secure in being able to legislate broadly under its commerce authority, Congress and the Roosevelt Administration aimed to keep firearms out of the hands of those within certain groups of citizens, most especially those convicted of felonies, those judged mentally incompetent, and those residing illegally in the United States, by prohibiting interstate shipment of firearms to them. It

[18] *Haynes v. United States,* 390 U.S. 85 (1968). Franklin E. Zimring, "Firearms and Federal Law," 138.
[19] John Brabner-Smith, "Firearm Regulation," 405, 407.
[20] Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250, repealed by Act of 19 June 1968, Pub. L. No. 90-351, Sec. 906, 82 Stat. 234 (1968). See Sheila A. Mikhail, "Reversing the Tide under the Commerce Clause: United States v. Lopez, 115 S. Ct. 1624 (1995)," *The Journal of Criminal Law and Criminology,* Vol. 86, No. 4 (1996), 1505.

also required now-registered gun dealers to keep records of every transaction as well as the name, age, and address of every firearm buyer and the transaction.[21]

By this time, the constitutionality of federal gun control had become largely unquestioned. Congress clearly had the power to lay and collect taxes. It also had the authority to regulate what was sent through its own mail system. States, as long as they were acting within their own constitutions, had the sovereign power to regulate firearms within their borders as well. Finally, the Supreme Court, with its expanded view of Commerce Clause-based legislation, seemed unlikely to overturn a law based upon those powers. However, the question reasonably might be asked, "Why wouldn't a gun-control law, based upon the Congress' enumerated powers, be simply struck down as repugnant to the Second Amendment?"[22] After all, Congress' enumerated powers fall under the main body of the Constitution, while the Second Amendment, ratified at a later date, should hold precedence. The answer may be found in the 1939 case, *United States v. Miller,* which challenged the 1934 Federal Firearms Act on Second Amendment grounds.[23] The case involved Jack Miller and Frank Layton, two thugs who took an unregistered sawed-off shotgun from Oklahoma into Arkansas. There is some evidence that the Roosevelt administration pushed the case to the Supreme Court to assure the validity of the law in the "post-revolution" Supreme Court. On May 3, 1938, in the federal district court in Ft. Smith, Arkansas, District Judge Hiram Heartsill Ragon, a former Arkansas congressman appointed by

[21] "Six Decades of Gun Legislation," *The New York Times,* May 24, 1990, B12, col. 5. Franklin E. Zimring, "Firearms and Federal Law: The Gun Control Act of 1968," *The Journal of Legal Studies,* Vol. 4, No. 1 (Jan. 1975), 140.
[22] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., Amend. 2.
[23] 307 U.S. 174 (1939).

President Roosevelt to the federal bench in 1933, ruled the law unconstitutional.[24] Consequently, the Supreme Court granted *certiorari*, bypassing the circuit court level of appeal, and reversed the lower court ruling by sustaining the law. However, the opinion in the case was very narrow and both gun control advocates and Second Amendment supporters use the ruling to support their views. The Court ruled that the Second Amendment does not guarantee the right of an individual to keep and bear a sawed-off shotgun. The Court's opinion was based on the justices' understanding that such a weapon was not one that would generally be used by an organized military force, i.e. "a well-regulated militia." The Court made no sweeping judgment that firearms ownership was an individual or a collective right. What was important was that the National Firearms Act was upheld; thus, both Congress and the Roosevelt Administration could feel secure in crafting future firearms legislation.[25]

After 1934, the incidence of sensational machine gun-related crimes decreased. The National Firearms Act, with the heavy taxes, may have made machine gun use prohibitive. However, adoption of the Twenty-first Amendment in 1933, ending prohibition, also caused mobsters to

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[24] Hiram Heartsill Ragon (1885-1940), *Biographical Directory of the United States Congress, 1774 – Present*. http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000009 (accessed January 13, 2012).

[25] For a more complete discussion of the case, see Brian L. Frye, "The Peculiar Story of United States v. Miller," *NYU Journal of Law and Liberty,* Vol. 3, No. 38 (2008), 48-82. Also see "Supreme Court Bars Sawed-off Shotgun," *New York Times*, May 16, 1939, 15. Interestingly, Miller did not attend his day in court because he was financially unable to do so, thus, the Court decided the case after only hearing the arguments of the prosecution. Miller was killed shortly afterward in a gunfight, prior to the issuance of the decision. Although Miller challenged the constitutionality of the law on Second Amendment terms, an earlier case, *Sonzinsky v. United States*, 300 U.S. 506 and 648 (1937) questioned whether the federal government could use taxation to suppress the thing being taxed. The Court ruled that Congress had the power to tax and that it was not within the justices' authority to question why it did so. "Court Takes Suits on Security Taxes," *New York Times,* Mar 30, 1937.

enter less public arenas for crime and this may have been a cause of the decrease as well; even Hollywood may have been a factor. As a result of a 1933 book by Henry James Forman entitled *Our Movie Made Children*, which suggested that movies were making young Americans more violent, the Catholic Church threatened a national boycott unless the film industry reduced the level of violence in its productions. The threat worked, and the Motion Picture Producers and Distributors of America created a code that didn't allow films to display nor show the details of firearms; neither displays of, or even could the sounds made by machine guns be featured in films. Additionally, criminals could not be shown killing policemen, and movies depicting crimes had to result in the criminals being apprehended and punished.[26] Whatever the cause of the reduced prominence of machine gun-related crimes, Congress seemed satisfied with its existing gun control legislation for the next three decades and focused instead on economic recovery, World War II, and the Cold War.

This status quo was disrupted when the turbulent 1960s resulted in demands for more gun laws. The tragic assassination of John F. Kennedy on November 22, 1963 reignited calls for stricter gun control at the federal level. The circumstances under which Lyndon Johnson assumed the presidency paved the way for the Gun Control Act of 1968. Kennedy's assassin had purchased his weapon via mail order from an advertisement in the NRA's *American Rifleman* magazine.[27] Although a few members of Congress had discussed it even before Kennedy's assassination, that event spurred others in Congress to immediately move to outlaw interstate purchases of firearms and ammunition by individuals though the U.S. Postal Service. However,

[26] Michael A. Bellesiles, Firearms Regulation: A Historical Overview, *Crime and Justice*, Vol. 28 (2001), 174.
[27] Bellesiles, "Firearms Regulation," 178.

the bill never made it out of committee until 1968.[28] After the assassination of President Kennedy, Congress immediately embarked on an attempt to ban mail-order purchases of shotguns and rifles. However, the bill crafted never left the Senate Judiciary Committee due to pressure from the National Rifle Association. The next motivating factor pushing Congress toward restricting weapons occurred with the assassinations of the Reverend Martin Luther King, Jr. on April 4, 1968, and of Senator Robert F. Kennedy (D-N.Y.) on June 6, 1968. The combination of these two events made a new attempt to legislate wide-ranging gun control legislation viable. After four and half months of contentious debate and compromise, Congress passed the Omnibus Crime Control Safe Streets Act and the Gun Control Act of 1968.[29] These laws repealed the Federal Firearms Act of 1938, but incorporated its provisions into the new laws along with other offenses as well. Whereas the 1938 law instituted licensing requirements to those engaged in selling firearms in interstate commerce, the new law extended those requirements to all dealers, regardless of their markets.[30] The Gun Control Act of 1968 prohibited any firearm sales to, or even their possession by, those convicted of felonies, those judged mentally incompetent, etc., groups of individuals who were formerly only excluded from interstate shipments of guns. It was also intended to provide federal support to state and local law enforcement officials.[31] These acts remain amended but in effect still today.

Based upon the federal government's commerce power, combined with the power of Congress to tax, and further enriched by the afore-mentioned authority given to the United States

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[28] Franklin E. Zimring, "Firearms and Federal Law: The Gun Control Act of 1968," *The Journal of Legal Studies,* Vol. 4, No. 1 (Jan. 1975), 145.
[29] Pub. L. No. 90-351, 82 Stat. 197 (1968) codified as 18 U.S.C. Sec. 921-928 and Pub. L. No. 90-618, 82 Stat. 1213 (1968) codified as 18 U.S.C. Sec. 921-930 respectively.
[30] Mikhail, *Reversing,* 1505-06.
[31] Ibid., 1506.

Postal Service, the new law regulated the sales of guns by prohibiting their sale to minors, felons, and incompetents. It also regulated the shipment of guns as well as allocating the licensing of dealers; additionally, the law further served to increase the penalties for federal crimes involving the use of guns. The same law also covered a variety of other explosives, though it did not include gun registration, as Johnson had wanted.[32]

The attempted assassination of President Reagan on March 30, 1981 resulted in calls for more federal gun control legislation. The Brady Handgun Violence Prevention Act imposed a five-day waiting period on certain handgun purchases to ensure that those people prohibited from owning handguns by the 1968 Gun Control Act were not allowed to purchase them.[33] The law stipulated that during the five-day waiting period, local law enforcement was to perform a background check on the purchaser. The act was successfully challenged in the Supreme Court case of *Printz v. United States,* when the Court ruled that the federal government could not compel states to enforce a federal regulatory program.[34] The case was perhaps more significant from a Tenth Amendment perspective than a gun control issue since a federal database can now provide instant background checks to accomplish the same objective as the five-day waiting period. The case is mentioned briefly here because in Justice Clarence Thomas' concurrence he used the same rationale for striking down the Brady Act as he did to strike down the Gun-Free School Zone Act.[35]

Some of the stipulations of the Gun Control Act of 1968 were modified in 1986. The Firearms Owners' Protection Act was originally an attempt to remove some of the regulations

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[32] Spitzer, *Gun Control*, 145.
[33] Pub. L. No. 103-159, Title I, 107 Stat. 1536 (1993) codified within 18 U.S.C. Sec. 921-925.
[34] 521 U.S. 898 (1997). See also Jonathan D. Varat, William Cohen, and Vikram D. Amar, *Constitutional Law,* Thirteenth ed. (New York: Thomson Routers/Foundation Press, 2009), 266.
[35] Varat, *Constitutional Law,* 266.

Congress had passed previously.[36] On the whole, its effects were negligible for handguns—nearly all pre-1986 handgun regulations remained in effect. But the law did slightly loosen regulations for long guns and eased the recordkeeping required by federal firearms licensees.[37] Perhaps the law's most notable feature resulted from the public's fear of what came to be known as "assault rifles," i.e. rifles that appeared to have military applications. The law made it illegal for anyone to own or transfer ownership of a machine gun that was not made and registered before May 19, 1986, without express authorization by federal or state governments.[38]

Throughout the 1980s, Congress increasingly had greater concerns about gun-related attacks in schools. A series of shootings had highlighted citizens' fears for their children as well as concerns for teachers and other school workers. Two events were particularly enraging. In May 1988, thirty-year-old Laurie Dann entered a second-grade public school classroom in Winnetka, Illinois (a wealthy suburb north of Chicago) and opened fire, killing an eight-year old student and wounding five others. She later shot a twenty-year-old man before killing herself.[39] In January 1989, a man in his mid-twenties named Patrick Edward Purdy of Lodi, California used an AK-47 rifle to kill five elementary school students; he also wounded a teacher and twenty-nine other students before shooting himself in the head.[40] Other less dramatic events, like shootings in school cafeterias in the Bronx and Washington D.C., only heightened the political motivation for Congress to respond.

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[36] Pub. L. No. 99-308, 100 Stat. 449 (1988) codified as 18 U.S.C. Sec. 922 (o).
[37] Franklin E. Zimring and Gordon Hawkins, *The Citizen's Guide to Gun Control* (New York: MacMillan Publishing Company, 1987), 136-37.
[38] Mikhail, *Reversing,* 1506, n. 130.
[39] Isabel Wilkerson, "Shootings Leave a Suburb in Trauma," *New York Times,* May 28, 1988, Sect 1, p. 6, col. 1.
[40] Jay Mathews and Matt Lait, "Rifleman Slays Five at School; 29 Pupils, Teacher Shot in California; Assailant Kills Self," *The Washington Post,* January 18, 1989, A1.

With the school shootings in mind, U.S. Representative Edward F. Feighan (D-OH) introduced H. R. 3757, the "Gun Free School Zones Act of 1990" in late November 1989. His legislation would prohibit anyone not specifically exempted, such as law enforcement officials, from bringing any sort of firearm within 1,000 feet of a public or private school. Feighan gathered nine cosponsors composed of seven Democrats and two Republicans—indicating the bill had bipartisan support. The companion Senate version was introduced as S. 3266 the following February by Herbert H. Kohl (D-WI), former president of the Kohl's retail chain and owner of the Milwaukee Bucks.[41] Citing a report from the National School Safety Center that estimated in 1987 "270,000 students carried handguns to school at least once," the bill's supporters in turn had the backing of the National Education Association, The American Association of School Administrators, the National School Boards Association, and the American Academy of Pediatrics.[42]

With the many supporters on hand, the House Judiciary Subcommittee on Crime held a hearing on September 6, 1990, just after the school year commenced and two months prior to the November mid-term elections. The subcommittee heard from several interested parties, including a police chief, a Bureau of Alcohol, Tobacco, and Firearms official, representatives from the National Education Association, National PTA, the American Academy of Pediatrics, and the Center to Prevent Handgun Violence. Each witness laid out a litany of compelling evidence that death, injury, and hostage situations involving firearms were critical threats and events that were happening with increased frequency across America. "Firearms are a problem

[41] Karen J. Cohen, "Kohl Defines Niche in the Senate," *States News Service,* June 25, 1993.
[42] "Introduction of the Gun-Free School Zones Act of 1990" U.S. Congress, *Congressional Record,* 101st Congress, E3988 and "Gun-Free School Zones Act" U.S. Congress, *Congressional Record,* 101 Congress, S767.

of epidemic proportions," stated one M.D. who argued that keeping children away from firearms is simply a form of preventative medicine.[43] The Center to Prevent Handgun Violence representative presented a four-year study that detailed the deaths of seventy-one people, the wounding of 201, and how 242 other individuals were held hostage at gunpoint all within and around America's schools.[44] All commenting subcommittee members agreed that schools had become dangerous places and that something had to be done to stop the violence. However, Chuck Douglass (R-NH) wondered how creating a law aimed at adults would help the problem of school violence, since the vast majority of the crimes were committed by people under the age of eighteen. He also asked how the BATF, with only 1,800 special agents, could possibly be effective as the primary law enforcement arm in 100,000 schools across the country. He posited that either the BATF would have to grow considerably or that state and local law enforcement would have to retain their primary police powers. Finally, he wondered what was "magic" about the 1,000-foot distance from a school ground. He described how in many rural areas, a 1,000-foot radius could encompass an entire community. The law would, therefore, create a situation in which every hunting season could result in a town full of potential federal felons. Feighan, the bill's sponsor, assured Douglas on the matter, "I am not so sure that it could happen. But beside the point, it certainly is not something that is going to lead to prosecution."[45]

During testimony before the House Judiciary Subcommittee on Crime, BATF official Richard Cook advised that the bill as presented needed a constitutional reference. He stated, "We would note that the source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against

[43] *Hearing*, 56-57.
[44] Ibid., 81-88.
[45] Ibid., 69.

possession of firearms by felons, mental incompetents and others, the legislation contained specific findings relating to the Commerce Clause and other constitutional bases, and the unlawful acts specifically included a commerce element."[46]

The National Rifle Association also presented its views on the legislation. In a statement written by James Jay Baker, the director NRA's Institute for Legislative Action, the NRA echoed Representative Douglas' concern about the 1,000-foot perimeter. Such a large boundary would surely cause otherwise law-abiding citizens to inadvertently become potential federal criminals. Furthermore, Baker also suggested that the new law was merely a political exercise with no useful impact. He wrote, "There is no state in which the carrying of a loaded firearm with criminal intent is not a crime…Indeed, it may be taking what the state constitution interprets as a guaranteed right and making it a federal felony."[47] He proposed also that from a due process requirement, an appropriate notice would have to be posted along a perimeter established 1,000 feet from each of the nation's 80,000 public schools, indicating that travelers were entering a gun-free school zone. Clearly, there were as significant practical and constitutional concerns against passage of the law even in the political environment that called for action.

Eventually, however, the Senate version of the bill was enacted as part of the broader Crime Control Act of 1990. The Senate passed the broader bill with an easy voice vote; in the house,

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[46] "Prepared Statement of Richard Cook, Chief, Firearms Division, Bureau of Alcohol, Tobacco and Firearms, U. S. Department of the Treasury," *Hearing Before the Subcommittee on the Judiciary, House of Representatives on H.R. 3757, Gun-Free School Zones Act of 1990, One Hundred First Congress, Second Session* (Washington: U.S. Government Printing Office, 1991), 13.

[47] "Appendix 3. – Statement of James Jay Baker, Director, National Rifle Association Institute for Legislative Action," *Hearing Before the Subcommittee on the Judiciary, House of Representatives on H.R. 3757, Gun-Free School Zones Act of 1990, One Hundred First Congress, Second Session* (Washington: U.S. Government Printing Office, 1991), 79.

the vote to pass the act was 313-1.[48] The House Report accompanying the act states that the intention was "to provide a legislative response to various aspects of the problem of crime in the United States."[49] However, the legislators did not heed BATF official Cook's advice to include a constitutional reference, as the report made did not mention the impact upon commerce of firearms in schools.[50] Additionally, while President George Bush signed the act into law on November 29, 1990, he had misgivings about portions of the legislation that appeared to him to tip the balance between federal and state power. He noted,

> I am also disturbed by provisions in S. 3266 [the Crime Control Act of 1990] that unnecessarily constrain the discretion of State and local governments. . . . Most egregiously, section 1702 [the Gun Free School Zones Act] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed on the States by the Congress.[51]

President Bush had little choice in signing the bill, however. Even in the interim between congressional passage and Bush's signing of the law, shootings involving school students continued to motivate officials to "do something" against schoolyard crime. Over a ten-day period in Herb Kohl's home of Milwaukee, a school bus carrying eleven elementary school pupils was "caught in a hail of gunfire during a street battle;" a man was shot on an elementary school playground; and a fifteen-year-old boy was shot outside another elementary school during

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[48] Bill Summary & Status, 101st Congress (1989-1990), S.3266, Major Congressional Actions, *The Library of Congress,* Thoma. http://thomas.loc.gov/cgi-bin/bdquery/z?d101:SN03266:@@@R (accessed January 11, 2012).
[49] *United States v. Lopez,* 2 F.3d 1342, 1359 (5th Cir. 1993).
[50] Ibid.
[51] George Bush, "Statement on Signing the Crime Control Act of 1990", November 29, 1990. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project* http://www.presidency.ucsb.edu/ws/?pid=19114 (accessed January 11, 2012).

a parent-teacher conference.[52] With such violence making the headlines passage of the law inevitable.

Once the law was passed, officials were quick to make political hay of their accomplishment. In December, Senator Phil Graham (R-TX) led students in putting up "Gun-Free" signs in various high schools in Dallas, El Paso, San Antonio, and Houston to announce the new law.[53] Several states, including Maryland, Virginia, Wisconsin, and New Jersey, as well as smaller municipalities, were emboldened by the new law and proposed their own versions.[54] Not to be outdone, in Connecticut, the Governor proposed a state law enlarging the gun-free school zone perimeter to 1,500 feet.[55] In discussions over the proposed legislation, anti-gun advocates were generally supported in their efforts to create gun-free school zones. While some pro-gun supporters pointed out that laws were already on the books that prohibited guns from being taken to school as well as punishing crimes committed with guns, many others backed the new legislation. The NRA was often quiet on the matter; many "tough-on-crime" Republicans considered the laws to be a much better solution than general gun bans or other forms of gun control.

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[52] Brian Bashinski, "Gunfire Near Schools Causes Alarm in Milwaukee," *The Associated Press*, November 1, 1990.

[53] Victor J. Garcia, "Gun Free: High School's New Sign to Blast Guns," *San Antonio Express-News,* December 2, 1991. Also attending the event was U.S. Attorney Ronald Ederer, who would later represent the government in the Lopez case.

[54] "Across the USA: News from Every State," *USA Today,* January 22, 1991; Janet Naylor, "PG Asks Law on Weapons at School," *The Washington Times,* January 6, 1992; "Drawing 'Gun-Free Zones; Some N. Va. Educators Skeptical of Benefit," February 10, 1992; "Soft on Crime in New Jersey" The New York Times, June 6, 1992.

[55] Alvin Powell, "Gun Control No Solution, Assembly Told," *New Haven Register,* June 26, 1992.

Emboldened with the legislative success of the Gun-Free School Zones Act, by early 1993 the National Education Association was publicly urging stronger enforcement of the law, as well as demanding increased legislation to curb school violence. Regarding the recently passed legislation, the association argued that the Bureau of Alcohol, Tobacco, and Firearms "has done little even to make school officials aware of its existence," implying that the agency was doing little to enforce the law. The NEA also urged Congress to pass a "Violence Free Schools Act" that would provide $100 million annually, over a five-year period, to supply schools with metal detectors, cameras, and other security enhancements. It was evident that infusing federal power into local school crime control was politically popular among many Americans.[56]

The rather even ideological division of the Court in the period 1995-2005 set the stage for its first major Rehnquist Court Commerce Clause ruling – which was focused on the 1990 Gun-Free School Zones Act. During the period 1995-2005, the Court was composed of roughly four conservatives (Rehnquist, Scalia, Kennedy, and Thomas), one swing voter with conservative tendencies (O'Connor), and four more liberal justices (Souter, Ginsburg, Breyer, and Stevens). Under this composition, the Supreme Court made four significant rulings regarding the interpretation of the Commerce Clause. The significance of the cases decided results from the fact that no law based upon the commerce powers of Congress had been ruled unconstitutional since 1937. Under the Rehnquist Court, three such laws were rejected by the Court with another severely threatened.

The first successful prosecutions under the 1990 Gun-Free School Zones Act occurred two years after its passage. By February 1992, the first man convicted of violating the law, a 23-year-

[56] Jim Abrams, "Teachers Union Seeks Federal Effort to Curb School Violence," *The Associated Press*, January 14, 1993.

old who fired a shot randomly outside a football stadium in Waskom, Texas, was sent to prison for an eight-year term.[57] Two months later, the Western District of Texas had its first conviction as well, by getting a plea bargain from a twenty-year-old resident of San Antonio who had fired three shots near a playground occupied by 100 to 200 students. He fired the shots claiming his intention was to scare his friend's former girlfriend; his plea bargain was for a one- to two-year sentence.[58]

In the Spring of 1992, Alphonso Lopez was entering the final semester of his senior year at Edison High School in San Antonio, Texas; he was described by his attorney as "your basic normal kid in high school" who had never been in trouble before.[59] His school records showed no disciplinary problems prior to 1992. Indeed, Lopez was a C student, whom friends and former classmates said was a popular senior but not a gang member or a troublemaker. Quite to the contrary, he looked forward to making a career in the United States Marine Corps.[60] Additionally, Edison High School was not considered a hub of gang activity. Students at the school said that there was only one gang associated with the campus, and its activities were mostly limited to spraying graffiti on signs in the school parking lot. Local police had a fairly firm handle on criminal activity at the school. Instead of intrusive police patrols or metal

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[57] "New Gun Law Brings Prison Term," *The New York Times,* February 28, 1992. Gerry Ray Hawkins, the convicted man, was on parole for attempted murder when he fired the shot on November 1, 1991.

[58] Jim Price, "First Case: Man First to Be Convicted of Firing Gun by School," *San Antonio Express-News,* April 18, 1992.

[59] Catalina Camia, "High Court Strikes Down Law Banning Guns Near Schools. Decision in Texas Case Could Affect Federal Firearms Measures," *The Dallas Morning News,* April 27, 1995, 1A.

[60] Stephen Power, "High Court to Review Key Gun Law: San Antonio Student Who Took Weapon to School at Center of Case, *The Dallas Morning News,* November 8, 1994, 1A.

detectors in on campus, the police had been able to develop sources within the student body that kept authorities informed of criminal or gang-related activities.[61]

It was one of these inside sources that informed police that Lopez was carrying a handgun to campus on March 10, 1992. Lopez was summoned to the principal's office; indeed, he was found to be carrying an unloaded .38 Smith and Wesson revolver in the waistband of his jeans. He also carried five rounds of ammunition in one of his pockets. According to Bureau of Alcohol, Tobacco, and Firearms officials, Lopez first claimed that he needed the gun to protect himself from gangs.[62] He later confessed that "Gilbert" had offered him $40 to deliver the gun after school to "Jason" who planned to use the gun in a "gang war."[63] Whatever the reason that Lopez brought the gun to school, San Antonio police arrested him for his actions. Texas had a state law that made carrying a gun to school a felony; if he had been a minor at the time of his arrest, the matter might have remained with local authorities. However, because Lopez was eighteen years old, federal prosecutors suggested that the state charges be dropped and that he instead be remanded into federal BATF custody and charged with a violation of the Gun-Free School Zones Act.[64]

Unable to afford a lawyer, Lopez was assigned a court-appointed defense attorney. The attorney, John "Jack" R. Carter, was faced with a daunting case before him: Lopez had obviously broken the law, and the minimum sentence for his crime was six months in prison. Carter was

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[61] Ibid.

[62] Ibid.

[63] *United States v. Lopez,* 2 F.3d 1342, 1345 (5th Cir. 1993).

[64] Power, "High Court," "What Lopez did has been a felony under Texas law since at least 1974." See Tex. Penal Code SS 46.04(a) (whoever "with a firearm . . . goes . . . on the premises of a school or an educational institution, whether public or private . . . .), SS 46.04(c) (third degree felony), *United States v. Lopez,* 2 F.3d 1342, 1345 (5th Cir. 1993), footnote 1.

also well aware that others had been successfully convicted under the law. He decided to concede that his client had broken the law, but he also determined to fight the legality of the law itself.[65] Thus before the United States District Court of the Western District of Texas, Lopez's attorney entered a plea of "not guilty" and moved to dismiss the indictment. He argued that the Gun Free School Zones Act was "unconstitutional as it is beyond the power of Congress to legislate control over our public schools" and that the law "does not appear to have been enacted in furtherance of any of those enumerated powers" of the federal government.[66]

Adjudicating the case was U.S. District Court Judge Hipolito F. "Hippo" Garcia. Known as an easy-going jurist with a relaxed style, Garcia was the son of Mexican immigrants and a veteran of World War II. He attended law school after the war with help from the G.I. Bill and by working as a janitor. Garcia began his career as an assistant district attorney and was the first Hispanic in the modern era to be elected as a county court-at-law judge in 1964, furthermore, he was also the first Hispanic to be appointed to the federal bench in the Western District, when President Carter made that appointment in 1980.[67] Despite Judge Garcia's reputation in the media as being "laid-back," he was unmoved to dismiss the indictment on constitutional grounds. His court concluded that the law "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle, and high school . . . affects interstate commerce."[68] Lopez then waived his right to a trial before

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[65] Kevin Fedarko, Nina Burleigh, J.F.O. McAllister, and Andrea Sachs, "A Gun Ban is Shot Down," *Time Magazine*, May 8, 1995.
[66] *United States v. Lopez,* 2 F.3d 1342, 1345 (5th Cir. 1993) and U.S. District Court, Western District of Texas (San Antonio) Criminal Docket for Case #: 5:92-cr-00084-HGF-1.
[67] David McLemore, "Laid-Back Judge 'Hippo' Lightening His Workload," *Dallas Morning News,* Pg. 13A.
[68] *United States v. Lopez,* 2 F.3d 1342, 1345 (5th Cir. 1993) and U.S. District Court, Western District of Texas (San Antonio) Criminal Docket for Case #: 5:92-cr-00084-HGF-1.

a jury and was instead tried "to the bench upon stipulated evidence." The bench trial occurred on June 16, 1992, when Lopez was found guilty. The following day he was sentenced to six months of imprisonment followed by two years of probation and a fifty-dollar fine.[69]

In September 1993, Lopez appealed his case in the Fifth Circuit Court of Appeals in New Orleans, which handles all federal appeals from Texas, Louisiana and Mississippi. The Fifth Circuit panel that Lopez faced was composed of three judges: Thomas Morrow Reavley, Carolyn Dineen King, and William Lockhart Garwood. Judge Reavley was a World War II veteran who served in the Navy, having graduated from Harvard in 1948, he was the Texas' Secretary of State from 1955-57; in 1979, President Jimmy Carter nominated him to enter the federal judiciary on the Fifth Circuit. President Carter also nominated Judge Reavley's future bride, Judge King. King, a 1962 graduate of Yale and a private practitioner in Texas, joined the Fifth Circuit in 1979. Reflecting on her nomination she said, "Only in America would a Southern Baptist male Democrat President appoint a Yankee Catholic female Republican transactions lawyer to the federal appeals court for the South."[70] The third jurist on the panel was Judge Garwood, who graduated from the University of Texas in 1955 and clerked for the Fifth Circuit for a year after graduation. He had previously served for three years in the Judge Advocate General Corps in the Pentagon before entering private practice for twenty years. In 1979, he became the first Republican since reconstruction to serve on the Texas Supreme Court; subsequently, two years later, President Reagan appointed him to the Fifth Circuit Court of Appeals. In addition, Judge

[69] Ibid.

[70] "25th Annual Devitt Distinguished Service to Justice Award Recipient Carolyn Dineen King" *American Judicature Society* at http://www.ajs.org/ajs/awards/devitt/devitt-King.asp (accessed July 29, 2011). Judges Reavley and King were married in 2004 becoming "the first married couple ever to serve together on a federal appellate court. "Thomas Morrow Reavley" Tarleton Law Library at http://tarlton.law.utexas.edu/justices/spct/reavley.html (accessed July 29, 2011).

Garwood was a member of the Federalist Society for Law and Public Policy Studies, an organization founded in 1982 with the goal of reintroducing strict constructionist principles into the legal order.[71]

With a panel of three conservative judges during a period of time when federalism and its implications were frequently discussed, the circuit court overturned the conviction because Congress never proved that it had the authority to set school safety policies.[72] Judge Garwood wrote the opinion for the court and he pointed out that Lopez's challenge to the constitutionality of the Gun-Free School Zones Act of 1990 was the first that had been attempted in federal courts and instructed that the question was one of "first impression;" hence no precedent had been set on such a matter.[73] He continued, outlining the controversy by noting that the case pitted "the states' traditional authority over education and schooling against the [federal] government's acknowledged power to regulate firearms in or affecting commerce."[74] Garwood reviewed previously sustained federal Commerce Clause-based laws, noting how each law could be shown to have some "substantial" connection to commerce that was either obvious or could be traced to congressional findings on the matter. He acknowledged that defining "substantial" was certainly imprecise, and "generally renders decision making in this area peculiarly within the province of Congress rather than the Courts."[75] He continued, "the Supreme Court has consistently deferred to Congressional findings in this respect, both formal findings in the legislation itself and

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[71] "William Garwood [6411]," Texas State Cemetery. http://www.cemetery.state.tx.us/pub/user_form.asp?pers_id=6411 (accessed August 3, 2011). "Our Background," The Federalist Society. http://www.fed-soc.org/aboutus/page/our-background (accessed January 19, 2012).
[72] *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).
[73] Ibid., 1345.
[74] Ibid., 1346.
[75] Ibid., 1362.

findings that can be inferred from committee reports, testimony before Congress, or statutory terms expressly providing for some nexus to interstate commerce."[76] However, Garwood cautioned that although Congress was given great latitude in making laws based upon its commerce power, those powers are not unlimited; he supported his assertion with Marshall's ruling in *Gibbons v. Ogden*:

> The subject to which power is next applied, is to commerce 'among the several states'. . . . Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one…The enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is the be applied to all the external concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessarily to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."[77]

Garwood argued that the power of Congress power certainly had limits: "Indeed, it could not be otherwise as the chain of causation is virtually infinite, and hence there is no private activity, no matter how local the matter and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place."[78] It is therefore incumbent upon Congress to show the manner in which an activity or class of activities affects interstate commerce. "When Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer 'if there is any

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[76] Ibid., 1362.

[77] *Gibbons v. Ogden,* 9 Wheat. 194-95.

[78] *United States v. Lopez,* 2 F.3d 1362 (5th Cir. 1993).

rational basis' for the finding."[79] However, without findings, Garwood reasoned that courts cannot determine if Congress is acting with a rational basis. In a similar vein, Garwood argued that anytime Congress exceeds its power, it infringes on powers reserved to the states. The judge pointed out that the Tenth Amendment is, after all, "as much a part of the Bill of Rights as the First."[80] Thus, when Congress decides that it wishes to change the current balance of power between the states and the federal government, it must make its intentions known to the courts; otherwise, the courts may inadvertently change the balance that had thus far been based on the political system, rather than the judicial system.

Garwood rejected the two most significant arguments offered by the government. First, the prosecution asserted that the "business" of schools affects interstate commerce, and that a federal statue addressing drug offenses occurring within 1,000 feet of school, the schoolyard statute," has been found valid.[81] Second, the government claimed that since federal funds are used to support schools, the federal government is entitled to "protect its investment." In rebuttal to the first argument, the Court stated that the schoolyard statute had been legislated in response to extensive Congressional findings that connected drug trafficking to interstate commerce; apparently the Court was unwilling to concede that the mere possession of a weapon had a like impact without Congressional findings. In response to the second argument, Garwood retorted that Congress in no way tied the Gun Free School Zones Act to federal funding; therefore, the government could not make that claim. Garwood then asserted that following the historic responsibility of states and localities to educate their children, Congress could not make such impositions on local law. "If Congress can thus bar firearms possession because of such a nexus

[79] Ibid., 1363.
[80] Ibid., 1364.
[81] 21 U.S.C. Sec. 860.

to the grounds of any public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, "sneakers," Game Boys, or slide rules." The Court therefore ruled that the law was unsustainable and reversed the District Court's decision.[82]

While the Fifth Circuit Court issued its ruling on the Lopez case, the Ninth Circuit in San Francisco was considering the case of *U.S. v. Edwards III*,[83] another challenge to the Gun Free School Zones Act. On December 11, 1991, Ray Harold Edwards, III came under suspicion when he and four companions were standing outside Edward's car in the Grant Union High School parking lot in Sacramento, California. Detective Mike Lopez described the five males as being "dressed like gang members." After a short conversation, Edwards allowed Lopez to look into his trunk where the detective found a .22 rifle and a sawed-off bolt-action rifle. Edwards was charged with the unlawful possession of an unregistered sawed-off rifle under 26 U.S.C. Sec. 5861(d), and for unlawful possession of firearms in a school zone under the Gun Free School Zones Act.[84] Edwards argued that the Act was unconstitutional under the Tenth Amendment and that the law was overbroad.

The three-judge panel of the Ninth Circuit Court took an opposing view to the Fifth, however, and the Gun Free School Zones Act was found to be a legitimate exercise of Congressional authority.[85] The judges, nominees of Presidents Carter, Reagan, and George H.W. Bush, ruled that unlike the Fifth Circuit Court, a previous Ninth Circuit ruling, *United States v. Evans*, concerning the possession of an unregistered machine gun, governed them in their

[82] *United States v. Lopez*, 2 F.3d 1367-58 (5th Cir. 1993).
[83] *United States v. Edwards*, 13 F.3d 291 (9th Cir. 1993).
[84] 18 U.S.C. Sec. 922 (q)(1)(A).
[85] *United States v. Edwards*, 292.

decision.[86] The ruling stated, "In reaching our conclusion in this matter, we reiterate our holding from *Evans* that is it unnecessary for Congress to make express finding that a particular activity or class of activities affects interstate commerce in order to exercise its legislative authority pursuant to the Commerce Clause."[87] Additionally, the Court ruled, "Since Congress has frequently relied upon the Commerce Clause as authority for the enactment of statutes regulating the use and possession of firearms, Congress was not required to conduct additional hearings and make new findings which would merely repeat its prior findings concerning the detrimental effect of firearms."[88] Finally, the Court ruled that Edwards lacked sufficient standing to challenge the Act as unconstitutionally overbroad. Edwards argued that the law criminalized merely driving past a school on the way to a skeet shooting range with a gun in the trunk of a car. Since Edwards had purposely brought a gun to school, his case did not qualify him to challenge that aspect of the law.

The repercussions of the two cases were immediate. A host of interested parties demanded that the Supreme Court address the issue; among the interested parties were the Clinton Administration's Solicitor General's office and the bill's author, Senator Kohl.[89] On April 18, 1994 the Supreme Court issued an announcement that it had agreed to hear the case. Senator Kohl looked forward to the Supreme Court's review; in an interview with the *States News Service* on the day the Court made its announcement, Kohl said, "Lopez threatens a whole host of federal firearms and other crime statutes. Simply put, Lopez is a bad decision that goes against common sense and precedent. Every day, more than two hundred thousand kids carry

[86] *United States v. Evans,* 928 F.2d 858 (9th Cir. 1991).
[87] *United States v. Edwards,* 293.
[88] Ibid., 294.
[89] Karen J. Cohen, "High Court to Hear Kohl's Gun Case," *States News Service,* April 18, 1994.

firearms to school. Congress tried to do something about it, and I'm hopeful the Court will ensure our authority to legislate in this area."[90] By June, Kohl and twelve other senators, along with 34 U.S. representatives, filed a brief with the Supreme Court to uphold their law.[91] Just as Kohl foresaw a series of federal gun legislation falling in the wake of the Lopez decisions, others wondered how the ruling might affect other non-commercial federal laws. Environmental laws might certainly be affected since their intentions often had no obvious commercial connection.[92] The case was certainly looked forward to with great concern by both sides of the political aisle.

The case of *United States v. Lopez* was argued on Tuesday, November 8, 1994. Jack Carter argued the case yet again for Alfonso Lopez, while Drew S. Days, the Solicitor General of the United States, argued for the government. Solicitor General Days argued his case first and had hardly begun his brief before being interrupted by the justices querying him about the limits of Congress' commerce power. Justice O'Connor wanted to know if "simple possession of something at or near a school is commerce at all?" Days answered that it was and O'Connor responded, "If this is covered, what's left of enumerated powers?" Justice Scalia pressed him to find a boundary of where Congress' power ended. He asked, "What cases of ours would stand in the way of a stricter. . . Commerce Clause jurisprudence where the activity in question is not commercial activity." Days responded, ". . . . I think that what this court has operated upon as an initial assumption is that Congress was given the power under the Constitution to legislate directly upon private individuals, and that there are no built in limitations on the Constitution." Justice Ginsburg sought the line of demarcation in the area of criminal law, ". . . . do I

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[90] Ibid.
[91] Ibid.
[92] Michael Scott Feely and Lino J. Lauro, "Commerce Power Cases Could Limit Federal Environmental Regulatory Power," *Washington Legal Foundation,* January 20, 1995.

understand your position to be, your rationale for this—that all violent crime, if Congress so desired, could be placed under a Federal wing, could be placed in the Federal court for prosecution, all violent crime, or is there any stopping point?" Days answered that, as long as Congress had a rational basis for making the law, there was no limit. Justice Souter pursued yet another avenue, asking Days if it was true that the ineffective schools were a threat to America's commercial activity, then would it not be justifiable under the Commerce Clause to nationalize the schools and "provide a Federal public school education from kindergarten on up?" Days again could see no Constitutional limitation as long as a nexus to interstate commerce could be determined. Souter continued with his line of reasoning, suggesting that since another factor in the education of children was the stability of their families, then perhaps under Day's rubric, Congress could enact Federal domestic relations laws regarding marriage, divorce, etc. Days responded that Congress indeed dealt with matters such as missing children and interstate divorce, to which Justice Scalia whimsically pondered whether it had dealt with them constitutionally. Although it was not part of Solicitor General Days' argument, the justices finally reached the point of questioning whether the court system had the tools to define the limit, or whether the balance between state and federal power was simply a political question that could only be decided by the legislative process. Justice Kennedy summarized: "None of us at least can think of anything under our present case law, or at least under your argument, that Congress can't do if it chooses under the Commerce Clause, so if the Federal system must be preserved by someone, and the Commerce Clause is the means by which the Federal structure can be obliterated, and if we have no tools or analytic techniques to make these distinctions, then it follows that the Federal balance is remitted to the political judgment of Congress."

Jack Carter then presented his argument before the Court. Carter faced the task of arguing that the Gun-Free School Zones Act was an unconstitutional use of Congress' commerce power when sixty years of case law indicated that the Supreme Court was averse to questioning that power as long as Congress could show some rationale for their legislation—a thus far infinitely broad interpretation of the commerce power. Therefore, he argued his position very narrowly, not suggesting to the Court that its precedents were incorrectly determined or that its rational basis doctrine was too broad an interpretation. Instead, he followed the Court's rational basis test and posited that since Congress had not provided any findings to support the idea that the mere possession of a gun within 1,000 feet of a school had a negative relationship on commerce, then there was, in fact, no rational basis for making the law; therefore, Congress was acting outside of its authority and the law was unconstitutional. Carter's argument was precisely the conclusion that had been reached by the Fifth Circuit Court of Appeals, although he did not mention that fact in his argument. Justice Ginsburg inquired of Carter, "Does it make sense for us to say that the only flaw in this legislation is the one you're pushing, because it's so obviously easy to get up a set of findings? It would be diminishing the Constitution, I think, if you impose that kind of, almost school-ma'am requirement on Congress." Justice Scalia agreed. "Can we tell Congress how it must legislate? Where do we get the authority to say that?" Carter carefully skirted the fact that it was actually the Supreme Court who had come up with authority through its previous rulings; he stated, "It . . . . I wouldn't view it as . . . in quite the same sense as you do Justice Scalia. The requirement of findings ensures that Congress addresses problems that this Court has recognized. In the Bass case, the Court speaks of being sure that Congress has indeed addressed the problem and thought about the State-Federal balance."[93] Presaging the future

[93] *United States v. Bass*, 404 U.S. 336 (1971).

case of *Raich v. Gonzales,* Justice Stevens wondered if Carter would apply his theory to the possession of marijuana. Carter answered that Congress would indeed have the power to regulate marijuana possession in schools based upon both Congress' previous findings and the unlikelihood of distinguishing between marijuana that was grown within a state, within the country, or marijuana that was brought in from outside the country. Carter concluded his argument by emphasizing that laws made with only implied findings would allow any lines limiting Congress' Commerce Clause powers to vanish.[94]

It became evident that the oral argument in the Lopez case could be reduced to the justices searching for some limit to Congress' commerce power. Solicitor General Days argued that because Congress has power over commerce and that everything can be found to have a connection to commerce if rationalized enough, then the Gun-Free School Zones Act was constitutional. Jack Carter merely wanted to keep his client out of jail, for this reason, he did not argue for or expect the justices to overturn any of their previous rulings. He did not argue that federal laws prohibiting selling or even discharging a gun near a school was unconstitutional, and he did not argue that federal law prohibiting mere possession of marijuana near a school was unconstitutional. He only suggested that a law proscribing possession of a gun near a school was unconstitutional because at the time it was written, Congress had made no findings showing that a rational basis existed for making the law.

The Court did not seem satisfied with either argument. Regarding Days' view of Congress' plenary commerce powers, Justice O'Connor wondered, "If this is covered, what's left of enumerated powers?" Justice Souter agreed, "Presumably there is nothing left if Congress can

[94] *United States v. Lopez,* the Oyez Project at IIT Chicago-Kent College of Law. http://www.oyez.org/cases/1990-1999/1994/1994_93_1260 (accessed January 15, 2012).

do this, no recognizable limit." Likewise, Carter's argument about findings seemed less than persuasive to the Court since as Justice Ginsburg suggested, findings could be readily produced; also, as several justices noted, the argument held little sway because the Supreme Court had no Constitutional authority to tell Congress how to legislate in the first place. Confined as they were by their previous "generous" decisions, as Justice Scalia called them, the Court was left to make its decision about how to handle the case.

On April 26, 1995, the Court rendered its decision on the Lopez case. The Court ruled five to four sustaining the judgment of the Fifth Circuit Court of Appeals, thus ruling that the Gun-Free School Zones Act was an unconstitutional use of Congress' commerce power. Voting with the majority were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Voting in the minority were Justices Breyer, Ginsburg, Souter, and Stevens. Chief Justice Rehnquist filed the Court's opinion while Justice Kennedy filed a concurring opinion joined by Justice O'Connor. Justice Thomas filed a separate concurring opinion. The four dissenting justices filed a dissent; in addition, Justices Stevens and Souter filed their own separate dissents as well.

The Chief Justice began his opinion with a discussion of previous Commerce Clause case law. He noted that in the century after the *Gibbons v. Ogden* ruling, "the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce."[95] He added, under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining," were within the province of state

[95] *United States v. Lopez,* 514 U.S. 549, 553.

governments, and thus beyond the power of Congress under the Commerce Clause."[96] However, after Congress enacted the Interstate Commerce Act (1887) and the Sherman Antitrust Act (1890), the Court began to rule over aspects of commerce that were so mingled "that full regulation of interstate commerce required incidental regulation of intrastate commerce."[97] He further noted that the 1935 case of *A.L.A. Schechter Poultry Corp. v. United States,* in which the Court overturned the National Industrial Recovery Act, established the doctrine that Congress could only legislate activities that had a "direct" effect on commerce but that the watershed case of *NLRB v. Jones & Laughlin Steel Corporation* two years later blurred the distinction between direct and indirect affects speaking instead to activities that have a "close and substantial relation to interstate commerce."[98] *Wickard v. Filburn* erased the distinction entirely and replaced it with activities that exert "a substantial *economic* effect on interstate commerce"[99] [emphasis added]. Rehnquist added that since that time, the Court has "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."[100]

Rehnquist identified three broad categories of activities that are within Congress' commerce power to regulate. First are the *channels* of interstate commerce, such as roads, rivers, railroads, etc. Second are the instrumentalities of interstate commerce, including persons and things. Finally, it is within Congress' power to regulate those activities having a *substantial relation* to

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[96] Ibid.
[97] Ibid., 554.
[98] *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).
[99] *Wickard v. Filburn,* 317 U.S., 111, 128-29 (1942).
[100] *Lopez,* 557.

interstate commerce, "i.e., those activities that substantially affect interstate commerce."[101] Rehnquist admitted that the Court's past decisions were unclear if an activity needed to "affect" or "substantially affect" interstate commerce to fall under Congress' power. According to the Chief Justice, "[w]e conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce."[102]

Drawing on key decisions of the Court dating back decades, *United States v. Lopez* clarified substantially the scope of the "substantial relations test" – holding that the only intrastate activity within the scope of this rule was *economic* activity. Chief Justice Rehnquist first determined that bringing a pistol within 1,000 feet of a school was activity that did not fall under either the first or second broad broach categories of interstate commerce jurisprudence, that is, channels or instrumentalities of commerce. If the Court was to sustain the operative section of the Gun Free School Zones Act, that is, § 922(q), it would have to be "under the third category as a regulation of an activity that substantially affects interstate commerce." The Court pointed out that it had upheld a wide variety of congressional acts regulating intrastate economic activity because the regulated activity was found to have substantially affected interstate commerce." Prime examples, according to Chief Justice Rehnquist, were the regulation of surface coal mining, in *Hodel v. Virginia Surface Mining*; extortionate credit transactions, in *Perez v. United States*; purchase of restaurant supplies, in *Katzenbach v. McClung*; and catering to inns and hotels, in *Heart of Atlanta Motel v. United States.* But the regulation at hand could not be upheld as it had been in these cases:

[101] Ibid., 558-59.
[102] Ibid., 559.

> These examples are by no means exhaustive, but the pattern is clear. 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.[103]

According to Chief Justice Rehnquist, one of the prime purposes of the Agricultural Adjustment Act under review in *Wickard* had been to limit the volume of marketable wheat and, thereby, increase its market price. "Home-grown wheat in this sense competes with wheat in commerce."[104] Making the distinction between economic activity and non-economic activity – and relying also on the comprehensive regulatory scheme component of the substantial effects test developed in *Wrightwood Dairy*, *Wickard*, *Perez* and *Hodel v. Virginia Surface Mining* – Chief Justice Rehnquist explained why the Court could not uphold § 922(q) of the GFSZA:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[105]

Precedents dating to the New Deal established that commerce power could reach intrastate non-economic activity to prevent such from undercutting a comprehensive regulatory regime. But

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[103] Ibid.
[104] Ibid., 560, citing *Wickard*, 317 U. S. at 128.
[105] Ibid., 561. Jonathan H. Adler, "The Conflict of Visions in *NFIB v. Sebelius*," *Drake Law Review*, Vol. 62 937-980, 944-955 (2014).

since Section 922(q) was not so integrated, the provision could not stand under the authority of the Commerce Clause.[106]

Chief Justice Rehnquist also held § 922(q) invalid as a criminal statute because it contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question had a nexus with interstate commerce."[107] In plain terms, § 922(q) was bereft of any language tying the possession of a firearm in a school zone to interstate commerce, declaring only "[i]t shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[108] The Court referenced several of its decisions dating back to 1945 to declare that, under "our federal system," the states possess the primary authority for establishing the criminal law and enforcing it – unless Congress, within its delegated powers, seeks to create offenses against the United States.[109] The chief justice hastened to emphasize that the government acknowledged that § 922(q) displaced state policy determinations and that its proscriptions applied even in States that had not outlawed the possession of a firearm in a school zone. "Most egregiously," said Chief Justice Rehnquist, "section [922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress.[110] The chief justice pointed out that in *United States v. Bass* (1971), the Court had

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[106] See *Jones & Laughlin Steel Corp.*, 301 U. S. at 38 (1937); *United States* v. *Darby*, 312 U.S. at 118-119 (1941); *Wrightwood Dairy Co.*, 315 U. S. at 119 (1942).
[107] *Lopez*, 561.
[108] Gun-Free School Zones Act of 1990, 8 U. S. C. § 922(q)(I)(A), 104 Stat. 4844.
[109] *Brecht* v. *Abrahamson*, *507* U. S. 619,635 (1993), quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982); *Screws* v. *United States*, 325 U. S. 91, 109 (1945); *United States* v. *Enmons*, 410 U. S. 396, 411-412 (1973), quoting *United States* v. *Bass*, 404 U. S. 336, 349 (1971).
[110] *Lopez*, 561.

expressed the view that in the case of a federal statute criminalizing misconduct customarily within the jurisdiction of the state, the Court had required explicit statutory language tying the offenses to interstate commerce, such that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[111]

The Court also emphatically rejected the independent contention of the government that, notwithstanding a bare legislative record on § 922(q), it should uphold that section under the Commerce Clause because possession of a firearm in a school zone, in fact, substantially affected interstate commerce.[112] Solicitor General Drew S. Days argued that violent crime in a school zone could be expected to affect the functioning of the United States economy, citing the costs of handgun-related violent crime that were invariably shared by Americans through increased insurance premiums. As well, he maintained that violent crimes committed with handguns deterred individuals from traveling in locales supposed to be unsafe in this regard, which negatively impacted the economy of such areas. Last, the government argued that the simple presence of guns in schools posed a "substantial threat to the education process" and, as such, posed a threat to the learning environment and the productivity of the citizens of the country, which would have deleterious effects on its well-being.[113] The Court was certainly aware that the Violent Crime Control and Law Enforcement Act of 1994 had amended § 922(q) to include an interstate commerce jurisdictional element that recited an "in commerce" and "affecting commerce" nexus to the offense.[114] But, given the decision of the government not to rely formally on the revised version of § 922(q) or the legislative committee findings

[111] *Lopez*, 562, quoting *United States* v. *Bass*, 404 U. S. 336, 349 (1971).
[112] Ibid., 563.
[113] Ibid., 563-564.
[114] Ibid., 563, Note 4.

undergirding it, the Court took the opportunity to air out the problem with employing commerce power to uphold the provision in its original form:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[115]

Responding to Justice Breyer's dissent, the Chief Justice pointed out that if the government's argument is true that local criminal activity threatened education, thus later impacting the economy, then other factors that affect students could come to fall under federal control as well, such as family law and eventually direct regulation of education. Quoting Chief Justice Marshall in *Gibbons v. Ogden*, regarding Congress' enumerated powers, "The enumeration presupposes something not enumerated."[116] Rehnquist concluded by stating that, "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid air to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." Although some prior cases had indeed made great leaps in that direction, he said, "we decline here to proceed any further."[117]

The decision of the majority in *Lopez* suggests the new lines of battle between the Court and Congress over the extent to which the latter might deploy the Commerce Clause to advance its ever-widening agendas. The revision of § 922(q) made by Congress and President Clinton seven and a half months before the ruling in *Lopez* had conspicuously wielded House and Senate committee findings to support a judicial ruling that there was, in fact, a nexus between the

[115] Ibid., 564.
[116] Ibid., 566, *Gibbons v. Ogden*, 9 Wheat. 195.
[117] Ibid., 567.

possession of a gun in a school zone and interstate commerce – findings, however, pitched primarily to the "in commerce" basis for deploying commerce power.[118] The 1994 revision did not redefine the crime described originally in § 922(q).[119] But it did insert a lengthy preliminary paragraph to the GFSZA holding that "[t]he Congress finds and declares that. . . crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem" which "at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs" and that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate . . . ." The new section went on to declare that "in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce . . . ."[120] The revisers certainly attempted to hedge their bets, including in the new introductory paragraph declarations, sans committee findings, that gun possession in a school zone adversely affected the "quality of education in the country" and, consequently, interstate commerce.[121] According to the majority in *Lopez*, however, the unrevised section of the GFSZA at issue could certainly not be upheld under the Commerce Clause as a non-criminal regulation of interstate commerce. Chief Justice Rehnquist could not have been more succinct or emphatic on the latter point:

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[118] Gun Free School Zones Act of 1996, 104 Stat. 4844, Pub. L. 101-647, approved November 29, 1990.
[119] 18 USC, § 922(q); §1702, Gun Free School Zones Act of 1996, 104 Stat. 4844, Pub. L. 101-647, approved November 29, 1990.
[120] Sec. 320904, (2)(1) (A-D), Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 2125-2126, approved September 13, 1994.
[121] Ibid., (E-G).

> § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.[122]

Justice Kennedy's concurrence, joined by Justice O'Connor, noted that the state-centered economic system the Founders knew had changed dramatically into a "single national market still emergent in our own era."[123] He concurred, but not wholeheartedly with the majority opinion. While admiring the federal system in which general and state governments competed with one another to ensure the liberty of the individual, he admitted difficulty in finding the line that separated national from state power. Based upon his reading of *The Federalist Papers*, he observed, "the balance between national and state power is entrusted in its entirety to the political process."[124] Indeed, Kennedy had made the same point during the oral arguments of Solicitor General Days. Kennedy also reasoned that a change in the political line of demarcation between federal and state responsibility required a notification that such a change was occurring. It was therefore incumbent upon Congress, in this instance of non-commercial activity, to make its intention clear. Since Congress had not done that, Justice Kennedy, joined by Justice O'Connor, sided with the majority.

According to Justice Kennedy

> Were the federal government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and
> State authority would blur and political responsibility would become illusory.[125]

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[122] *Lopez*, 559.
[123] Ibid., 568.
[124] Ibid., 577.
[125] Ibid.

If Justices Kennedy and O'Connor were agreeable to the majority's "necessary though limited holding" (as Kennedy described it), Justice Thomas was not only ready to throw out the Gun-Free School Zones act, but he was also prepared to overhaul much of the Court's Commerce Clause jurisprudence, given a proper case with which to adjudicate. Justice Thomas joined with the majority but wrote separately "to observe that our case law has drifted far from the original understanding of the Commerce Clause."[126] Echoing arguments from originalists such as Richard Epstein and others, Justice Thomas noted that at the time of its ratification, the term "commerce" consisted of selling, buying, and bartering only, activities distinct from agriculture and mining. Addressing the Court's "substantial effects" formula, Thomas noted, "I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test."[127] If the "substantial effects" test was legitimate, argued Thomas, then there would be no need to enumerate Congress' powers since all of those powers "substantially affect" commerce.[128] Thomas' point seems valid, considering that the other enumerated powers include such activities as coining money, making bankruptcy laws, and providing for punishments for counterfeiting U.S. currency. Even punishing piracy and raising armies substantially affect interstate commerce, argued Thomas, and yet each of these powers are specifically authorized to Congress.

Justice Stevens answered both the majority and the originalist position as well in his dissent. "Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity . . . . Whether or not the national interest in eliminating [the firearm] market would have justified federal

[126] Ibid., 584.
[127] Ibid., 596.
[128] U.S. Const. Article I, Sec. 8

legislation in 1789, it surely does today."[129] Justice Souter's dissent also evaluated prior history when he likened the Court's opinion to a return to a previous doctrine when the Court was at odds with both New Deal legislation and the popular will. He feared that the distinction the majority made between what is patently commercial and what is not was a very similar test to the pre-1937 test that analyzed direct and indirect affects, and that test was discarded in *NLRB v. Jones & Laughlin Steel Corp.* Souter suggested, "Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisdiction from which the Court extricated itself almost 60 years ago."

However, Justice Breyer submitted the most extensive dissent, including an appendix exceeding 150 scholarly articles and reports. Discounting the originalist viewpoint of original understanding, Breyer began his dissent, "In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century."[130] Breyer applied three basic principles to reach his conclusion. First, he argued, terms like "direct," "indirect," and "substantial," have no precision, and the test for constitutional authority should be whether an activity's effects on commerce are "significant." Second, to determine if an activity is likely to have significant effects on interstate commerce, the activities of an individual must be considered in light of the cumulative effects of all similar instances of the activity; thus, if students around the nation bring guns to schools, the effects on interstate commerce could become significant. Third, Congress should be given broad leeway in determining the commercial nexus of its laws. Congress is far better equipped than the Court to determine the relationship between a law and commerce because it has the resources to conduct

[129] *Lopez*, 602-603.
[130] Ibid., 615.

empirical studies to create findings on the activities under review. Understanding that the Fifth Circuit and the majority on the Supreme Court overturned the law because Congress had presented no findings, Breyer endeavored to present his own evidence that guns in schools have a significant effect on interstate commerce. Breyer's dissent includes a litany of studies that indicated that, among other things, businesses tend to avoid localities with poor quality, violent schools; that, for Americans to be competitive in the worldwide economy, they must have sound educations.[131] Breyer further commented, contrary to the majority's conclusion, that the Court had upheld previous laws with less impact on interstate commerce than school violence. Laws against local loan sharking, racial discrimination, and growing wheat for purely personal use all have, arguably, lesser effects on interstate commerce than does education, and yet those laws were upheld.[132] Additionally, Breyer admonished the majority for including only purely commercial activities in its definition of activities that affect commerce quoting from *Wickard*, that though Filburn's wheat wasn't commerce, it could be regulated so long as "it exerts a substantial economic effect on interstate commerce."[133] Finally, Breyer warned that the majority judgment would result in legal uncertainty since it seemed that the Court's view of Congress' commerce authority had been well-settled with over 100 sections of the United States Code, including at least 25 sections of criminal statutes, all justified by the use of the words "affecting commerce."

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[131] Ibid., 618-25.

[132] *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964) and *Heart of Atlanta Motel v. United States* 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

[133] Ibid., 125, quoted in *Lopez*, 628.

The emotion-fraught political impact of *United States v. Lopez* was immediate. Senator Kohl took the Senate floor to lambast the ruling, "If today's decision is broadly interpreted, the reasoning of the majority could have far-reaching consequences that may undermine a variety of crucial federal laws; the Drug-Free School Zones Act, on which the Gun-Free School Zones law was based, the ban on cop-killer bullets, our federal wetlands laws; and many of our civil rights statutes."[134] However, no one was sure quite how to interpret the verdict. Did it signal the Court's return to a pre-1937 jurisprudence or was it simply an anomaly? Had the Court only established the outer reaches of the regulatory state or was it signaling a rollback of federal authority?[135] Perhaps the ruling was a message to Congress that federal judges were overburdened with seeing defendants who should be prosecuted in state courts.[136] Many agreed that the effects of the ruling would be negligible in a practical sense. "More than 40 states have similar legislation on the books. The others should quickly follow suit," stated a Washington Post editorial.[137] Still, the impact of the ruling on other laws and the direction the Court was taking was yet to be determined.

President Clinton made his views known in his April 29th weekly radio address. As a backer of the Brady Act and the Assault Weapons Ban, he declared, "We all know guns simply don't belong in school." He went on to say that he had asked his Attorney General, Janet Reno, to produce for him "what action I can take to keep guns away from schools. I want the action to be

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[134] Karen J. Cohen, "High Court Rejects Kohl's Gun-Free School Zone Law," *Wisconsin State Journal,* April 27, 1995.
[135] W. John Moore, "A Landmark Decision? Maybe Not," *The National Journal,* Vol. 27, No. 18 (May 6, 1995), 1131.
[136] Patricia Manson, "School Gun Case is Legal Shot Heard Round U.S.," *Arkansas Democrat-Gazette,* October 23, 1995, 1B.
[137] John P. Greenspan, "The Constitution, Schools, Gun Laws," *The Washington Post,* May 17, 1995.

constitutional, but I am determined to keep guns away from schools."[138] Indeed, the previous year, in response to the Fifth Circuit Court's decision, Clinton had proposed the "Gun-Free Schools Act" to require local school boards to adopt policies forcing schools to expel for one year any student who brought a firearm to school. Any school that did not comply with the act would be ineligible for federal funding.[139] Clinton countered conservative arguments about local control of schools by citing a Center for Disease Control and Prevention Youth Risk Behavior Surveillance Survey that indicated widespread violence in schools as well as an increase in students carrying weapons or being the victims of weapons on school property. His administration also used the example of the San Diego school system, which had implemented a one-year expulsion for school gun possession. In the 1992-93 school year there were 355 assaults with weapons; after the gun ban took effect in 1993-94, there were only 230.

President Clinton stated that the problem of school violence was a "national crisis" requiring "a national effort to fight it."[140] On May 10, 1995, the president made clear that he was prepared to begin the legislative battle to resurrect the overturned law. In a message to Congress proposing a further amendment to the GFSZA he wrote, "[This] legislative proposal would amend the Gun-Free School Zones Act by adding the requirement that the government prove that the firearm has 'moved in or the possession of such firearm otherwise affects interstate or foreign commerce.'"[141] Within two weeks, Senator Kohl had a new bill prepared for Senate approval;

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[138] Al Kamen, "Clinton Says Gun Ruling Is a Threat; President Will Seek to Renew Ban on Schoolyard Firearms," *The Washington Post*, April 30, 1995.
[139] Ibid.
[140] Ibid.
[141] William J. Clinton, "Message to the Congress Transmitting Proposed Legislation to Amend the Gun-Free School Zones Act of 1990," Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=51344 (accessed January 3, 2012).

Senator Arlen Specter (R-PA) cosponsored the bill, thus making it a bipartisan effort. In September the modified bill was rolled into HR 3756, an unrelated Omnibus Appropriations bill for fiscal year 1997.[142]

President Clinton and Congress, which the Republican Party controlled for the first time since fall 1954, pushed through an omnibus bill that revised the GFSZA in keeping with the preferences of at least the president. The revision of §922(q), approved on September 30, 1996, set out, verbatim, all the findings and declarations featured in the 1994 revision purporting to show a nexus between possessing a gun in a school zone and interstate commerce, again, with an emphasis on the interstate movement or "in commerce" rationale.[143] Equally important, the revision included a redefinition of the offense in keeping with the 1994 congressional findings and the arguments made by the government in *Lopez*:

> It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone.[144]

If the reports of the federal circuit courts can be any guide, enforcement of the revised GFSZA appears to have, largely, given federal authorities an enhanced means to arrest and prosecute urban criminals involved in drug trafficking, other criminal enterprises, or violent crimes of any kind if committed near a school. The statute effectively established across each urban grid a relatively even constellation of enforcement radii, each over a third of a mile wide,

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[142] "How They Voted?" *Telegraph Herald* (Dubuque, Iowa), September 15, 1996, C15.
[143] Sec. 320904, Gun-Free School Zones, Title 32-Miscellaneous, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 2125-2126.
[144] § 922(q)(2)(A), Title 18 U.S.C., per Sec. 657, Title VII-General Provisions, An Act Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1997, and for other purposes, Pub. L. 104-208, 110 Stat. 3009, 3009-369-371, approved September 30, 1996.

in which to ensnare offenders usually unaware that they were in a federally-created gun-free school zone and who did not intend to target public schools or their occupants. For example, in the 2007 First Circuit Court of Appeals decision reviewing a conviction under the GFSZA *United States v Nieves-Castaño*, a federal district court found Belen Nieves-Castaño guilty of keeping a firearm in a public housing project apartment, which happened to be situated within a 2,000-foot school zone radii.[145] Opponents of the GFSZA appear to have been far more concerned with staving off federal encroachments on state and local lawmaking prerogatives and Second Amendment rights than with undercutting the authority of federal officials to prosecute urban criminals. The GFSZA made an exception for persons licensed by a state to carry a firearm. But those who did so in "open carry" states could inadvertently cross into a gun-free zone while, simply, driving along major thoroughfares near a school and then face prosecution.[146] Perennial Libertarian Party candidate for president and United States Representative of Texas Ron Paul introduced bills in May 2007, June 2009, and July 2011 to repeal the GFSZA. But such initiatives invariably died in committee.[147]

In the two decades following the 1996 revision of § 922(q), lower federal courts, at least, seemed satisfied with the Gun-Free School Zones Act. After *Lopez* and to the publication of this study, two federal circuit courts of appeal decisions upheld convictions under revised § 922(q) of

[145] *United States v. Nieves-Castaño*, 480 F.3d 597 (1st Circuit 2007).
[146] § 922(q)(2)(B)(ii), 18 U.S.C.; Sec. 657, Pub. L. 104-208, 110 Stat. 3009-369, approved September 30, 1996; Joan Barron, "Wyoming Gun Owners Could Violate Federal Law," *Caspar Star-Tribune*, July 11, 2011.
[147] H.R. 2424, Citizens Protection Act of 2007, House Judiciary Committee, June 25, 2007, 110th Congress, 2007-2008; H.R. 3021, Citizens Protection Act of 2009, House Judiciary Committee, June 24, 2009, 111th Congress, 2009-2010; H.R. 2613, Citizens Protection Act of 2011, House Judiciary Committee, August 25, 2011, 112th Congress, 2011-2012. See Ron Paul, *The Revolution at Ten Years* (Clute, TX: Ron Paul Institute, 2017), 83-93.

the Gun Free School Zones Act and, in doing so, addressed challenges to the constitutionality of the provision under the Commerce Clause. In one of these two cases, *United States v. Danks,* the United States Supreme Court declined to review the decision of the Eighth Circuit, while the appellant in the other decision, *United States v. Dorsey*, rendered in the Ninth Circuit, did not seek review in the Supreme Court.[148] Four other circuit court decisions upheld convictions under the GFSZA in the period 1996-2017 but did not deal with GFSZA Commerce Clause issues.[149] Three other circuit court decisions overturned convictions under the act in the period but also did not deal with such issues.[150]

One might surmise, at first blush, that the refusal of the United States Supreme Court to review the decision of the Eighth Circuit Court of Appeal in *United States v. Danks* (2000) signaled an acknowledgment by the Court that its Commerce Clause holdings in *Lopez* were a lost cause. In fact, the Eighth Circuit Court followed these holdings, presenting the Supreme Court no compelling reason to review the decision. In *United States v. Danks*, defendant Jordan Danks of Minot, North Dakota, was charged with shooting a car parked within 1,000 feet of a school in April 1998. He argued that amended § 922(q) was still unconstitutional because "the mere insertion of a 'commerce nexus' does not cure the original Act's defect." Danks' challenge failed in the North Dakota District Court and the Eighth Circuit Court of Appeals. With a per

[148] *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999) cert. denied, 528 U.S. 1091 (2000); *United States v. Dorsey,* 418 F.3d 1038 (*2005,* 9th Cir.).

[149] *United States v. Weekes* (Third Circuit 2007), No. 06-2082, decided May 23, 2007; *United States v. Benally* (Tenth Circuit 2007), No. 06-2277, decided May 24, 2007; *United States v. Cruz-Rodriguez*, 541 F.3d 19 (1st Cir. P.R., 2008), cert. denied, 129 S. Ct. 1017; *United States v. Nieves-Castaño*, 480 F.3d 597 (1st Circuit 2007).

[150] *United States v. Tait,* 202 F. 3d 1320 (11th Circuit 2000); *United States v. Haywood* (Third Circuit 2002), No. 01-4086, decided: April 8, 2004; *United States v. Guzman-Montanez* (First Circuit 2014), No. 13–107, decided: June 13, 2014.

curium opinion, judges of the Eighth Circuit Theodore McMillan and Richard S. Arnold, both Carter appointees, and David R. Hansen, a George H.W. Bush appointee, upheld the conviction of Danks under revised § 922(q). The circuit court noted that the Supreme Court in *Lopez* had struck down the 1990 provision because it lacked a "jurisdictional element" that would ensure, "through case-by-case inquiry," that the firearm possession under review had a "requisite nexus with interstate commerce."[151] But the circuit court hastened to point out that the subsequent 1996 revision of the provision had provided exactly what the Supreme Court had required.[152] In making the requisite case-by-case inquiry and declaring that § 922(q) was "a constitutional exercise of Congress's Commerce Clause power," the circuit court was careful to find that the district court had determined that "the firearm had moved in interstate commerce."[153] Consequently, the circuit court did not hold that a federal criminal statute based on commerce power reached possession of a gun in school zone because such possession had affected or substantially affected interstate commerce.

In *United States v. Dorsey* (2005), Nikos Delano Dorsey of Anchorage, Alaska, was convicted of possession of cocaine base with intent to distribute, possession of a firearm in relation to a drug trafficking offense, and possession of a firearm in a school zone on September 3, 2003. Before Dorsey pleaded guilty, the district court had rejected his motion to dismiss the charge under 922(q) of the GFSZA because the statute exceeded the scope of Commerce Clause power. Deciding the case on appeal in the Ninth Circuit was judge William C. Canby, Jr., a Carter appointee, and judges Richard C. Tallman and Johnnie B. Rawlinson, both Clinton

[151] *Lopez*, 561-562, the Court discussing and quoting from *United States* v. *Bass*, 404 U. S. 336 (1971) at 347.
[152] *Danks*, 1037, quoting *Lopez* at 514 U.S. 561.
[153] Ibid.

appointees. In response to the §922(q) challenge, the circuit court pointed to that part of the opinion by Chief Justice Rehnquist in *Lopez* that had relied on the 1971 decision of the Supreme Court in *United States v. Bass*; that decision had reviewed the controversial federal offense of gun possession by a convicted felon, set out in the 1968 Omnibus Crime Control and Safe Streets Act and, therein, declared to be based on commerce power. Indeed, the chief justice had drawn on the basic Commerce Clause rationale in *Bass* to conclude in *Lopez* that, with the inclusion of a "jurisdictional element" in §922(q), a court might uphold the provision or not for the purposes of conviction or acquittal – but would be required to make a case-by-case inquiry as to whether, in the case at bar, there was a nexus between gun possession in a school zone and interstate commerce.[154] The Ninth Circuit readily acknowledged that Congress had revised §922(q) in keeping with the holdings of Chief Justice Rehnquist in *Lopez* – and seemed to accept, at least provisionally, the requirements set out in *Bass*. But the circuit court upheld §922(q) and affirmed the conviction of Dorsey without making an inquiry to determine if the district court had established a nexus between his gun possession in a school zone and interstate commerce. In justification of this omission, the Ninth Circuit relied on the 1977 decision of the Supreme Court *Scarborough v. United States*, which held that, in a prosecution for possession of a gun by a felon, under the same statute at issue in *Bass*, "the required nexus could be proven by demonstrating that the firearm had previously traveled in interstate commerce. . . [and] the nexus did not need to be contemporaneous with the offense."[155]

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[154] § 1202(a)(1), Omnibus Crime Control and Safe Streets Act, Pub. L. 90–351, 82 Stat. 197, enacted June 19, 1968; *United States v. Dorsey*, 418 F.3d 1038 (*2005*, 9th Cir.), Part III, Paragraph 3, quoting from *United States v. Lopez*, 514 U.S. 549, 561 (1995) and *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

[155] *Dorsey*, Part III, Paragraph 3, discussing and quoting from *United States v. Bass*, 404 U.S. 349-50 and *Scarborough v. United States*, 431 U.S. 563, 575-77 (1977).

Because the Supreme Court had no opportunity to review *Dorsey* (2005), which misconstrued *Lopez*, the latter Supreme Court decision remained the paramount authority on the constitutionality of federal criminal statutes legislatively based on the Commerce Clause. The Ninth Circuit concluded that *Scarborough* had provided "clarification" for the Commerce Clause rationale set out in *Bass.* But it unaccountably read *Scarborough* as authority largely to dispense with the independent case-by-case inquiry mandated in *Bass* and *Lopez* – in lieu of what appears to have been an ad hoc *de minimis* presumption that all guns, at some point in time, had travelled in interstate commerce. The circuit court affirmed the conviction of Dorsey, who did not seek a writ of certiorari from the Supreme Court. But, as in *Danks*, the Ninth Circuit in *Dorsey* did not decide that commerce power upheld §922(q) of the GFSZA because gun possession in a school zone affected or substantially affected interstate commerce.

To some commentators, *Lopez* seemed to have little impact in the field of federal environmental law or on federal laws affecting endangered species grounded in commerce power. Olin Corporation, which operated numerous chemical manufacturing facilities, was prosecuted and found guilty under the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of disposing chemicals at its plant in McIntosh, Alabama, and required to clean up its property. The district court in *Olin* asked both parties to address the question of how *Lopez* applied to the case at hand. The district court subsequently determined that, with the passage of CERCLA, Congress was operating outside of its authority because the unregulated chemical dumping was strictly local activity. Eleventh Circuit Court Judges Robert Lanier Anderson, Phyllis A. Kravitch, and Albert John Henderson, all Carter appointees, however, reversed the decision of the district court and, in so doing, upheld

CERCLA against the Commerce Clause challenge made by Olin. [156] The appeals court concluded that *Lopez* had not changed the substantial effects test, and, thus, it ruled that the unregulated chemical storage at Olin's McIntosh site substantially affected interstate commerce by providing an economic disadvantage to plant operators who obeyed the law and to surrounding landowners whose commercial endeavors could possibly be adversely affected by the hazardous chemical waste stored at the Olin plant.[157]

The declaration of the Eleventh Circuit in *Olin,* that *Lopez* did not change the substantial effects test, while true on its face, appears to have been based on several questionable conclusions about the decision and prior ones made by the court. The circuit court in *Olin* read *Lopez* to say that the majority in that decision had ratified without much qualification the open-ended declaration of plenary power under the commerce clause found in decisions such as *Jones & Laughlin Steel* and *Wickard v. Filburn.*[158] Equally problematic, the Ninth Circuit in *Olin* concluded that a majority in *Lopez* had held the substantial effects test turned "not upon the qualities of the regulated activity, but rather the degree to which that activity affects interstate commerce." The problem is that the majority in *Lopez* made no such holding. And the relevant discussion in *Olin* omitted entirely to address the critical passages in *Lopez* authored by Chief Justice Rehnquist clarifying the substantial effects test and limiting commerce power, under that rationale, to intrastate commerce or, at the most, intrastate economic activity, except if necessary to give effect to a comprehensive regulatory scheme.[159]

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[156] 107 F.3d 1506 (11th Cir. 1997)
[157] *United States v. Olin Corp*., 927 F. Supp. *1506* (SD. Ala. 1996), revd *107 F.3d 1506* (*11th Cir. 1997*).
[158] Ibid., Part III, Paragraph 9; *Lopez,* 557, quoting *Wickard* v. *Filburn,* 317 U.S. at 128-129.
[159] *Olin Corp*, Part III, Paragraph 7.

Environmentalist Lydia B. Hoover, writing in 1997, was not convinced that the decision of the Eleventh Circuit in *Olin* had taken any meaningful steps toward undercutting the potential the holdings in *Lopez* had to overturn CERCLA. Hoover wrote as an advocate, arguing, instead, that the more restrictive Rehnquist Court understanding of the substantial effects doctrine continued to threaten the legislation – at least so far as Commerce Clause challenges might undercut federal authority under CERCLA to respond to the release of or threatened releases of hazardous substances potentially dangerous to public health or the environment and institute law suits to recover damages from violators. In her estimation, the broader substantial effects set out in *Olin* was much preferable to that established in *Lopez*. Local and state governments, in her view, were not sufficiently informed or prepared to deal with such problems on their own, and the Supreme Court needed to return to a broader view of interstate commerce to ensure the viability of the CERCLA and federal environmental protection.[160]

Olin declined to appeal the 1997 decision of the Ninth Circuit Court in *United States v. Olin Corp.* But it seems worth pointing out that, had the Supreme Court reviewed that decision, it might well have come to the same result as did the Ninth Circuit – but by employing the substantial effects test, in fact, articulated in *Lopez*. First, adoption of CERCLA was based on extensive evidence compiled by the Senate Committee on Environment and Public Works purporting to show "a nexus between all forms of improper waste disposal and interstate commerce." According to the collected reports, these included "the growth of the chemical industry and the concomitant costs of handling its waste" and "agricultural losses from chemical

[160] Lydia B. Hoover, "The Commerce Clause, Federalism and Environmentalism: At Odds After Olin?" *William & Mary Environmental Law and Policy Review*, Vol. 21, no. 3 (1997): 735-777. See the Comprehensive Environmental Response Compensation and Liability Act. Pub. L. 96-510, 94 Stat. 2767, 42 U.S.C. §§9601-9675 (1994 & Supp. I 1995); *United States v. Olin Corp.* 107 F.3d 1506 (11th Cir. 1997).

contamination in six states at $283 million" and "commercial damages resulting from unregulated waste management . . . [and] "from accidents associated with purely intrastate, on-site disposal activities, such as improper waste storage in tanks, lagoons and chemical plants."[161] Given these findings, and that Congress formally acknowledged them, it seems unlikely that the Supreme Court might have found no "rational basis" for the remediation mandates of the CERCLA, even if the Court found some of the findings less than persuasive. As well, CERCLA established a comprehensive regulatory regime. And, under the Court's prior holding in *Perez*, once Congress established "a class of activities" to be regulated under its commerce power, the Court had "no power 'to excise, as trivial, individual instances' of the class."[162] As well, the unregulated storage of mercury- and chlorine-based commercial chemicals, as an integral, indispensable feature of production at Olin's chemical plant at McIntosh, Alabama, certainly was "economic activity," at least if one accepts standard definitions of the adjective "economic" – "relating to, or based on the production . . . of goods" or "having practical or industrial significance or uses" or "affecting material resources."[163]

The Lopez ruling created considerable disquiet among liberal members of the legal community who favored centralization of power and no little jubilation among conservative legal thinkers. Writing in 1995 about *Lopez*, Steven G. Calabresi maintained that "the Supreme Court's recent decision in *United States v. Lopez* marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers."[164] The

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[161] *United States v. Olin Corp.*, 107 F.3d 1506, Part III (A) (12) (11th Cir. 1997).
[162] *Perez v. United States*, 402 U.S. 146 (1971).
[163] *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Springfield, Mass.: Merriam-Webster, Inc., 2001), 230, 365.
[164] Steven G. Calabresi, "A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez," *Michigan Law Review*, Vol. 94, (1995), 752, proclaimed that

following year, Raoul Berger, concluded that *Lopez* afforded "an inducement to rethink the [Commerce] Clause, to abandon the conflicting efforts to 'give' it meaning, and to inquire rather into what the Framers meant by the words they employed."[165] The decision would, in the coming decade and a half, spawn numerous challenges to the Supreme Court's newly defined boundary between state and federal power. But, in the view of some conservative jurists, at that point, *Lopez* had not inspired the constitutional counterrevolution for which they had hoped and which liberals had feared. To some disappointed conservatives, *Lopez* now seemed to have made a very narrow ruling giving favor to states in the regulation of gun possession. In the view of Richard A. Epstein, writing in 2014, the holding of the Court in *Lopez*, unfortunately, had ratified the most expansive Commerce Clause interpretation to date – that set out in *Wickard v. Filburn* (1942). According to Epstein, the unexplained employment by Chief Justice Rehnquist of the *Wickard* "substantial effects" test in *Lopez* provided no guidance for future application of the rule.[166]

Much of the public reaction to *Lopez* has omitted to identify or discuss with sufficient precision or appreciation the doctrinal breakthrough worked by the majority in *Lopez.* As discussed, there is ample reason to discount the various global assertions made by individual Supreme Court judges and commentators dating back to 1937 that the substantial effects rationale could extended commerce power to any kind of intrastate activity, "whatever its nature." David Klein and Neal Devins remind us that "[t]he distinction between holding and dictum reflects fundamental norms of American law." In support of this well-known proposition, they allude to a seminal assertion made by Karl Llewellyn: A "court can decide nothing but the

[165] Berger, "Judicial Manipulation," 696.
[166] Epstein, *The Classical Liberal Constitution,* 184.

legal dispute before it. . . . Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court."[167] This proposition, in theory, at least, is central to the tradition of judicial minimalism declared by the United States Supreme Court.[168] Holdings are to be obeyed, dicta have no binding judicial power. According to Klein and Devins, the practice of treating dictum as holding, however, has played a substantial role in the making of "sudden and sweeping changes in doctrine."[169] No better case in point can be found than the 1942 declaration of Justice Robert H. Jackson in *Wickard v. Filburn*: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[170] In *Wickard*, the Court invoked *Darby Lumber* and *Wrightwood Dairy* to declare, once again, the broad, "plenary power" of the Commerce Clause.[171] Yet *Wickard* interpreted only a section of the Agricultural Adjustment Act of 1938. The growing of wheat for home consumption under the act was, indisputably, economic in nature.[172] But to declare that all

[167] David Klein & Neal Devins, "Dicta, Schmicta: Theory Versus practice in Lower Court Decision Making." *William & Mary Law Review*, Vol. 54, no. 6 (2013): 2021-2053; Karl Llewellyn, Michael Ansaldi, trans., *The Case Law System in America* (Chicago: University of Chicago press, 1989), 14.

[168] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999); Neal Devins, "The Democracy-Forcing Constitution," *Michigan Law Review*, Vol. 97, no. 6 (1999): 1971-1993; Christopher J. Peters, "Assessing the New Judicial Minimalism," *Columbia Law Review*, Vol. 100, No. 6 (October 2000): 1454-1537.

[169] Klein and Devins, "Dicta, Schmicta," 2026.

[170] Emphasis added, *Wickard v. Filburn*, 317 U.S. 125.

[171] *Wickard v. Filburn*, 317 U.S. at 118, 124.

[172] As discussed in chapter one, "economic" is defined as "of, relating to, or based on the production, distribution, and consumption of goods and services." The economic activities of production and consumption do not involve buying and selling, that is, commerce. *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Springfield, Mass.: Merriam-Webster, Inc., 2001), 230, 365.

intrastate activity was within the reach of the commerce power was certainly not necessary for the decision. The sweeping substantial effects doctrine declared in *Wickard* was dictum insofar as it laid claim to intrastate non-economic activity having nothing to do with enforcement of the act in question.

Yet, before the decision in *Lopez*, the Supreme Court and myriad lower federal courts had, off and on for half a century, invoked the seemingly open-ended power of Congress under the substantial effects test, first set out in *Jones & Laughlin Steel Corp,* as a bona fide foundation for an ever-expanding, virtual federal police power.[173] The decision of the Rehnquist Court in *Lopez* identified and rectified this error. Chief Justice Rehnquist's three-part substantial effects test entailed an emphatic clarification of extant Commerce Clause doctrine – one that he made without purporting to or, in fact, needing to overturn any important precedents. Rehnquist and the majority held that, in the case of congressional legislation not part of a comprehensive regulatory scheme, commerce power could reach intrastate activity only if it was commercial activity or, at a minimum, *economic* activity. In this case, non-commercial activity and non-economic activity were out of bounds. Commerce power could reach intrastate non-economic activity to prevent such from undercutting a comprehensive interstate regulatory regime. But it was to be decided by the federal courts whether the statutory means chosen to regulate the subject intrastate non-economic activity were necessary to attain the purpose of that scheme. Quite similarly, under the substantial effects test, the commerce power might reach intrastate

[173] For example, see *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); and *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Coenen concludes that the "affecting interstate commerce" rationale articulated initially in *Jones & Laughlin Steel Corp* "had a long reach – so long, in fact, that the court would find no law beyond its grasp for the next half century." Dan T. Coenen, *Constitutional Law: The Commerce Clause* (New York: Foundation Press, 2004), 87.

non-economic activity to uphold a criminal statute – but, again, only if, on a case-by-case basis, a federal court found that activity to be penalized, in fact, had a nexus with interstate commerce.[174] The finding of the Supreme Court in *Lopez* that it had never, under its substantial effects rationale, upheld a Commerce Clause-based piece of legislation that reached non-economic intrastate activity suggested powerfully that, in future, there would be few instances in which the Court would, in fact, uphold such measures.

Disputes over the balance of power between state governments and the federal government were central to culture wars conflict that emerged after 1963. The decision in *Lopez* re-animated a longstanding tradition of judicial minimalism protective of state sovereignty. In doing so, the decision effectively articulated discernible limits to an expanding commerce power – which helped to supercharge partisan culture war struggles for at least a decade. In the year following *Lopez*, the Supreme Court would again decide the purview of commerce power—this time in favor of the Eleventh Amendment.

[174] Adler also concludes that, in *United States v. Lopez* and *United States v. Morrison* (2000) the Court recognized that the authority of Congress to regulate intrastate activity that undercut a comprehensive regulatory scheme was part and parcel of the substantial effects doctrine. Jonathan H. Adler, "The Conflict of Visions in *NFIB v. Sebelius*," *Drake Law Review*, Vol. 62 937-980, 954 (2014).

Chapter Five

Indian Casinos and

Seminole Tribe v. Florida (1996)

In the year following *Lopez*, another Supreme Court decision was decided that would again raise eyebrows and stimulate concerns or hopes that the Court was seeking to reign in the federal Commerce Clause-based expansion of the federal government. This time, in *Seminole Tribe v. Florida*, the Supreme Court struck down the 1988 Indian Gaming Regulatory Act (IGRA) based upon Congress' "Indian Commerce Clause" power.[1] The Act held that states must enter into good-faith negotiations with Native American tribes who sought to open gaming casinos. Florida, led by its Democratic Governor Lawton Chiles, refused to enter into such negotiations with the Seminole tribe, arguing that to be forced to do so was a violation of Florida's state sovereignty. The Supreme Court of the United States, in *Seminole Tribe v. Florida* (1996), would eventually agree, ruling that Congress' Article I power "to regulate Commerce . . . with the Indian Tribes" did not grant it the right to abrogate state sovereign immunity from private lawsuits in contravention of the Eleventh Amendment. Equally important, the decision overturned a 1989 ruling of the Court dealing with the contentious Comprehensive Environmental Response, Compensation, and Liability Act to re-establish the principle that Congress could not, under its authority "To regulate Commerce . . . among the States," similarly

[1] 517 U.S. 44 (1996); Public Law 100-497, 25 U.S.C. Sec 2710 et sec.;
U.S. Constitution, Article 1, Section 8, Clause 3. "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

abrogate their sovereign immunity.[2] Five of the nine justices in *Seminole Tribe of Florida*, at least, seemed to be reconfirming the sovereign authority of the states in the face of increasingly extensive employments by Congress of its commerce power.[3] Thus, *Seminole Tribe v. Florida* constituted a major victory of the Rehnquist Court in advancing "New Federalism" principles that involved some of the most contentious issues comprising the culture wars of the 1990s – the rising casino gambling industry, federal government environmental protection regulations, and the balance of power between the state governments and the federal government. Of considerable importance, *Seminole Tribe v. Florida* undergirded earlier decisions declaring that the states were not to be "commandeered" by the federal government or otherwise transformed into mere administrative appendages of it.

It seems rather clear that Congress and the Supreme Court have interpreted the Indian Commerce Clause far beyond its original meaning and that the IGRA was indeed an unconstitutional use of Congress commerce power. The IGRA was a regulation of internal activities on Native American reservations. The Commerce Clause, in its original meaning, does not provide Congress with the power to legislate over the internal affairs of a tribe. The original meaning of the Commerce Clause would only allow Congress to pass laws regulating, limiting, or taking down barriers to trade with the Indian tribes. Congress' power over the Native American tribes and all their affairs is not plenary. While it is true that Congress has acquired the power to govern the affairs of some tribes, that power was not derived from the Indian Commerce Clause; instead, it was the result of the treaties that the federal government concluded

[2] 209 U.S. 123 (1908).
[3] Jonathan D. Varat, William Cohen, Vikram D. Amar, *Constitutional Law*, 13th ed., (New York: Foundation Press, 2009), 278.

with the tribes. Through treaties, the federal government could negotiate a variety of actions including changing tribal boundaries, negotiating land deals, or allowing the federal government to meddle in the internal affairs of the tribe. But, since Congress outlawed making treaties with Indian tribes in 1871, and since most of the laws regarding the internal affairs of the tribes since that time have been based on the Indian Commerce Clause, it is reasonable to infer that many of the laws affecting the internal affairs of Native American tribes today have no true constitutional backing.[4]

Writing in 1996, Herbert Hovenkamp argues that the term "commerce" encompassed far more than mere trade to the Founders, but instead included such activities as manufacturing and agriculture.[5] Why else, he argues, would the Constitution's framers frequently speak of "trade and commerce" if the two words meant the same thing?[6] With this broad view of the Commerce Clause, it is no surprise that Hovenkamp takes the position that Congress' commerce power is plenary, and in regards to Indian tribes, Congress may use its power "to apply its own law to Indian lands and preempt all state law."[7] In the *Seminole Tribe* case, any sharing of power between the federal government and the states was pure charity on the part of the federal

[4] 25 U.S. Code § 71 "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty…" More will be discussed on this topic later in the narrative.
[5] Herbert Hovenkamp, "Judicial Restraint and Constitutional Federalism: The Supreme Court's 'Lopez' and 'Seminole Tribe' Decisions," *Columbia Law Review*, Vol. 96, no. 8 (Dec. 1996): 2213-2248.
[6] Ibid., 2230. However, Alexander Hamilton's words in *Federalist* No. 17 would seem to contradict Hovenkamp's view. Hamilton wrote, "The administration of private justice between the citizens of the same State, the supervision of *agriculture* [emphasis added] and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."
[7] Hovenkamp, "Judicial Restraint and Constitutional Federalism," 2237.

government since the Constitution grants all power to deal with Native American tribes to Congress under Hovenkamp's view of the meaning of the Clause.

Also in search of the Commerce Claus' original meaning, but more focused on the Indian Commerce Clause particularly, was Robert G. Natelson.[8] Like Barnett, Natelson sought to determine if the Clause should be viewed narrowly or more broadly based upon the Founders' use of the words. He found that in his search through tens of thousands of eighteenth-century documents, phrases such as "commerce with the Indians" and "commerce with the Indian tribes" showed "almost invariably" that the expression meant merely "trade with the Indians" and nothing more.[9] Natelson takes exception to the idea that the Indian Commerce Clause somehow grants the federal government police powers or the power to manage all Native American *affairs*. Indeed, he shows that such language was considered but removed from the Clause during the constitutional convention. Founding era document searches of the term "regulation" of Indian commerce or trade was "generally understood to refer to legal structures by which lawmakers governed the conduct of the merchants engaged in the Native American trade, the nature of the goods they sold, the prices charged, and similar matters."[10] When the founders wished to describe interactions with the tribes more generally, they typically used the term "affairs," and thus was the Department of Indian Affairs named.[11] Therefore, powers not exclusive to trade are

[8] Robert G. Natelson, "The Original Understanding of the Indian Commerce Clause," *Denver University Law Review,* Vol. 85 (2007): 215. Sources included the Thomson Gale data base *Eighteenth Century Collections Online* and the Readex database *Early American Imprints, Series I: Evans, 1639-1800*. See also Robert G. Natelson and David Kopel, "Commerce in the Commerce Clause: A Response to Jack Balkin," *Michigan Law Review,* Vol. 109 (2010): 55.
[9] Natelson, "The Original Understanding," 214-215.
[10] Ibid., 216.
[11] Ibid., 217.

reserved to the states under the Tenth Amendment.[12] Natelson argued that the federal government did indeed make extensive laws from the founding and through the nineteenth century that went beyond mere trade with Native American tribes, but that those laws were fashioned in support of treaties in which the tribes agreed to the terms. Certainly, Article IV of the Constitution grants significant power to Congress over Indians living in a federal territory or on federal land within state boundaries; but is a reservation federal land or Native American land? The idea of tribal sovereignty would suggest that reservations are Indian land. Without treaties and with the power under Article IV limited, it seems reasonable that Congress' authority under the Constitution is confined to regulating trade and not the internal affairs of the tribe.[13]

Taking an alternative view to the originalists is Timothy Joseph Preso.[14] Preso makes the point that one of the main motivations for moving from the Articles of Confederation to the Constitution was to clarify the dizzying inconsistencies of the thirteen states all dealing with the Native American tribes independently. In his view, "[t]he Indian Commerce Clause committed power over relations between Indians and non-Indians exclusively to the federal government." He shows how Article 9 of the Articles of Confederation could have provided the central government great powers over Indian affairs but that its power was stymied by the phrase within the Article that read, ". . .provided that the legislative right of any State within its own limits be not infringed or violated."[15] He argues that the Constitution removes that modifier and thus,

[12] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."
[13] Natelson, "The Original Understanding," 265-266.
[14] Timothy Joseph Preso, "A Return to Uncertainty in Indian Affairs: The Framers, the Supreme Court, and the Indian Commerce Clause," *American Indian Law Review*, Vol. 19, no. 2 (1994): 444-454.
[15] Articles of Confederation, Article 9, Section 4.

Congress' power over the affairs of Native Americans is exclusive and far-reaching. His case about exclusivity is certainly compelling; however, from an originalist standpoint, Preso's argument is weakened by failing to differentiate the word *commerce* from the word *affairs*. In a post-1937 view of the Commerce Clause, one might conclude that the word "commerce" denoted all affairs. In the Founders day it appears evident that it would not. Still, Preso offers a great deal of historical insight into the evolution of the Indian Commerce Clause from the Articles of Confederation.

Another view comes from Mark Savage, who wrote a decade before Bartlett and Natelson. Savage provides an answer to the question of whether tribal lands fall under federal or tribal sovereignty.[16] In his view, tribes are sovereign over their lands based upon how the Founders treated the issue. He argues that beginning in the mid-nineteenth century the original understanding of the Constitution began to be ignored regarding the affairs with Native Americans. However, at the time of the founding the new government of the United States had a very limited ability to usurp land from the Indian tribes without great cost. War with the tribes could be expensive in resources and in human lives. Much better for both the states and the new federal government, Savage explains, to either make treaties or purchase lands from the tribes to acquire their property by peaceful means. He has good evidence to back up his claim. The Northwest Ordinance, for example, states "The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent . . . ."[17] Another example: Secretary of War Henry Knox stated his natural law view in 1789, "The Indians being the prior occupants, possess the right of the soil. It cannot be taken

[16] Mark Savage, "Native Americans and the Constitution: The Original Understanding," 16 *American Indian Law Review* (1991): 74.
[17] Ibid., 103.

from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principal, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation."[18] By this logic, even federal lands that encompass Native American lands remain the domain of the tribes. If Savage is right, then whatever land continues to be held by Indian tribes must surely fall under their sovereignty and Commerce Clause-based laws which dictate Native American internal affairs must be unsupportable.

Nathan Speed adds credence to Savage's argument by illustrating that in the early days of the republic, when Congress wished to "regulate matters beyond trade and exchange, the Indian Commerce Clause was not asserted as a constitutional justification for doing so." [19] He argues that no law to regulate the internal affairs of Native Americans living in tribal lands was ever introduced in Congress until 1834, and the one introduced failed to pass because the majority in Congress perceived it to be unconstitutional.[20] Further, the first law that did assert direct governing power over the tribes, the Major Crimes Act of 1885, was upheld in *United States v. Kagama*, but *not* because of the Indian Commerce Clause. [21] Although the federal government lawyers argued that the Indian Commerce Clause was sufficient, a unanimous Court expressly rejected that argument and instead supported the law by asserting an extra-constitutional "ward" theory that claimed the United States had a duty to protect those who were dependent upon the

[18] Ibid., 105 n. 178

[19] Nathan Speed, "Examining the Commerce Clause Through the Lens of the Indian Commerce Clause," *Boston University Law Review,* Vol. 87, (2007): 470.

[20] Ibid., 476-478, The Western Territory Bill of 1834.

[21] Major Crimes Act, ch. 341, Sec. 9, 23 Stat. 362, 385 (1885), allowed federal prosecution of Indians accused of committing certain major crimes on or off tribal lands. *United States v. Kagama*, 118 U.S. 375 (1886).

government for food and political rights and thus it could legislate over internal affairs. Once the ward theory became a precedent, Speed argues, the Court could then give Congress unlimited powers to regulate the internal affairs of the tribes.

The evolution and interpretation of the Indian Commerce Clause and how it has been used to control tribal activity has been contentious and evolving from colonial times to the present. How did it get that way? A review of what prompted the inclusion of the clause into the Constitution is in order before delving into how it has been interpreted since.

During colonial times, individual colonies dealt with Native Americans on a local level with the power of the Crown behind them. As the colonists moved westward and colonial populations grew, interactions with the tribes, whether peaceful or in war, was a primary concern, especially to those on the leading edge of westward settlement. We'll begin this study in 1754, as the French and British vied over lands west of the colonies and good colonial relations with the tribes was critical to maintaining the peace and balancing colonial power. In that year, the Six Nations of the Iroquois threatened to sever relations with the colony of New York because of non-Indian encroachment on Native American lands as well as inconsistent policies towards them from the various colonies. With such a crisis on the horizon, Benjamin Franklin and other colonial representatives from seven colonies met in Albany, New York to ameliorate the deteriorating relations with the Iroquois. So important was creating a unified policy towards the tribes that the representatives went on to consider unifying the colonies on other issues as well and created a plan of colonial union. Among other things, the proponents of the resulting "Albany Plan" hoped to be able to present consistent commercial and political policies toward the Native Americans by giving the power to create such policies solely to the proposed

President General and Grand Council.[22] The Albany Plan failed initially due to the reluctance of colonial legislatures to give up their prerogatives and finally because the king completely ignored it.[23]

Following the French and Indian War, the Crown attempted to establish more uniformity as well.[24] King George III pronounced the Proclamation of 1763 and thus established a formal boundary between colonial and Native American lands. The following year, the British Board of Trade attempted to take over regulation of commercial and Indian affairs from the colonies "so as to sett [sic] aside all local interfering of particular Provinces, which has been one great cause of the distracted state of Indian affairs in general."[25] That plan was never adopted as the colonies and their mother country grew further apart in the period before the Revolution.

Beginning in the summer of 1775 and throughout the Revolutionary War, the Continental Congress attempted to secure and maintain good relations with the tribes to keep them from joining the British. John Dickenson, in the second draft of the Articles of Confederation, proposed that one of the powers of the United States would be "Regulating the Trade and managing all Affairs with the Indians."[26] This power was not something that the newly independent states were ready to give up. Thomas Jefferson's thoughts on the matter are illustrative. Regarding state sovereignty, he suggested in July 1776 that Congress only control Native American land sales outside of state boundaries, pointing out that Indians living within

[22] Preso, "A Return to Uncertainty," 445.
[23] Ibid., 446.
[24] 1756-1763
[25] Preso, "A Return to Uncertainty," 446.
[26] Ibid., 447. It should be noticed that "trade" and "affairs" have been used as separate actions, conforming to Natelson's similar findings regarding "commerce" and "affairs."

state boundaries were already "subject to [state] laws in some degree."[27] After two years of wrangling over the precise language, when the Articles of Confederation that were adopted on November 15, 1777, Article IX read as follows:

> The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated.[28]

This clearly was not the plenary power that some, like Benjamin Franklin, had hoped for. When it is considered that "members" of states in contemporary terms referred to those involved in the body-politic or who paid taxes, it becomes evident that according to the Articles, Congress would handle all of the affairs of those Native Americans outside of state borders and those Indians who lived under tribal law rather than as state citizens and who didn't pay taxes to the state.[29] However, the final portion of the clause that defended the rights of the states to legislate within their borders was a problem; it caused confusion and allowed states to carry on much as they had before. Congress would be authorized to negotiate with tribes within state lines, but would be required to coordinate with state officials to stay in compliance with the Articles.[30] Thus, for those wanting to standardize Native American policy and other affairs, a more powerful successor to the Articles was needed.

When the Constitution was being drafted in Philadelphia in the long summer of 1787, Federalists such as James Madison came prepared to readdress the issue of Indian affairs.

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[27] Natelson, "The Original Understanding," 228.
[28] Articles of Confederation, Article 9, Section 4.
[29] Natelson, "The Original Understanding," 229.
[30] Ibid., 230.

Madison proposed a congressional power on August 18 "[t]o regulate affairs with the Indians as well within as without the limits of the U. States."[31] Four days later, the Committee on Detail responded with a version similar to that in the Articles of Confederation, reading, "to regulate commerce with foreign nations, and among the several states and with Indians, within the limits of any state, not subject to the laws thereof."[32] Madison and his supporters must have hoped to avoid another Article IX experience, but no record exists on further discussions of the subject. Although the Committee somewhat limited Madison's ideal of allowing the federal government authority over Indian *affairs* to having authority only over *commerce*, they must have achieved some success in their wrangling because by September 4, the clause was finalized with the now familiar phrase, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," without the statement affirming the power of the states.[33]

So, what power over Indian affairs did the new Constitution give the federal government and what was retained by the states? In selling the Constitution to "we the people" in *Federalist* No. 42, Madison wrote, "commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory."[34] It appeared that the Constitution provided the federal government with unified power over commerce with Native American tribes, just as it did regarding commerce with other countries. However, by limiting the Clause to the word "commerce" and not broadening it to include the word "affairs" it likewise appears that the Founders allowed states to maintain, under the Tenth Amendment, their police powers over persons within their boundaries. Of course, on

[31] Preso, "A Return to Uncertainty," 453.
[32] Mark Savage, "Native Americans and the Constitution: The Original Understanding," 16 *American Indian Law Review* (1991): 74.
[33] Ibid., 75.; U.S Const., Article I, Section 8, Clause 3.
[34] Preso, "A Return to Uncertainty," 453-454.

federal property or in a federal territory, the federal government had sovereignty under the Property Clause of the Constitution.[35] However, as we have seen with Nathan Speed's argument above, one was not to assume that tribal lands within the boundaries of federal territory were under federal control until the tribe who had rights to the land had ceded it to the federal government through treaty or just war.

What about the power to make treaties with Native Americans? Article II provides the power to negotiate treaties to the President under the Treaty Clause. [36] And Just as the Constitution provided the President power to negotiate treaties with other nations, that clause also provided the power to the President to make treaties with the Indian tribes. The treaty power allowed the new government and the tribes to make agreements that could be far more encompassing than just commercial activity. However, for a treaty to be enacted, it had to be agreed to by two-thirds of the members of the Senate. Senatorial concurrence was included in the Constitution to provide the states protection against federal overreach since at the time Senators were chosen by state legislators rather than through the popular vote as they are now.[37] Finally, the Indian Commerce Clause, Treaty Clause, and Property Clause only applied to the tribes, not individual Native Americans, implying that those who were not members of tribes were subject to state laws just as non-Indians.[38]

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[35] U.S Const., Article IV, Section 3, Clause 2 the Property Clause. See David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground, American Indian Sovereignty and Federal Law*, (Norman: University of Oklahoma Press, 2001), 5, 9. 99.

[36] U.S Const., Article II, Section 2, Cl 2, i.e. the Treaty Clause.

[37] See U.S. Const., Article I, Section 3, and Amendment XVII.

[38] Natelson, "The Original Understanding," 243-244.

Arguably, the first law based upon the Indian Commerce Clause was the Indian Trade and Intercourse Act of 1790.[39] That law included three sections that pertained to the regulation of trade, a fourth section that implemented the existing treaties, and a fifth that provided a criminal provision that made crimes by United States citizens against Native Americans in Indian country a federal criminal offense.[40] The constitutional basis of the legislation is important because if it is based upon the Indian Commerce Clause, the implication is that the commerce power is plenary and encompasses all Indian affairs. Otherwise, one can assume a more limited view of the commerce power prevailed. Even with the commerce-related name, the act appears to have been based upon the President and Congress' treaty power when one reviews how the legislation came about. In 1789, President Washington and his Secretary of War, Henry Knox, grew dissatisfied with American citizens not complying with existing treaties and hoped to have Congress draft enforcement legislation to support the agreements they had made.[41] Washington visited Congress on August 22 and 24, 1789 to impress upon the Senate the importance of upholding the Hopewell Treaty to maintain positive relations with the Cherokees, Chickasaws, and Choctaws.[42] The Indian Trade and Intercourse Act which passed the following summer appears to be a direct result of Washington and Knox's desire to maintain the treaties that they had been parties to and not merely trade laws based upon Congress' commerce power. Several

[39] 1 Stat. 137, for text see http://tm112.community.uaf.edu/files/2010/08/Non-Intercourse-Act.pdf (accessed November 22, 2014).
[40] Natelson, "The Original Understanding," 255.
[41] The Treaty of Hopewell in which Congress defined Cherokee lands and the Treaty of Fort Stanwix with the Six Nations in New York, both passed during the Confederation era. See Preso, "A Return to Uncertainty," 450.
[42] Natelson, "The Original Understanding," 254-255.

renditions of the Indian Trade and Intercourse Act were made in two-year intervals after 1790 until the law became permanent in 1802.[43]

Relations between southerners and the Cherokees continued to be a point of contention between the federal government and the state governments involved. In 1828, chafing at the federally defined borders of the Cherokee tribe, the State of Georgia passed legislation that in effect obliterated the Cherokee tribal government, extended Georgia's hegemony over tribal lands, and distributed Native American lands to several county governments for disposal.[44] In response, Cherokee leader John Ross attempted to garner support in Congress for it to do something about the situation. His action bypassed the traditional executive branch-Indian tribal communication chain since he knew he'd have little success with the newly elected president, Andrew Jackson. However, Ross made little headway in Congress since few representatives or senators wanted to be seen giving up their own states' powers to deal with the Indians as Georgia was doing. Eventually Ross succeeded in bringing his case to the Supreme Court. In the case *Cherokee Nation v. Georgia* (1831),[45] Chief Justice Marshall was perplexed as to how to go forward with the case. Although in his ruling he seemed apologetic to all Native Americans for how they had been treated by Europeans, he could not find specifically in the Constitution where the Court was given authority to adjudicate cases between the tribes and the United States. Hearing a case between a foreign nation and the United States was addressed in Article III; the question that had to be decided before hearing the case was whether a Native American tribe constituted a foreign state. Reasoning that the tribes were not wholly independent, Marshall

[43] Nathan Speed, "Examining the Commerce Clause Through the Lens of the Indian Commerce Clause," *Boston University Law Review,* Vol. 87, (2007): 467.
[44] Preso, "A Return to Uncertainty," 455.
[45] 30 U.S. (5 Pet.) 1 (1831).

ruled that they might more properly be called "domestic dependent nations" who had no legal standing in federal court as would maligned foreign states and their citizens would.[46] Of interest to us is that Marshall noted that if there were any constitutional insight into the founders' view of the tribes as being foreign states, the Commerce Clause made a distinct differentiation between the two.

> In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them.[47]

Be that as it may, within a year, Marshall was to pen another ruling regarding the Cherokees in *Worcester v. Georgia* (1832).[48] In that case, Samuel Worcester, a missionary who stood against Georgia's Indian removal efforts, ignored a Georgia law requiring him to get a state license to reside in that state's Indian country. This time, Marshall ruled that while dependent upon the United States, an Indian nation was as a separate political entity and could not be bound by the laws of the state within which its territories lay.

For the next half century, the United States government dealt with the Native American Tribes as nations, as had the European powers had previously. The U.S. engaged in treaties guaranteeing Native American sovereignty within Indian territories, but all the while those treaties often cost the tribes portions of their lands. In 1830, the United States government passed the Indian Removal Act. That act resulted in the "Trail of Tears" begun by the Choctaws

[46] Ibid., 17.
[47] Ibid., 18.
[48] 31 U.S. (6 Pet.) 515 (1832).

in 1831 and concluded by the Cherokees in 1838 as tribes gave up their lands in the American southeast for their (temporary) freedom and sovereignty to live as they wished west of the Mississippi in what would later become Oklahoma.

However, after the War Between the States, as the Indian Wars in the west subsided and as the last territories became states, the idea of thinking of Native Americans as dependent nations began to fade. Instead, states longed to control all the territory within their borders and make relations with the tribes less complicated. Settlers wished to settle on Native American lands and wanted them opened for settlement. Additionally, since only the Senate had the power of advice and consent for treaties and many House members wanted a role in formulating Indian policy, Congress produced the Indians Appropriations Act of 1871.[49] This seminal act made it illegal for the federal government to deal with Native Americans as tribes or nations and instead authorized the government to deal with Indians only as individuals. There would no longer be treaties or contracts made between the United States and Indian nations. As section 71 of the Act stated:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.[50]

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[49]G. William Rice, "25 U.S.C. Sec. 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?" *American Indian Law Review,* Vol. 5 (1977): 239. Also, in *Antoine v. Washington,* 420 U.S. 194, 202 (1975) Justice Brennan explained, "The Act of 1871 resulted from the opposition of the House of Representatives to its practical exclusion from any policy role in Indian affairs. For nearly a century the Executive Branch made treaty arrangements with the Indians "by and with the Advice and Consent of the Senate." Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them." See also, U.S. Code Title 25: Indian Tribes, 16 Stat. 544, 566

[50] Ibid., Sec. 71.

Of course Congress maintained its power to make laws within United States territories and the Indian Appropriations Act of 1871 supported Congress' drafting of statutes to control Native Americans who lived on reservations.[51] Without treaties as the primary means of dealing with Native Americans, relations henceforth would be undergirded by statutes and the only power that Congress had in that regard was through the Indian Commerce Clause, even though that clause only described commerce with tribes, not individual Native Americans. Also of note, the Clause gives Congress the power to regulate commerce *with* the tribes, not to regulate the commerce *of* the Indian tribes. The way the Clause is written defines only an ability to regulate external commerce, not the internal affairs of a tribe.[52]

Not long after changing the fundamental means by which the United States dealt with Native American tribes, Congress passed the Major Crimes Act of 1885. That act allowed United States prosecution of Indians who were accused of committing crimes against other Natives in Indian Territory.[53] The law was clearly an abrogation of tribal sovereignty, but Congress justified the law by positing that tribes were not capable of dealing with such serious issues of law and order. The landmark case that confirmed the constitutionality of the law was *United States v. Kagama* in 1885.[54] As mentioned above, the unanimous decision to uphold the law was not based upon the Indian Commerce Clause; the justices expressly rejected that argument as follows:

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[51] U.S. Const. Article 4, Sec. 3, Clause 2; Donald Fixico, "Federal and State Policies and American Indians," pp. 379-396, in *A Companion to American Indian History*, ed. Philip J. Deloria & Neal Salisbury (Malden: Blackwell Publishing, Ltd., 2004), 383.
[52] Savage, "Native Americans," 116.
[53] The crimes included murder, manslaughter, rape, assault with intent to commit murder, arson, burglary, and larceny. Wilkins and Lomawaima, *Uneven Ground*, 108-109.
[54] *United States v. Kagama*, 118 U. 375 (1886); Savage, "Native Americans," 116, n.32; Wilkins and Lomawaima, *Uneven Ground*, 108.

> The mention of Indians in the constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.[55]

Instead of a ruling based upon the Indian Commerce Clause, the Court opted to justify the law by asserting that since the tribes' sovereignty and political rights rested solely upon the benevolence of Congress, then Congress must therefore have plenary authority to legislate in whatever affairs it wished. The Court reasoned as follows:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States -- dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by Congress, and by this Court, whenever the question has arisen.[56]

With this precedent set, it became possible to legislate over the internal affairs of the tribes in a plenary manner.

[55] 118 U.S. 378-379.
[56] Ibid., 383-384.

Indeed, if treaties were no longer to be made with the tribes, and Congress' power over the tribes was plenary, it would follow that treaties with the tribes might no longer be followed if Congress legislated thusly. In 1903 the Court ruled in *Lone Wolf v. Hitchcock* that Congress could do just that.[57] Lone Wolf was a Kiowa chief who was a leader on the Kiowa, Comanche, and Apache reservation in Texas and Oklahoma. Congress legislated to alter the lands of the reservation substantially but did so without getting three fourths of the adult males of the tribal population to agree to the reduction, as the Medicine Lodge Treaty of 1867 required them to do. Citing the *Kagama* decision, Justice Edward White opined that:

> . . . . as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.[58]

In other words, because the actions of Congress in the matter were constitutional, the only recourse to the tribes was through Congress. There is no reference to the Indian Commerce Clause in the case; instead, the ward theory prevailed.

Along with eliminating treaty obligations, the primary goal of the federal government in the late nineteenth century and early twentieth century was Native American assimilation, with the aim of having Native peoples adopt the western model of property ownership—that is, individual ownership rather than tribal ownership. The Dawes Act of 1887 was designed to eliminate the reservation system by dividing reservation land among the members of the respective tribes. Each head of a household would receive 80 acres of land and single males would be allotted 40

[57] 187 U.S. 553 (1903); Wilkins and Lomawaima, *Uneven Ground*, 111.
[58] Ibid., 568.

acres.[59] Any land left over within the reservation, "surplus land," would be sold to the federal government which could then sell the land to whoever wanted to purchase it, typically white settlers, railroad companies, or corporations. Federally purchased surplus land could also be used for military bases and eventually national parks, forests, etc.[60]

In 1924, Congress continued the process of Native American assimilation by passing the Indian Citizenship Act.[61] In the wake of World War I, during which a significant number of Native Americans fought gallantly for the United States in Europe, many in Congress believed that all tribal members who had not already attained citizenship through other means should be granted that status through legislation. The results of the Act were mixed. Indians who attained U.S. citizenship and hoped to be involved in the political process were sometimes stymied by state laws that prevented them from voting. Other tribal members had legitimate concerns that by assuming U.S. citizenship, they would be giving up what tribal sovereignty they retained since they would now be answerable to state and federal laws instead of tribal laws.

If the Indian Citizenship Act occasioned mixed results, the out consequences of the Dawes Act were clearer; it was not generally good for the tribes or individual Native Americans. The parcel of land allotted to a head of a household might be economically viable for the first generation, but for descendants it was wholly insufficient as family members could not divide the land but only hold a share in it. Those shares got progressively smaller with each generation.

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[59] Dawes Severalty Act of 1887 (a.k.a. General Allotment Act), Pub. L. 49-119, 24 Stat. 388, approved February 8, 1887; Fixico, "Federal and State Policies," 384. In 1891, the law was amended to double the allotment if the land was only suitable for grazing, as was often the case in drier areas in the West.

[60] "History of Allotment," Indian Land Tenure Foundation. https://www.iltf.org/resources/land-tenure-history/allotment (accessed February 18, 2015).

[61] Indian Freedom Citizenship Suffrage Act of 1924, Pub. L. 68-175, 43 Stat. 253, effective June 2, 1924; Fixico, "Federal and State Policies," 385.

Many tribal members never became successful farmers or ranchers, but by taking allotments they gave up the subsidies provided by the federal government to those living on reservations. Additionally, the allotments led to reservations becoming checkerboards of Native American and non-Indian held land thus making it difficult for tribes to use the land communally. Because of the Dawes Act, Native Americans gave up nearly two thirds of their lands—roughly 86 million acres. [62] The process also caused a loss of sovereignty as some reservations ceased to exist and tribal members had to assume the responsibilities of landowners in U.S. society.[63]

By 1934, there was a decided backlash against the idea of assimilation. In that year, Franklin Roosevelt led the Congress to pass the Indian Reorganization Act (IRA), known as the "Wheeler-Howard Act" as well.[64] In the spirit of the era the act was also nicknamed the "Indian New Deal." The IRA was an attempt to reverse the assimilation goals of the Dawes Act and allow tribes once again to govern themselves – to ameliorate the effects of the Great Depression and improve the situation of Native Americans generally. The act ended the allotment of tribal land and authorized the Secretary of the Interior to accept additional tribal lands into U.S. trust and to establish new reservations on those lands. It also encouraged tribes to adopt Bureau of Indian Affairs-created constitutions to promote self-government. In addition, the act set up

[62] Charles F. Wilkinson and Eric R. Biggs, "The Evolution of the Termination Policy," *American Indian Law Review*, Vol. 5, No. 1 (1977): 142.
[63] Dawes Severalty Act, 24 Stat. 388.
[64] Indian Reorganization Act of 1934, Pub. L. 73-383, 48 Stat. 984, effective June 18, 1934; Janet McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington: Indiana University Press, 1991), 121; Fixico, "Federal and State Policies," 385.

business charters to encourage economic progress. The act also gave Native Americans a hiring preference with the Bureau of Indian Affairs (BIA).[65]

However, the IRA never achieved its goal of bringing the tribes up to standard of living equal to the white population and during World War II and in the early Cold War years the IRA came under a great deal of scrutiny. Indeed, the U.S. Senate spent fifteen years investigating Native American living conditions which resulted in its 1943 report, *Survey of Conditions of the Indians of the United States*.[66] That report was highly critical of the IRA itself as well as the BIA's administration of it. The House began its own investigation in 1944 and by 1947 representatives held hearings on bills to "emancipate" Native Americans from BIA control.[67] In 1953, Congress passed a resolution stating its official policy. Known as HCR 108, the resolution was not binding but only states the policy that Congress would follow as it attempted to revise the relationship between the federal government and Natives not fully assimilated into American society. Additionally, the resolution was only technically valid during the Eighty-third Congress (1953-55); however, it has never been replaced or "repealed," although activists and interested groups have attempted to sway Congress to do so.[68]

The long-term policy objective of HCR 108 was to "terminate" the federal government's trusteeship responsibilities with the tribes and integrate Native Americans into the U.S. population as fully responsible tax-paying citizens. The early 1950s saw the BIA encourage and

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[65] UAF Interior Aleutians Campus, "Indian Reorganization Act (1934)." https://tm112.community.uaf.edu/unit-2/indian-reorganization-act-1934/ (accessed July 23, 2015); McDonnell, *The Dispossession of the American Indian*, 121-124.
[66] Charles F. Wilkinson and Eric R. Biggs, "The Evolution of the Termination Policy," *American Indian Law Review*, Vol. 5, No. 1 (1977): 145.
[67] Ibid., 146.
[68] Ibid., 151.

assist tribal members to leave their reservations to take up residence in cities where they might find employment. Additionally, Congress passed individual acts to terminate the federal relationship with specific tribes. From 1955 to 1970, 109 tribes' relationships to the federal government were terminated. Roughly three percent of all federally recognized Native Americans were involved, as were about 3.2% of Indian held lands.[69] Each tribe's land was sold and the proceeds given to the tribes to distribute among its members. Tribe members then became subject to state and county laws, taxes, and courts. Federal health, education, and welfare assistance that was available exclusively to Native Americans became unavailable and individual Indians were only allowed into the same programs available to non-Indian U.S. citizens. For those affected by termination legislation, their identities as tribe members tended to become essentially non-existent as their interests became more tied to non-Indian institutions.

The Seminole Tribe of Florida avoided such a fate, although it was threatened with termination by the federal government and the action was supported by the State of Florida. Instead, in 1957 the tribe established a constitution and two-tiered formal government composed of a Tribal Council and a Board of Directors. Additionally, it established the Seminole Tribe of Florida, Inc. to oversee the tribe's business aspects.[70]

However, even though the Seminole Tribe avoided termination of its relationship to the federal government, it, along with many other tribes in the U.S., had its federal relationship

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[69] Ibid.

[70] Seminole Tribe of Florida official website, "Brief Summary of Seminole History." http://www.semtribe.com/History/BriefSummary.aspx (accessed Aug 1, 2015); Katherine Ellinghuas, *Blood Will Tell: Native Americans and Assimilation Policy* (Lincoln: University of Nebraska Press, 2017), 125, 138, 146, 171-173, 189, 194.

changed significantly when Congress passed Public Law 83-280 in 1953.[71] Known more commonly as "PL 280," the legislation transferred criminal jurisdiction over the tribes from federal to state authority. Initially, the law applied only to tribes in six states, but the law had a clause allowing other states to join in with the consent of the state's citizens. In 1962 Florida opted for PL 280 jurisdiction and hence held it in 1996 during the case at hand.[72]

During the tumultuous years of the 1960s and continuing into the 1970s, the Civil Rights movement came to affect Native Americans as well. As historian of American Indian law Todd A. Morman puts it, "[t]he 1960s saw the rise of Red Power and Indian militancy. . . ."[73] Conditions on reservations had been poor historically. Mismanagement by the BIA was often to blame but tribal governments also came under Congress' scrutiny. Under tribal governments, traditional laws and justice took precedence over the Bill of Rights. Indeed, in *Talton v. Mayes*, decided in 1896, the Supreme Court ruled that the protections afforded U.S. citizens from the federal government by the Fifth Amendment did not apply to Indians who remained on reservations.[74] But the 1965 the Voting Rights Act put an end to divergent state laws regarding

[71] The official title of Public Law 280 was "An act to confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes." Pub. L. 280, 67 Stat. 588, approved August 15, 1953, codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326. See *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 177 (1973); Fixico, "Federal and State Policies," 386-387.

[72] Carole Goldberg, Duane Champagne, and Heather Valdez Singleton, "Final Report Law Enforcement and Criminal Justice Under Public Law 280," U.S. Department of Justice, Doc. No. 222585, May 2008. https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf (accessed August 1, 2015).

[73] Todd A. Morman, "Indian Sovereignty and Religious Freedom: United States Public Land Management and Indian Sacred Sites, 1978-2014" (Unpublished Ph.D. dissertation, University of Missouri-Columbia, May 2016), 27.

[74] 163 U.S. 376.

the right of Natives to vote. Under its terms, Native suffrage was, as a matter of federal law, to be universal and unimpaired.[75] In 1968, responding to concerted Native American protests and demands organized around the American Indian Movement, Congress passed the Indian Civil Rights Act. Included in that act was a stipulation that any further expansion of PL 280 jurisdiction would require the consent of the states and of tribes within the states that would be affected.[76] By 2007, there had been at least seventy-four cases brought by or on behalf of Native Americans under that Voting Rights Act or the Fourteenth or Fifteenth amendments. Most of these actions were litigated in states that included large reservations or Indian populations, such as Arizona, Oklahoma, and New Mexico.[77]

President Richard M. Nixon abandoned the termination policy, setting the stage for what some scholars have characterized as a new era of Indian sovereignty or at least relations of the tribes with the state governments and the federal government that were more reciprocal. The basic thrust of this change was the decision of the federal government to cede an increasing number of governmental functions to the tribes. The policy gained official standing in 1975, during the administration of President Gerald R. Ford, with the passage of the Indian Self-

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[75] Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* (Cambridge, UK: Cambridge University Press, 2007), 22.

[76] Indian Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 337, 25 U.S.C. ch. 15, §§1301-1341. See Frank Pommersheim, *Broken Landscapes, Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2009), 300-301; Fixico, "Federal and State Policies," 388. See also Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* (New York: Avon, 1969); N. Scott Momaday, *House Made of Dawn* (New York: Harper & Row, 1968); Dee Brown, *Bury My Heart at Wounded Knee* (Chicago: Dramatic Publishing, 1971); Paul Chaat Smith and Robert Allen Warrior, *Like A Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (New York: The New Press, 1996).

[77] McCool, et al., *Native Vote*, 45.

Determination and Education Assistance Act.[78] In 1978, Congress and President Jimmy Carter passed the Indian Child Welfare Act and the American Indian Religious Freedom Act, the latter of which provided for consultation with tribal leaders when federal action might adversely affect Native American sacred sites.[79]

In the landmark decision *Oneida Indian Nation of New York v. County of Oneida* (1974), the Supreme Court broke new ground by holding that, under extant statutes, federal courts were authorized to try land claims asserted by Native Americans based on aboriginal title and treaties with the federal government and agreements with others.[80] At this point, regardless of original understandings of the Constitution, most jurists accepted that Congress had "plenary" authority over the tribes, which could be derived from the Commerce Clause; the Treaty Clause (Article II, Section 2, Clause 2); the Property Clause (Article IV, Section 3, Clause 2); and, otherwise, the nature of the sovereign power of the federal government in relation to the Indian tribes. Even so, after 1974, numerous Native American tribes, including the Seminoles of Florida, assertively and successfully litigated contentious tribal claims to land and associated water rights against private title holders, state governments, their political subdivisions, and the federal government. Many of these lawsuits also sought to identify the extent to which the tribes were entitled to use their lands and associated resources under treaties and state and federal law. This litigation insurgency

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[78] Fixico, "Federal and State Policies," 389. See Jack D. Forbes, *Native Americans and Nixon: Presidential Politics and Minority Self-Determination, 1969-1972* (Los Angeles: American Indian Studies Center, UCLA, 1981); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, 88 Stat. 2203, approved January 4, 1975.

[79] The Indian Child Welfare Act of 1978, Pub. L. 95–608, 92 Stat. 3069, enacted November 8, 1978; The American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469, approved August 11, 1978, codified as 42 U.S.C. § 1996. See Morman, "Indian Sovereignty and Religious Freedom."

[80] *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); Act of June 25, 1948, Pub. L. 85-554, ch. 646, 62 Stat. 930; Act of July 25, 1958, Pub. L. 94-574, 72 Stat. 415.

led to major land settlements with Congress in the period 1978-2006 that resolved conflicting claims and clarified the property rights of the tribes, usually to their benefit.[81]

The limits of PL 280 were tested in 1976 in *Bryan v. Itasca County.* Itasca County, Minnesota attempted to levy property taxes on any Native American who lived in a mobile home on a reservation within the county. However, the Court ruled that PL 280 was not so expansive as to allow states and local government entities the power to tax Indians or regulate Native American activities on reservations but only granted states the power to try criminal cases and decide civil disputes that included reservation Indians. The case is noteworthy because it resulted in a test that distinguished criminal legislation that penalized certain activities from civil statutes that regulated certain activity [hereafter "criminal/prohibitory versus civil/regulatory test"] to determine PL 280 applicability directly related to Native American gaming operations.[82]

In some ways, the resolve of Congress to employ the Indian Commerce Clause to promote a new world of gambling enterprise via the 1988 Indian Gaming Regulatory Act (IGRA) seems incongruous with its strenuous exertions of commerce power to regulate, suppress, and criminalize gambling enterprises from 1949 through 1994. Ten years before

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[81] Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W. W. Norton. 2005), 241-270; Imre Sutton, ed., *Irredeemable America: The Indians' Estate and Land Claims* (Albuquerque: University of New Mexico Press, 1985); Harry A. Kersey, Jr., "The Florida Seminole Land Claims Case, 1950-1990," *Florida Historical Quarterly*, Vol. 72, no. 1 (July 1993): 35-55. For the Florida Indian Land Claims Settlement, approved December 31, 1987, which dealt with Seminole water rights, see *Seminole Tribe of Indians of Florida v. Florida*, No. 78-cv-6116 (S.D. Fla.). As of 2003, there were more than three hundred different recognized tribes in the lower forty-eight states alone. Bryan H. Wildenthal, *Native American Sovereignty on Trial: A Handbook with Cases, Laws, and Documents* (Santa Barbara: ABC-CLIO, 2003), xiv.

[82] 426 U.S. 373.

President John Kennedy signed into law three statutes in 1961 targeting interstate wagering by wire, transportation of gambling paraphernalia, and gambling enterprise, Congress and President Dwight Eisenhower had passed a measure that criminalized the interstate transportation of gambling devices, commonly known as the Johnson Act.[83] A section of the Organized Crime Control Act of 1970, commonly known as the Illegal Gambling Business Act of 1970, took aim at syndicated gambling, including illegal casino-like enterprises, which the act declared to be a prime source of funds for organized crime.[84] The Racketeer Influence and Corrupt Organizations Act of 1970 defined as "racketeering activity" any "act or threat involving. . . gambling."[85] Eight years later, President Jimmy Carter and Congress combined to pass the Interstate Horseracing Act, which set up stiff penalties for off-track wagering by wire, telephone, or other electronic means.[86] Adopted in 1986, during the administration of President Ronald Reagan, the Money Laundering Control Act zeroed in on interstate monetary transactions involving funds obtained from "specified unlawful activity," especially "racketeering activity" such as illegal gambling enterprises.[87] President George H. W. Bush signed into law the Professional and Amateur Sports

[83] Transportation of Gambling Devices Act, Pub. L. 906, 64 Stat. 1134, approved January 2, 1951.
[84] Organized Crime Control Act of 1970, Pub. L. No. 91-452, title VIII § 803(a), 84 Stat. 922, approved October 15, 1970.
[85] Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, §1961(1), 84 Stat. 941 (1970).
[86] Interstate Horseracing Act of 1978, Pub. L. 95–515, §2, 92 Stat. 1811, approved October 25, 1978.
[87] Money Laundering Control Act, Pub. L. No. 99-570, § 1352(a), 100 Stat. 3207, approved October 27, 1986; Jeffrey R. Rodefer, "Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466," *Gaming Law Review*, Vol. 6, no. 5 (2004): 393-415.

Protection Act of 1992, which made it unlawful for a "government entity" to set up a "wagering scheme" based on professional or amateur athletic games.[88]

The presidency of Bill Clinton saw several bills passed to regulate various forms of gambling enterprise implicating interstate commerce. Consider the Interstate Wagering Amendment of 1994. This measure revised the 1961 ban on the transportation of wagering paraphernalia to prohibit lottery ticket messenger services that transported state lottery tickets from an issuing state into another state, at least in the absence of a compact between the two states. Congress based the act squarely on its commerce power to protect state lottery revenues, control interstate gambling, and, preserve state sovereignty.[89] The Gambling Ship Act of 1994 revised a 1949 statute that had prohibited any "gambling ship," defined as a vessel used primarily for the operation of one or more gambling establishments other than ships that cruised for a minimum of twenty-four hours and provided meals and lodgings for passengers; the 1994 revision altered the definition of a "gambling ship" to exclude vessels offering onboard gambling that cruised beyond the territorial waters of the United States during a "covered voyage."[90]

During the presidency of George W. Bush, Congress trained its sights on internet gambling. By 2006, numerous federal courts had ruled that, under the Constitution and Dormant Commerce clause, states were not to be permitted to regulate online services and commerce, at least commercial websites for adults. The courts rather consistently held that online services

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[88] Professional and Amateur Sports Protection Act of 1992, Pub. L. 102-559, 106 Stat. 4227, adopted October 28, 1992.

[89] Interstate Transportation of Wagering Paraphernalia Act, Pub. L. 87-218, § 1, 75 Stat. 492, approved September 13, 1961; amended Pub. L. 93-583, § 3, 88 Stat. 1916, January 2, 1975, and Pub. L. 96-90, § 2, 93 Stat. 698, approved October 23, 1979; Interstate Wagering Amendment of 1994, Pub. L. 103-322, title 33, § 330016(1)(L), 108 Stat. 3147, approved September 13, 1994.

[90] 63 Stat. 92, ch. 139, §23, approved May 24, 1949; Gambling Ship Act of 1994, Pub. L. 103-32, title 33 § 330016(1)(L), 108 Stat. 2147, approved September 13, 1994.

constituted interstate commerce, which, Congress insisted, required a unified, comprehensive scheme of regulation.[91] The Unlawful Internet Gambling Enforcement Act, which was included in the SAFE Port Act of 2006, prohibited "gambling businesses" from accepting payments related to the participation of another person in a wager involving the use of the Internet that was illegal under federal or state law.[92]

Some Native American tribes began to dabble in commercial gaming in the 1970s. Although a variety of games were offered, bingo was the primary activity. Tribes in Florida and California operated such enterprises but without following existing state laws or obtaining state gaming licenses. In both states, authorities attempted to enforce their state laws, and, in response, the tribes sued in federal court to obtain injunctions against further "harassment." Two cases resulted: *Seminole Tribe v. Butterworth* in Florida in 1981 and *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy* in California in 1982.[93] In both cases, the appellate court judges ruled in favor of the tribes. At the time, the State of Florida allowed pari-mutuel gambling in the form of horseracing and jai alai. Likewise, the State of California allowed pari-

[91] *American Book Sellers Foundation for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002); *PSI Net, Inc. v. Chapman*, 167 F. Supp. 878 (W. D. Pa. 2001), 317 F. 3d 413 (4th Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001); *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999); *American Libraries Association v. Pataki*, 969 F. Supp. 160, 182 (S. D. N. Y. 1997); *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 2 006 (E. D. Pa. 2004); *Southeast Booksellers Association v. McMaster*, 371 F. Supp. 2d 773 (D. S. C. 2005).

[92] The act did not ban or criminalize simple online betting. But Section 5364 required financial institutions to employ procedures and policies to thwart the flow of prohibited funds to the operators of online gambling websites. Unlawful Internet Gambling Enforcement Act, Title VII of the Security and Accountability For Every Port Act of 2006, Pub. L. 109-347, 120 State 1884, approved October 13, 2006.

[93] 658 F. 2d 310 and 694 F.2d 1185 respectively.

mutuel betting and licensed betting at card parlors. Neither state outlawed gambling entirely, they only regulated it. The two appellate courts therefore reasoned that the tribes' use of gaming to raise income was not criminal or prohibited activity that the states could prosecute under PL 280. Likewise, the activity could not be regulated by the state based on the *Bryan v. Itasca County* ruling. The implication was that the tribes were free to operate gaming operations under their own rules. Although both Florida and California tried to appeal their cases to the Supreme Court, the Court refused to hear their arguments. Because of the two cases, Native American gaming began to grow substantially.

Also contributing to the growth of Indian gambling operations in the 1980s were the efforts by President Reagan to reduce the size of the federal government. Native American tribes had received significant amounts of federal funds through the BIA, the Indian Health Service, and other federal programs in the past. As these funds were reduced, the tribes turned to gambling to become more self-sufficient. As one writer noted, "As the implications of the two Federal court decisions percolated through Indian country, gaming seemed like an ideal source of revenue and there was a mini-explosion of tribal high stakes bingo and pull-tab operations."[94] In 1984, John Fritz, the Deputy Assistant Secretary – Indian Affairs of the Department of the Interior, reported to a House committee that about 80 tribes were conducting or would soon be conducting bingo activities on their reservations. Of those, twenty to twenty-five were considered "high stakes"

[94] Franklin Ducheneaux, "The Indian Gaming Regulatory Act: Background and Legislative History" March 10, 20015 (Revised Nov. 21, 2006). www.cga.ct.gov/gae/related/20090518_State%20Tribal%20Resouc e%20 (accessed January 11, 2015).

gaming with unlimited jackpots. Those high stakes operations could allow a tribe monthly gross revenue of $100,000 to $1 million.[95]

The expansion did not come without a cost however. Non-Indian backlash to unregulated Native American gambling operations was significant. State and local authorities, non-Indian casino and other gaming operators, and those simply opposed to gambling all stepped up to decry the new Native American industry. To them, the vacuum in legal authority needed to be remedied as quickly as possible.

In response, Native American advocates anticipated that it would not be long before some members of Congress would move to fill the vacuum with legislation that would be unfriendly to Indian gaming. Their response was a pre-emptive bill that would allow reservation gaming to continue as it had previously. Therefore, the bill would include language that would give federal regulatory pre-emption to any potential laws that the individual states might adopt that would be restrictive on Native American gaming. In addition, the bill's authors were also concerned that non-Indian firms that the tribes had contracted with to oversee tribal gaming enterprises were bilking the tribes of much of their profits. The writers wanted their bill to remedy that situation. To sell the bill to members of Congress opposed to Native American gaming, its authors gave the bill a hard-nosed sounding short title – the "Indian Gambling Control Act." Congressman Morris K. "Mo" Udall (D-AZ), Chairman of the House Committee on Interior and Insular Affairs, introduced the draft as H.R. 4566 on November 18, 1983.[96]

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[95] U.S. Congress, *Hearing before the House Committee on Interior and Insular Affairs on H.R. 4566*, June 19, 1984, 62 in Ducheneaux, "Indian Gaming," 10.

[96] Ibid., 11-12. Besides Udall, other authors of the draft bill included Franklin Ducheneaux, who was counsel to Udall's committee, his deputy, Alex Skibine, and Michael Jackson, who was the Republican Consultant on Indian Affairs.

Udall's bill never made it out of his committee during the Ninety-eighth Congress. Hearings were held on the bill to determine who would be the regulatory authority. The Justice Department didn't want the responsibility since Justice was not a regulatory agency. The Department of the Interior didn't want it either, fearing that it didn't have the resources to do the job. Additionally, in the 1980s, that agency was working to reduce its historic paternalistic role and allow for greater tribal independence and self-determination. Finally, tribal opinion was against the bill since it appeared to the tribes that the legislation infringed upon their sovereignty.[97]

Meanwhile, the growth of Native American gaming continued. By 1985, the BIA was reporting the number of gaming enterprises at 108. While gaming on reservations continued to grow, non-Indian cities and towns in need of revenue came up with an innovative idea. Seeing the success of Native American gaming, local governments offered to donate land to the Federal government to be held in trust for a tribe. In turn, the tribe would build a casino on their newly acquired land to benefit themselves and provide jobs and an economic stimulus to the local community. However, this practice, along with the continued growth of Indian gaming on existing tribal lands, resulted in a more organized backlash against it for the same reasons as mentioned earlier.[98]

With the increased attention given to Native American gaming, debates in the Ninety-ninth Congress over the issue grew more contentious. Udall again presented his bill (this time called H.R. 1920) to the Committee on Interior and Insular Affairs. However, other bills related to Indian gaming were presented to Congress as well. S. 902, introduced by Senator DeConcini (D-

[97] Ibid., 16.
[98] Ibid., 17.

AZ), was similar to H.R. 4566; but it also proposed regional gaming commissions as part of the legislation; because of his legislation, eventually a single commission would be established by the final Indian Gaming Regulatory Act (IGRA).[99]

H.R. 2404 was introduced by Representative Norman Shumway (R-CA). His bill was the most state-friendly of the bills in the House. It prohibited gambling activities on reservations unless they conformed to state law. However, this bill was soon rejected since the majority in Congress wanted the regulation to be a federal affair.[100]

S. 2557 was the Reagan administration's contribution to the issue. In this version, the federal government would regulate bingo and traditional Native American gambling games but "hard core" gambling, such as that involving poker, black jack, and slot machines would be prohibited. This bill was soon rejected as well for being too restrictive and not allowing the tribes to maximize their profits.[101]

H.R. 3130 was introduced by Congressman Douglas Bereuter (R-NE). His bill addressed the practice of municipalities giving lands to the tribes for gaming purposes. This concept had support and eventually made its way into the final version of the IGRA. Recalling that the tribes had rejected the original, simpler, Indian Gambling Regulatory Act a year earlier, it's interesting to consider that they might have avoided this prohibition along with a good number of additional stipulations.[102] In a sense, they lost their own bet when gambling on the actions of Congress.

Throughout the Ninety-ninth Congress the bill was debated and amended. Gaming activities were defined as falling into three classes. Class I gaming came to be defined as "social games

[99] Ibid., 18.
[100] Ibid.
[101] Ibid., 30.
[102] Ibid., 18.

solely for prizes of minimal value or traditional forms of Native American gaming engaged in by individuals as a part of tribal ceremonies or celebrations or in relation to them.[103] Class II games included bingo, card games, pull tabs, lotto, instant bingo, etc. Games in this class did not include blackjack, slot machines, or electronic facsimiles of card games. Class III games were defined as those not defined in the other classes and thus they included casino gambling.[104]

As the Ninety-ninth Congress continued the legislative process towards finding compromises to pass the IGRA, a looming Supreme Court case tilted the debate; that case was *California v. Cabazon Band of Mission Indians* decided on February 25, 1987.[105] In the case, the Cabazon Band as well as the Morongo Band of Mission Indians operated high stakes bingo, poker and other card games on their reservations near Palm Springs in Riverside County, California. The State of California sought to shut down the operations arguing that such activities violated state regulations. Riverside County also wanted to shut down the card games because they violated county ordinances and it wanted to be able to regulate the bingo games.

In response, the Mission Indian bands argued that since California's gaming laws were only regulatory and did not outright prohibit gambling, then under the criminal/prohibitory versus civil/regulatory test established in *Bryan v. Itasca County*, the state and county had no power to interfere with the tribes' gaming operations.[106] The Court agreed. In a 6-3 opinion, the justices ruled as the tribes had argued, concluding, "State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club."[107]

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[103] IGRA, 25 U.S. Code § 2703.
[104] Ibid.
[105] 480 U.S. 202.
[106] California ran a state lottery, allowed bingo and other games. See 480 U.S. 209-210.
[107] Ibid., 222.

Because of this decision, the legislative process in the IGRA came to a standstill. Anti-Indian gaming advocates now wanted a law that provided more state and federal control. Native Americans became convinced that any legislation would be a setback for them and became somewhat divided between those who participated in Class I and II gaming and those who had the more hard-core Class III gaming establishments. Pro-Native American legislators believed that legislation allowing for minimal oversight would protect Indian sovereignty in the long run and thwart the efforts of organized crime to infiltrate Indian gaming endeavors. Formal committee meetings nearly ceased as the sides dug into their positions. However, informal negotiations on the legislation continued over the next year and a half in the One-hundredth Congress and, in the end, the sides hammered out provisions that passed a voice vote in the Senate and 323 "ayes" and eighty-four "noes" in the House.[108]

What Congress came up with was signed into law by President Reagan on October 17, 1988. The IGRA created a National Indian Gaming Commission (NIGC) that would provide oversight to certain gaming activities and aimed to ensure that Native American gaming remained free of the influence of organized crime. It allowed for the regulation of Class I gaming to be done completely by the relevant tribes. It allowed for the oversight of Class II gaming by the NIGC; the tribes were to remain primarily responsible for staying within the bounds of certain minimum standards. Finally, regulation of Class III gaming would be done through the terms to be negotiated by the tribes and their respective states through a Tribal-State Compact.[109]

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[108] Ducheneaux, 46-47.

[109] An act to regulate gaming on Indian lands (a.k.a. The Indian Gaming Regulatory Act), Pub. L. 100-497, 102 Stat. 2467, approved October 17, 1988, creating 25 U.S.C. ch. 29 § 2701 et seq.; U.S. Congress, *Congressional Record,* September 26, 1988, 25371-73.

The Tribal-State Compact is what would eventually be tested in the Supreme Court. The authors of the IGRA assumed that states hostile to Indian class III gaming would drag their feet in negotiating with tribes that wanted to operate such establishments. As a result, a clause was inserted that allowed tribes to sue the reluctant states if those states failed to enter good-faith negotiations within 180 days after the tribe had presented an application to the state for such negotiations.[110] In addition, the law also allowed the tribes to sue state officials who might obstruct negotiations from advancing. At the time, Congress must have felt confident that these parts of the legislation were supported by the Indian Commerce Clause and the 1908 decision of the United States Supreme Court, *Ex parte Young.* In that case, the state of Minnesota had enacted a statute placing limits on railroad freight rates. The Northern Pacific Railroad filed suit in federal district court, invoking "substantive due process" to claim the statute violated the Due Process Clause of the Fourteenth Amendment and, also, the Dormant Commerce Clause. They also sought an injunction against Edward T. Young, the attorney general of Minnesota, to prevent him from enforcing the law. Notwithstanding the argument by the state that Eleventh Amendment sovereign immunity barred such an action, the United States Supreme Court held that the suit was, in fact, permissible because it sought to redeem protections set out in Section One of the Fourteenth Amendment, Section Five of which explicitly authorized the federal government to enforce.[111]

The *Seminole Tribe v. Florida* case began to simmer in the news in late June of 1991 shortly after the tribe had applied for the state's permission to allow gambling under the IGRA. Florida

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[110] Ibid., 25373.

[111] *Ex parte Young*, 209 U.S. 123 (1908); See John Harrison, "Ex Parte 'Young,'" *Stanford Law Review*, Vol. 60, no. 4 (February 2008): 989-1022.

was historically one of the reluctant states that refused to allow the tribes within its borders to operate casino type gambling. Indeed, Floridians had voted several times to disallow casinos or other gaming operations run by any entity. However, the state did allow gambling in some forms. It ran its own lottery. Private entities ran horse and dog race operations. Also, in existence at the time was a "penny-ante" law that decriminalized gambling for small stakes; however, such gambling was limited to poker. Bingo games, typically run by charitable organizations, were also allowed. Although charity events such as "Las Vegas nights" were also known to be held in the state, such events were, in fact, illegal since they involved blackjack and other casino games, which the state did not allow. Complicating matters was the fact that Florida also outlawed slot machines, but the IGRA specifically allowed for electronic games that mimicked high-stakes bingo, a game commonly allowed on Native American lands. Clearly some definitions of what constituted an electronic game would have to be worked out and the Seminoles hoped that requirements of the IGRA would help them fulfill their wishes.[112]

In September 1991, the Seminole Tribe filed suit in federal court claiming that Florida Governor Lawton Chiles (D) and Attorney General Bob Butterworth (D) had failed to begin good faith negotiations with the tribe, after it had so requested, as required by the IGRA. In early 1991, the tribe had contacted the governor and attorney general requesting permission to offer poker, video, electronic and computer-aided games and similar games, but the governor

[112] John D. McKinnon and Marlene Sokol, "Seminoles Seek Casino Gambling," *St. Petersburg Times*, June 28, 1991, Tampa Bay and State, 1B. Florida legalized horse racing in 1931 to bring in revenue during the Depression. In 1986, a ballot measure passed to allow a state lottery for public schools. That ballot measure also defeated a constitutional amendment to allow casinos. In 1990, the Florida legislature passed a law allowing "inter-track wagering via television hookups at the state's track and jai-alai frontons." John D. McKinnon, "Legislature Seems Ready to Take a Chance," *St. Petersburg Times*, November 12, 1991, Tampa Bay and State, 1B.

rejected all the proposals except poker. In June, the tribe expanded their request to include casino gambling but in August learned that the state would fight each any form of gambling not previously allowed by state law.[113]

Meanwhile, the tribe continued its operations in its bingo halls. While Florida law limited bingo jackpots to $250, tribal bingo operations had no such limits. As a result, Florida reservation bingo games with jackpots up $16,000, $20,000, and even $85,500 were reported on October 1992. Likewise, reservation video gaming grew stronger as well with one establishment operating about 200 machines offering such games as bingo and lotto in a video format. The big difference was that those games allowed for an unprecedented speed of gambling. Although the bets were low (typically $2) they could be made in five second intervals, resulting in gambling that more resembled traditional slot machine games than the bingo and lottery games they were supposed to replicate.[114]

On June 18, 1992, U.S. District Court for the Southern District of Florida Judge Stanley Marcus issued his ruling in favor of the Seminole Tribe.[115] During the trial, Ft. Lauderdale attorney Bruce S. Rogow represented the Seminoles and argued that the state had failed to enter good-faith negotiations with the tribe after being requested to do so. Florida Assistant Attorney General Jonathan A. Glogau countered that Congress had no power to enforce the "good faith" requirement of the compact process because the Eleventh Amendment prohibits such action. The Eleventh Amendment of the Constitution reads as follows:

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[113] *Seminole Tribe of Fla. V. State of Fla.,* 801 F. Supp. 655 (S.D. Fla. 1992); Lucy Morgan, "Seminoles Sue for Big Stakes," *St. Petersburg Times,* September 20, 1991, Tampa Bay and State, 1B.

[114] David Olinger, Bingo and Beyond, *St. Petersburg Times*, October 4, 1992, Perspective, 1D.

[115] *Seminole Tribe of Florida v. Florida,* 801 F. Supp. 655 (S.D. Fla. 1992); "Judge: State Can Ban Tribe Gambling," *Palm Beach Post,* September 23, 1993, 11A.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[116]

In his ruling, Judge Marcus first set out a synopsis of Eleventh Amendment jurisprudence. In 1890, he emphasized, the Supreme Court had ruled in *Hans v. Louisiana* that, not only could a state not be sued by a citizen of another state, but citizens could not sue their own states in federal court.[117] The Supreme Court's reasoning was that the initial ratifying states would never have given up such sovereignty to join the union. On the other hand, said Judge Marcus, the sovereign immunity provided by the Eleventh Amendment was not absolute and the Supreme Court had ruled in several instances that the Amendment could be abrogated. Again, in 1908, the Supreme Court had ruled in *Ex parte Young* that an individual may obtain a federal injunction against a state officer to prevent the him from acting in ways that contravened the Fourteenth Amendment.[118] Judge Marcus also pointed to the 1964 decision of the Supreme Court in *Parden v. Terminal Railway of Alabama*, in which the Supreme Court had ruled that a state could waive its immunity and consent to be sued in federal court.[119]

Far more important for the case at hand, Judge Marcus relied on the 1989 Supreme Court decision *Pennsylvania v. Union Gas Company* (1989) [120] In that decision, the Supreme Court had

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[116] U.S. Const., Amend. 11.
[117] 134 U.S. 1.
[118] 209 U.S. 123. In this decision, the Due Process Clause of the 14th Amendment and the Commerce Clause were ruled to be violated by a Minnesota state law that severely limited what railroads could charge within the state, so much so that it inhibited interstate commerce.
[119] The Court had found only one such occurrence. In *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964), the State of Alabama wished to run its state-run railroad in competition with commercial railroads on an interstate basis. The Eleventh Amendment would have protected Alabama unfairly in such a case according to the Court.
[120] 491 U.S. 1.

declared that Congress possessed the power to abrogate the Eleventh Amendment when it legislated under the auspices of the Interstate Commerce Clause. The reasoning was that Congress would clearly need a means to enforce Commerce Clause-based laws and each state would have had to understand that fact when they voted to ratify the Constitution. In other words, the states would have had to understand that they would be ceding certain powers to the federal government when they agreed to join the Union, and assenting to the federal commerce power was one of those powers given up.[121]

Pennsylvania v. Union Gas Co. (1989) had undoubtedly constituted a grievous setback for the New Federalism being advanced by the conservative justices of the Rehnquist Court. In this 5-4 decision, the Supreme Court had held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorized Congress, under its commerce power, to allow companies required to pay for hazardous waste site cleanups to sue states for their role in creating such environmental hazards – notwithstanding Eleventh Amendment sovereign immunity protections. From about 1900 to 1950, the predecessor of Union Gas Company had operated a coal gasification plant near Stroudsburg, Pennsylvania, along Brodhead Creek. A waste byproduct was coal tar, which the company stored underground. After the plant was dismantled, the state of Pennsylvania reworked areas along Broadhead Creek to improve flood control. In 1980, after having obtained easements from Union Gas, state workers accidentally struck a large deposit of coal tar while excavating the creek, and the hazardous material seeped into it. The EPA declared the project the first emergency Superfund site. The State of Pennsylvania and EPA operatives cleaned up the area at a cost of $720,000, and the federal

[121] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7-24 (1989).

government sued Union Gas under CERCLA for reimbursement. Union Gas, in turn, sued the state of Pennsylvania in federal district court for its contribution to the spilled hazardous material under a provision of CERCLA allowing such suits to be brought against states, whether they consented or not. The Third Circuit Court of Appeals affirmed the dismissal of the action.[122]

But five members of the Supreme Court saw the matter differently. With a plurality opinion written by Justice William J. Brennan, and with Justice Byron White concurring, the Court remanded the case for reconsideration in view of amendments to CERCLA made by the Superfund Amendments and Reauthorization Act of 1986 (SARA) that clearly allowed liability suits against the states in federal court. The bare holding was that Congress could abrogate the Eleventh Amendment sovereign immunity of the states from lawsuits to effectuate its commerce power on behalf of CERCLA. Invoking the 1934 decision of the Supreme Court *Monaco v. Mississippi*, Justice Brennan emphasized that "We have recognized that the States enjoy no immunity where there has been "a surrender of this immunity in the plan of the convention" – quoting *Federalist* No. 81, by Alexander Hamilton:

> Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.[123]

[122] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 1-6 (1989).
[123] Ibid., 19, citing *Monaco v. Mississippi* 292 U.S. 313, 322-323 (1934), quoting *Federalist* No. 81, p. 657 (H. Dawson ed. 1876) (A. Hamilton).

In the face of considerable public support of federal action to improve environmental protection, and amid growing controversy over Superfund projects, Justice Antonin Scalia and Sandra Day O'Connor registered strong dissents, which Chief Justice Rehnquist and Justice Anthony Kennedy joined. According to Justice O'Connor, "a faithful interpretation of the Eleventh Amendment embodies a concept of state sovereignty which limits the power of Congress to abrogate States' immunity when acting pursuant to the Commerce Clause."[124]

Federal District Court Judge Marcus, in *Seminole Tribe of Florida* relied entirely on the rationale set out by Justice Brennan in *Union Gas*:

> Given Congress' plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, Sec. 8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.* . . . we conclude that Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States' immunity.[125]

Judge Marcus' ruling was a blow to Governor Chiles, but Florida quickly made a petition to the Eleventh U.S. Circuit Court of Appeals in Atlanta and continued to resist in negotiations with the Seminoles. However, even if the governor had no interest in negotiating with the tribe, the Seminoles continued to make offers. In early 1993 the tribe offered to pay the state of Florida $100 million a year to allow it to operate casinos in Tampa, Hollywood, and Brighton. In a

[124] *Union Gas*, 491 U.S. 1, 29, 57 (1989). According to Dianne Rahm, although there was widespread public and political support for Superfund cleanups, the program was "fraught with dissension and controversy" from its inception, much of which had to do with the slow progress of cleanup operations, questions about the competence of the EPA, and the extraordinary costs it imposed on private individuals and businesses. Rahm, "Controversial Cleanup: Superfund and the Implementation of U.S. Hazardous Waste Policy," *Policy Studies Journal*, Vol. 26, no. 4 (December 1998): 719-734.

[125] *Seminole Tribe of Fla. v. State of Fla.*, 801 F. Supp. 655 (S.D. Fla. 1992).

sense, the governor was being offered a gamble himself since federal law prevents states from collecting taxes on Native American gaming. If Florida lost its appeal, gaming would be allowed and the state would receive nothing in return. However, Governor Chiles was adamant in his opposition to Indian gaming, and in fact he was against all gambling, including the state's lottery. His communications director stated the governor's views thus: "From a broad policy (standpoint) we think that government has an obligation to lead by action. If individuals want to gamble that's up to an individual, but in terms of a government endorsing certain areas and expanding the arena the governor's always been on record against that."[126]

Governor Chiles' gamble and stand on principles paid off. On January 18, 1994, the Eleventh U.S. Circuit Court of Appeals overturned Judge Marcus' decision, although the three-judge panel also ruled that the tribes could turn to the Secretary of the Interior for redress according to the IGRA. The panel was composed of Chief Judge Gerald B. Tjoflat, Circuit Judge Susan H. Black, and Senior Circuit Judge Frank M. Johnson, Jr. The Chief Judge was first appointed by President Nixon the federal bench in 1970 and was later promoted to a circuit court position by President Ford. Tjoflat knew and was admired by Chief Justice William Rehnquist who respected the judge's work.[127] Judge Black was first appointed to federal district court by President Carter in 1979 and President H.W. Bush appointed her to the Eleventh Circuit in 1992.[128] Judge Johnson had achieved considerable fame during the Civil Rights Era while he was the district court judge for the Middle District of Alabama from 1955 to 1979. He was the federal judge responsible for ruling to desegregate busses, parks, and restaurants in the

[126] John D. McKinnon, supra 106.
[127] William H. Rehnquist *et al*., "Tribute: Gerald Bard Tjoflat," *Duke Law Journal*, Vol. 44, 1995, 985.
[128] United States Court of Appeals for the 11th Circuit, "Hon. Susan H. Black." http://www.ca11.uscourts.gov/judges/hon-susan-h-black (accessed January 7, 2016).

Montgomery area during the 1950s and 60s. His opinions earned him death threats and a cross burned on his front lawn as a result.[129] First appointed by President Eisenhower, he was elevated to the Fifth Circuit in 1979 by President Carter and then to the Eleventh Circuit in 1991 by President H.W. Bush where he assumed senior status.[130]

Similarly to Judge Marcus, the appeals judges determined that the critical precedent upon which to decide the case was *Pennsylvania v. Union Gas Company*. However, the appeals court determined that *Union Gas* was inapplicable to the case at hand. The panel differentiated the Interstate Commerce Clause and the Indian Commerce Clause. While questioning the authority of the Union Gas ruling because of the plurality of the judgment, the Tjoflat-authored judgment stated, "we refuse to disregard *Union Gas* merely on these bases." Instead, they found that the case simply didn't apply to the present case since the present case involved the Indian Commerce Clause. The judges reasoned that the Indian Commerce Clause was added to the Constitution for a very different reason than the Interstate Commerce Clause, one clause being to allow Congress to legislate in the field of Native American affairs and one to smooth the way for commerce between states. Thus, the panel concluded, "the Union Gas holding does not control our disposition of this case."[131] It was now the Seminoles turn to appeal.

The Supreme Court granted certiorari and heard oral arguments on October 11, 1995.[132] Representing the State of Florida was its Assistant Attorney General, Jonathan A. Glogau, aided

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[129] "Judge Johnson Buried in the Alabama Hills," *The New York Times*, 28 July 1999. http://www.nytimes.com/1999/07/28/us/judge-johnson-buried-in-the-alabama-hills.html (accessed January 7, 2016).

[130] Federal Judicial Center, Biographical Directory of Federal Judges, "Frank Minis Johnson, Jr." http://www.fjc.gov/public/home.nsf/hisj (accessed January 7, 2016).

[131] *Seminole Tribe of Florida v. State of Florida Poarch Creek Indians*, 11 F3d 1016 (11th Cir. 1994).

[132] *Seminole Tribe of Florida*, 517 U.S. 53 (1995).

by Florida's Attorney General, Robert A. Butterworth. This was both attorneys' first appearances in the Supreme Court. Bruce S. Rogow represented the Seminole Tribe. Rogow was a prominent Fort Lauderdale attorney who had been before the Court eight times previously.[133] Representing the United States was Solicitor General Drew S. Days, III, who also urged a reversal of the judgment. Days had argued before the Court nineteen times previously and had represented the government in *United States v. Lopez*.[134] The case had gathered strong constituencies on both sides with five other tribes and the National Indian Gaming Association filing amici curiae briefs urging reversal and thirty state attorneys general filing such briefs urging affirmance.[135] Court watchers, having recently seen the surprising judgment in *Lopez* were watching this case closely as well.[136]

During oral arguments, the questions of the justices centered largely on one aspect of the case. They wondered why the Seminoles wanted to force the state to negotiate an agreement when the IGRA authorized the Secretary of the Interior to allow gaming licensing on reservations when all prescribed avenues or tribal-state negotiations had been exhausted. Likewise, they wondered why a state would not engage in negotiations knowing that, at some point, they would lose bargaining power when the issue went to the Secretary of the Interior. None of the three attorneys arguing the case seemed to have wanted to let time take its course but

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[133] "Bruce S. Rogow." *Oyez*. Chicago-Kent College of Law at Illinois Tech. https://www.oyez.org/advocates/bruce_s_rogow (accessed January 7, 2016).
[134] "Drew S. Days, III." *Oyez.* Chicago-Kent College of Law at Illinois Tech. https://www.oyez.org/advocates/drew_s_days_iii. (accessed January 7, 2016).
[135] *Seminole Tribe,* 517 U.S. 46-47.
[136] Linda Greenhouse, "Supreme Court Roundup: Justices Rule for Employees in a Bias Suit," *New York Times,* January 24, 1995. http://www.nytimes.com/1995/01/24/us/supreme-court-roundup-justices-rule-for-employees-in-a-bias-suit.html?pagewanted=all (accessed January 7, 2016).

were, instead, bent upon winning in court.[137] The justices offered no hints as to how they were going to rule on the decision and the waiting game for the ruling began. Their decision was published nearly six months later, on March 27, 1996.

With Chief Justice William Rehnquist authoring the majority opinion, joined by justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas, the Court readily acknowledged that it had found authority for Congress to abrogate the sovereign immunity of the states in the Fourteenth Amendment. In this connection, the Court pointed first to its 1976 decision *Fitzpatrick v. Bitzer*. In that case, employees of the State of Connecticut had brought a class action against the state, arguing that its statutory retirement plan discriminated against them because of their sex in violation of the Civil Rights Act of 1964. A federal district court, among other things, had denied an award to the petitioners of retroactive retirement benefits as compensation for their losses and to cover an attorney's fee. The district court based this ruling on the proposition that both awards would constitute a recovery of money damages from the treasury of the state, which, it insisted, the Eleventh Amendment precluded. According to the Supreme Court in *Bitzer*, however, the Eleventh Amendment did not bar a backpay award because the Eleventh Amendment and the principle of state sovereignty upon which it was grounded were limited by the enforcement provisions of § 5 of the Fourteenth Amendment, which granted Congress authority to enforce "by appropriate legislation" its substantive provisions. According to Chief Justice Rehnquist in *Seminole Tribe of Florida*, "[w]e held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the

[137] *Seminole Tribe v. Florida*, Recording of oral argument. https://www.oyez.org/cases/1995/94-12 (accessed January 7, 2016).

Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment."[138]

But the Court in *Seminole Tribe* also determined that the doctrine of *Ex parte Young* did not permit suits against a state's governor for prospective injunctive relief to enforce the negotiation requirements of the IGRA.[139] Again, that controversial decision had held that a lawsuit seeking an injunction against a state official did not violate the sovereign immunity of the state, because the state official was not acting on behalf of the state when he sought to enforce an unconstitutional law. In *Seminole Tribe*, the Court recognized that the principle set out in *Ex parte Young* had sometimes upheld federal jurisdiction in a suit brought by a private party against a state official. But, according to the Court, "[t]he situation presented here. . . is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine." Of critical important, the IGRA provided a "carefully crafted and intricate remedial scheme." The IGRA already had a remedy in place for a state unwilling to negotiate. The law demanded that, if a state was non-compliant for 180 days, a court would provide sixty more days to reach an agreement. After sixty days, the two parties were to provide their plans to a mediator who would then conclude a settlement. Finally, if the state failed to agree to the mediated plan, then the case would be referred to the secretary of the Department of the Interior, who would then prescribe regulations governing Class III gaming on

[138] Ibid., 59; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Fourteenth Amendment, Section One, states in part, ". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Section Five states, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."
[139] *Seminole Tribe,* 517 U.S. at 73-74.

tribal lands. The Court reasoned that a state's liability under *Ex parte Young* would be considerably greater than that proposed by the IGRA scheme, and the Court had no interest in rewriting the scheme; that would be the job of Congress. Therefore, *Ex parte Young* did not apply to this case.[140]

The Court also declared that its decision in *Union Gas* did not authorize Congress, under the Indian Commerce Clause, to permit private parties to sue the states under the IGRA and, thereby, abrogate their sovereign immunity. Chief Justice Rehnquist directly addressed the holding articulated by Justice Brennan in *Union Gas* that the states, when the they ratified the Constitution, had agreed to surrender certain powers under the Commerce Clause. According to Chief Justice Rehnquist, "We agree with petitioner that the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." But, to the extent that *Union Gas* purported to authorize abrogation of state sovereign immunity under either component of the Commerce Clause, the decision was unacceptable and wrongly decided. In the words of the chief justice, "*Union Gas* should be reconsidered and [is] overruled."[141] And, in this regard, he was rather emphatic:

> It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point . . . . And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III."[142]

[140] *Seminole Tribe,* 517 U.S. 78.
[141] *Seminole Tribe,* 517 U.S. 62-63.
[142] Ibid., 64.

The four justices in the minority took a dim view of the majority ruling. Two dissents were written, one by Justice Stevens (who wrote a concurring opinion in *Union Gas*) and the other by Justice Souter. The opinion of Justice Stevens ran twenty-four pages and was peppered with terms such as "curious," "shocking," and "misguided."[143] The thrust of his contention was that the idea of state sovereign immunity is "ancient" and "cannot justify the majority's expansion of it."[144] He wrote: "For this Court to conclude that timeworn shibboleths iterated and reiterated by judges should take precedence over the deliberations of the Congress of the United States is simply irresponsible."[145] In Justice Steven's view, the states were clearly subordinate to the federal government and only Congress could decide in which cases the Eleventh Amendment applied.

Justice Souter's eighty-five-page dissent ran nearly three times the length of the Court's opinion and was joined by justices Ginsburg and Breyer. Souter argued that the authors of the Eleventh Amendment had no desire to stifle all suits against states; all they intended was to ensure that states that had borrowed money from citizens of other states to finance the Revolutionary War were not sued by their creditors in federal court. The Eleventh Amendment, insisted Justice Souter, was never intended to bar cases arising under federal law or the Constitution.[146] Further, the idea of sovereign immunity was a remnant of the English common law that held little weight with the men who wrote the Constitution; indeed, the question would have to be asked, what exactly was the common law? Souter recalled James Madison's observation: "The common law was not the same in any two of the colonies."[147] In addition,

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[143] Ibid., 77, 78, and 100.
[144] Ibid., 98.
[145] Ibid., 99.
[146] Ibid., 113.
[147] Ibid., 139.

Souter argued that the ruling in *Hans* was suspect and that the *Hans* Court also misread the Eleventh Amendment because it had misconstrued the significance of the common law.[148]

Seminole Tribe of Florida constituted a "twofer" from the perspective of the Supreme Court justices interested in advancing an understanding of the Commerce Clause that comported with the New Federalism. Notwithstanding the outrage registered by the two dissenting opinions, the majority in *Seminole Tribe of Florida* held unmistakably that the Eleventh Amendment prohibited Congress from making the State of Florida, or any other state, capable of being sued in federal court for non-compliance with the tribal demands authorized by the Indian Gaming Regulatory Act. The "narrow exception" to this sovereign immunity, which empowered Congress to pass legislation to uphold the protections set out in Section One of the Fourteenth Amendment, was inapplicable because the Indian Gaming Regulatory Act provided a satisfactory remedial scheme. This holding could only have further dismayed the dissenters if the opinion of the majority, in this regard, had stated plainly that the remedial scheme provided by the IGRA, ultimately, permitted a state to ignore altogether the request made to it by an Indian nation to form a tribal-state compact for the purposes of establishing a casino on tribal land.[149] And it was, quite likely, gratifying to at least a few of the more conservative judges on the Court that *Seminole Tribe of Florida* also overturned *Union Gas* – and, thereby, entirely neutralized the erstwhile capacity of the CERCLA to produce lawsuits in federal courts against the states for environmental damages wrought by corporate industry. *Union Gas* had been a clear aberration to the majority in *Seminole Tribe*. It had not been a strong decision, as discussed, being based on a majority of five constituted by four justices joined in a plurality opinion and a concurring justice.

[148] Ibid., 130.
[149] Ibid., 76.

Additionally, the holdings in *Union Gas* had been blurred by partial concurrences and dissents that muddled exactly what the Court agreed upon. Fragmented as the 1989 decision was, it had greatly expanded the power of the federal judiciary to hear suits against the states beyond those authorized to enforce the Fourteenth Amendment. *Union Gas*, moreover, had created confusion in the lower courts as these tribunals weighed the decision's viability and waited for it to be overruled.[150]

Earnest A. Young emphasizes that the decision of the Supreme Court in *Seminole Tribe of Florida* quickly created an opportunity for the Court to further advance its New Federalism sovereign immunity doctrines. Because the decision reaffirmed its holding in *Fitzpatrick v. Bitzer*, that is, that the Congress was authorized to establish remedial law suits against the states to enforce the substantive provisions of the Fourteenth Amendment, claimants energetically began to bring such actions under legislative revisions made by Congress, under this rationale, to several extant programs and regulatory regimes. The Rehnquist Court rather rapidly overturned virtually all these initiatives, including decisions relating to revised provisions of the Patent Act of 1790, the Lanham Trademark Act of 1946, and the Age Discrimination Act of 1967, as well as to the Americans with Disabilities Act of 1990 (Title 1).[151]

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[150] "Justice White's "vague concurrence renders the continuing validity of *Union Gas* in doubt"" the Court quoting 11 F. 3d 1027 at ibid., 64

[151] These decisions employed a test set out in the important 1997 decision *City of Boerne v. Flores*. According to the prime holding in that decision, Congress could act under Section Five of the Fourteenth Amendment if it sought to prevent or remedy an actual constitutional violation and the remedy was "congruent and proportional" to the constitutional wrong. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) [Patent Act of 1790]; *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) [Lanham Trademark Act of 1946]; *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) [Age Discrimination and Employment Act of 1967]; *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) [Americans with Disabilities Act of 1990]. Earnest A. Young, "Its

Young argues that the Rehnquist Court handed down its New Federalism sovereign immunity decisions, beginning with *Seminole Tribe,* because there had been no New Deal innovations to impede this assertive line of constitutional federalism. There was no *Wickard* or *NLRB v. Jones & Laughlin Steel Corp.* permanently weakening state sovereign immunity. This circumstance, he suggests, "allowed the Court to do something nice for constitutional federalism without overruling important precedents or directly challenging the national regulatory state."[152] Young suggests further, with some circumspection, that the states' rights enhancing line of sovereign immunity decisions "reflects a somewhat odd mix of principle and pragmatism. It was principled in the sense that the impetus came from a desire to vindicate a neglected aspect of constitutionalism, not so much from a desire to achieve particular policy results."[153]

On the other hand, one might well view *Seminole Tribe of Florida* and the New Federalism sovereign immunity decisions it produced as emblematic of the determination of the Rehnquist Court to resist efforts by the Congress to undercut further state sovereignty with a divergent employment of commerce power. Beginning with *Seminole Tribe*, every New Federalism sovereign immunity decision through 2002 dealt with federal regulatory schemes based initially on the commerce power set out in Article I, Section 8. The reactive series of

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Hour Come Round at Last? State Sovereign Immunity and the Great Debt Crisis of the Early Twenty-first Century," *Harvard Journal of Law & Public Policy*, Vol, 35 (2012): 593-622, 608.

[152] Marking the end of the surge was, according to Young, a 2003 decision, while a 2006 decision seemed to confirm it. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) upheld the immunity-abrogating provisions of the Family Medical Leave Act of 1993. Pub. L. 103-3, 107 Stat. 6, approved February 5, 1993. *Central Virginia Community College v. Katz, 546 U.S. 356* (2006) held that the Article I Bankruptcy Clause of the Constitution abrogated state sovereignty, which made this decision the only one in the history of the Supreme Court to allow Congress to authorize individuals to sue state governments.
Young, "Its Hour Come Round," 608-609, 612.

[153] Ibid., 613-614.

decisions, thus, refused to allow Congress to inaugurate private law suits against state governments under § 5 of the Fourteenth Amendments by revising regulatory schemes and programs originally based on commerce power.[154]

Seminole Tribe and its Eleventh Amendment sovereign immunity progeny stood as a reaffirmation of the federalism principle that the state governments were not to be "commandeered." *Seminole Tribe* effectively held that Congress could not employ private law suits to compel states to enter tribal-state compacts against the wishes of a state's electorate and leadership, while, with its reversal of *Union Gas*, quite similarly insulated state governments from the remedial strictures of CERCLA. The two most contentious sovereign immunity rulings resulting from *Seminole Tribe* made it clear that Congress could not authorize private lawsuits to dictate the internal operations of a state. Private lawsuits authorized by federal statute for compensatory damages and backpay probably did not have the potential to adversely affect state treasuries to any large degree. But such actions not only encroached on Eleventh Amendment sovereign immunity – in the case of suits based on the revised Age Discrimination Act and the Americans with Disabilities Act – they compelled state governments to adhere to employee wage

[154] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999): Patent Act of 1790, 1 Stat. 109, approved April 10, 1790; Patent and Plant Variety Protection Remedy Clarification Act of 1992, Pub. L. 102-560, approved October 28, 1992. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (1999): Lanham Trademark Act of 1946, Pub. L. 79-489, 60 Stat. 427; Trademark Remedy Clarification Act of 1992, 106 Stat. 3567, approved October 27, 1992. *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000): Age Discrimination and Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602, approved December 15, 1967; Fair Labor Standards Amendments of 1974, Pub. L. 95-151, 88 Stat. 74, approved April 8, 1974; Older Workers Benefit Protection Act of 1990, 104 Stat. 978, Pub. L. 101-433, approved October 16, 1990. *Board of Trustees of the University of Alabama v. Garrett* (2001): Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327, approved July 26, 1990.

and hour, hiring, and promotion policies imposed unilaterally by Congress. As discussed in chapter three, this kind of encroachment had raised the hackles of conservatives jealous of state sovereignty, especially those with seats on the United States Supreme Court.[155]

As in *Lopez,* the decision in *Seminole Tribe* implicated some of the most contentious issues fueling the culture wars of the 1990s – including the rising casino gambling industry, federal government environmental protection regulations, and the balance of power between the state governments and the federal government. In *Seminole Tribe v. Florida* (1996), five of the nine justices of the Supreme Court reaffirmed the sovereign authority of the states in the face of increasingly extensive employments by Congress of its powers under Article I, Section 8. Dealing with that part of the Commerce Clause known as the "Indian Commerce Clause" and the Indian Gaming Regulatory Act of 1988, the decision marked a major advance for the "New Federalism."

Seminole Tribe of Florida constituted a twin victory from the perspective of the Supreme Court justices interested in advancing Commerce Clause New Federalism. The decision made it clear that the Eleventh Amendment prohibited Congress from making the State of Florida, or any other state, susceptible of being sued by a private party in federal court for non-compliance with the tribal demands authorized by the Indian Gaming Regulatory Act. In coming to this result, the Court also reversed a decision it rendered in 1969 to hold that commerce power did not authorize Congress to allow companies required to pay for hazardous waste site cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to sue

[155] *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *New York v. United States*, 505 U.S. 144 (1992).

states for their role in creating such environmental hazards. Once again, Eleventh Amendment sovereign immunity protections forbade this.

Seminole Tribe of Florida and the New Federalism sovereign immunity decisions it produced were also emblematic of the determination of the Rehnquist Court to resist efforts by the Congress to undercut further state sovereignty with a divergent employment of commerce power and to "commandeer" the states. While *Seminole Tribe* effectively held that Congress had no authority to authorize private law suits to compel states to enter tribal-state compacts, the decision also insulated state governments from the remedial strictures that Congress had set out in CERCLA. Eleventh Amendment sovereign immunity decisions resulting from *Seminole Tribe* that dealt with private lawsuits under the Age Discrimination Act and the Americans with Disabilities Act, moreover, effectively declared that Congress had no authority to establish private causes of action against state governments to coerce them into following Commerce-Clause-based employee wage and hour, hiring, and promotion policies imposed unilaterally by Congress.

Chapter Six

Violence against Women and

United States v. Morrison (2000)

Congress and President Bill Clinton approved the Violence against Women Act (VAWA) on September 13, 1994, establishing the new federal offense of gender-motivated violence. On May 15, 2000, the Supreme Court ruled in the case of *United States v. Morrison* that § 13981 of the VAWA was unconstitutional.[1] The Court concluded that Congress had no constitutional authority to enact that part of the statute providing victims of gender-motivated violence a civil remedy against their attackers. This remedial provision could not be sustained by either the Commerce Clause or the Fourteenth Amendment.[2] The events that precipitated the case began nearly six years earlier on a college campus in Virginia.

On the night of September 21, 1994, and the following morning, two men raped student Christy Brzonkala in her dormitory at Virginia Polytechnic Institute. Brzonkala, a freshman, had been a high school athlete and was attending Virginia Tech in hopes of pursuing a sports-related career.[3] Antonio Morrison and James Crawford were both new students at Virginia Tech as well

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[1] *United States v. Morrison,* 529 U.S. 598 (2000); 42 U.S.C. Sect. 13981.

[2] U.S. Const., Art. I, Sec. 8, "Congress shall have the Power To . . . regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."
U.S. Const., Amend. XIV, Sec. 1., ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] Brooke A. Masters, "'No Winners' in Rape Lawsuit; Two Students Forever Changed by Case That Went to Supreme Court," *The Washington Post,* May 20, 2000, B01.

and were also members of its highly-touted football team. The effects on Brzonkala were immediate and dramatic. She sought mental assistance, stopped attending classes, and eventually withdrew from school. In early 1995, Brzonkala had charges brought against her alleged attackers, but a Virginia grand jury refused to indict the men. She then brought suit in federal district court under § 13981 of the federal Violence against Women Act [VAWA hereafter]. That District Court of Western Virginia, based on the precedent set by the *Lopez* decision, concluded that the Act was unconstitutional. The three-judge panel of the Fourth District Court of Appeals reversed the district court's ruling by a 2-1 split decision; a review by the full Court of Appeals then vacated the panel's decision. The Supreme Court upheld the lower court's decision and added more fuel to speculation about the Court's new outlook on Commerce Clause-based legislation. It was clear that the Court was no longer going to accept *carte blanche* any new statutes based on tenuous ties to commerce as it had for the past sixty years.

The *Lopez* decision had shocked Court followers and officials nationwide because it was the first Commerce Clause-based statute overturned in sixty years. The Supreme Court was, in *United States v. Morrison*, again adjudicating in an area of federal authority in which it had never ruled before, making the case one of first impression. While culture wars conflict produced the Violence Against Women Act of 1994, divergent understandings of its social, political, and constitutional import shaped popular understandings of Christy Brzonkala's lawsuit and the ruling in *Morrison*. Activists working to improve women's rights would generally discount the decision for its seeming insensitivity to the pain and struggles of battered women. But, as in *Lopez*, the Supreme Court in *Morrison* also faced a question of monumental importance: Would Congress be permitted to rely on the Commerce Clause to wield an unlimited federal police

power? The clarified substantial effects test set out in *Lopez* would, amid much partisan tumult, provide the answer.

The Violence Against Women Act of 1994 was the federal government's first attempt to deal specifically and directly with the crimes of gender-based rape, domestic violence, and other forms of violence against women, other than statutes that had made assault and violence crimes on federal property. The VAWA, moreover, constituted Title IV of the Violent Crime Control and Law Enforcement Act of 1994.[4] More important, the VAWA was the result of several decades of feminist activism.[5] The modern history of the VAWA may be thought of as having begun with second-wave feminism, which was popularly associated with the Women's Liberation Movement of the late 1960s and early 1970s.[6]

Second-wave feminism extended the efforts of the women's rights movement beyond suffrage and marital property rights to deal with inequities related to gender prescriptions concerning female sexuality, reproductive rights, family relations, and employment and related legal inequalities embedded in the law. Among other achievements, feminists of this cohort focused their efforts on raising public awareness about domestic violence, including marital rape. Part and parcel of this campaign was the organized effort to establish rape crisis assistance and

[4] Sections 40001-40703, Title IV. Violence Against Women, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796, 1902-1955, approved September 13, 1994.

[5] Sally F. Goldfarb, "The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism," *Fordham Law Review,* Vol. 71, no. 1 (2002): 64.

[6] Carol Giardina marks the beginning of the Women's Liberation Movement in the United States with the arrival there of Simone de Beauvoir's *Le Deuxième Sexe* (1949), or *The Second Sex*, in 1953. Giardina, *Freedom for Women: Forging the Women's Liberation Movement, 1953-1970* (Gainesville: University Press of Florida, 2010), 15-33.

shelters for battered women, and reform the law of divorce and child custody to make them more equitable for women. Among other things, the activists of this cohort scored signal victories with significant alterations to federal law, including the extension of affirmative action rights to women in 1967, the decision of the United States Supreme Court in *Roe v. Wade* (1973), the passage of the Title IX Education Amendments, and the Pregnancy Discrimination Act of 1978.[7]

As indicated, one of the prime campaigns of second-wave feminism in the United States was dedicated to what contemporaries denominated the "anti-rape movement" or "rape prevention movement." Spurred by turn-of-the-decade F.B.I. statistics that showed an annual occurrence of 19.4 rapes per 100,000 people in New York, 35.3 in Columbus, Ohio, 43.2 in Kansas City, and 51.8 in Los Angeles, many women's rights activists made rape the focus of their activities.[8] The long-term goals of the movement were to reduce the incidence of sexual violence and lessen the impacts of such violence on victims. To reach these goals, the movement's activists sought to achieve many sub-objectives. They hoped to raise awareness about the incidence of rape and sexual assault and change the traditional attitudes about rape. Rape had historically been assumed to be the result of unbridled sexual desire, but feminists hoped to make the point that it was instead an act of domination. Activists also argued that rape victims had often been too

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[7] Title IX, Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, approved June 23, 1972: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance; *Roe v. Wade*, 410 U.S. 113 (1973); The Equal Credit Opportunity Act, Pub. L. 93-495, title V, § 503, 88 Stat. 1521, approved October 28, 1978; The Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, approved October 31, 1978, amended Title VII of the Civil rights Act of 1964 to "prohibit sex discrimination on the basis of pregnancy." Stephanie Gilmore, ed., *Feminist Coalitions: Historical Perspectives on Second-Wave Feminism in the United States* (Urbana and Chicago: University of Illinois Press, 2008).

[8] Angela Taylor, "The Rape Victim: Is the Also the Unintended Victim of the Law?" *The New York Times*, June 15, 1971, 52L.

ashamed or afraid to speak out; anti-rape advocates hoped to enable women to feel less threatened to come forward with accusations. By raising awareness, the movement then hoped to be able to revise the sexual violence statutes in existence at the time to allow for more fruitful prosecutions and to aid the victims of sexual assault as well.[9]

The movement to stop sexual violence against women began as activists developed communications networks to organize for other issues in the late 1960s. By the early 1970s, anti-rape activists were conducting conferences and workshops to raise consciousness including "speak-outs" in which rape victims presented public testimony on their experiences.[10] In July 1972, the Rape Crisis Center in Washington D. C. established the first rape crisis hotline to provide emergency assistance and support for victims. A year later, the City of New York, in cooperation with private efforts, established a similar operation.[11] By 1977, the National Organization for Women (NOW) was operating approximately two hundred rape task forces around the country, including a national task force.[12]

As the rape prevention movement grew in numbers and support, its activists tried, with various degrees of success, to modify state statutes to make rape and sexual assault prosecutions more successful. They helped in crafting "rape shield laws" that prevented defense attorneys from revealing or inquiring about a victim's past sexual conduct. By 1974, ten states had passed such laws in varying forms, while a dozen other states considered them.[13] While some women's

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[9] Vicki McNickle Rose, "Rape as a Social Problem: A Byproduct of the Feminist Movement," *Social Problems*, Vol. 25, No. 1 (Oct. 1977): 75.
[10] Ibid., 75-76.
[11] *New York Times*, August 9, 1973, p. 25, col. 2.
[12] Rose, "Rape," 76.
[13] Linda Wolfe, "New Rape Laws Ending the Anti-Victim Bias," *The New York Times*, Dec. 1, 1974, 10E.

rights activists claimed victory with the passage of the new laws, other activist lawyers voiced concerns that forbidding cross-examination was a slippery slope in the field of civil rights since the practice could threaten a defendant's Sixth Amendment right to confront his accuser.[14] Nonetheless, by 1984, forty states had enacted rape shield laws.[15]

Another change in law that women's rights activists tried to influence was the requirement for corroboration of identity of the assailant and proof of rape.[16] Advocates seeking to stop sexual violence against women argued that while other crimes, such as robbery, assault, or fraud, required only the victim's word to make a viable case, rape was different. In contrast with other crimes, rape required corroborating evidence to substantiate the identity of the accused, evidence of force and lack of consent, and proof of penetration. Such evidence could include a witness, a torn dress, bruises, and other physical proof, but such proof was often lacking since many victims waited days or even weeks to report the crimes. Advocates for women's rights were passionate in their cause but they were opposed by many who favored the stringent requirement. Their opposition included lawyers, psychiatrists, and others, who believed that, to protect those wrongly accused, the standard of proof had to be higher in rape and sexual assault cases. They pointed out that the motives for claiming rape were many, including an excuse for an unwanted pregnancy, feeling guilt afterwards about having had sex, unrequited love, or injured pride as the result of a breakup. Eve Preminger, the President of the Correctional Association of New York

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[14] Jerrold K Footlick, Lucy Howard, Diane Camper, Elaine Sciolino, and Sunde Smith, "Rape Alert," *Newsweek,* November 19, 1975, 70; U.S. Const. Amend. VI, "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him . . ."

[15] Colman McCarthy, "Shield Laws on Trial," *The Washington Post,* March 11, 1984, K3. See also, for example, Linda Wolfe, "New Rape Laws Ending Anti-Victim Bias," *The New York Times,* Dec. 1, 1974, 10E.

[16] "Learning the Law from Women's View," *The New York Times,* October 28, 1971, 34L.

stated her concern, "By coming out in favor of stricter prosecution, it's as if the women's movement has stopped believing in the basic principles of our entire legal system—that it's better to let some guilty people go free than to send one innocent person to jail."[17] Women's rights activists countered, and the argument was used later to support § 13981 of the VAWA, that the higher standard of proof was a denial to women of equal protection under the law as guaranteed by the Fourteenth Amendment.[18] The idea was that just as that amendment had been used to combat prejudicial treatment against African Americans, the Fourteenth Amendment should be used to support legislation that aimed to give equality to the sexes in rape and sexual assault cases. Because of their activism, many states relented in relaxing the burden of proof. In 1974, New York eliminated the need for corroboration, while other states followed suit in later years.[19] In April 1975, Michigan passed what many feminists considered the model "criminal sexual conduct" code. The Michigan statute dropped the requirement for corroborative evidence and modified the penalties for rape as well, providing several sentencing options. Because rape is such a serious charge, penalties for it were often so severe that juries were less prone to convict knowing that they could be possibly sentencing an innocent man to life in prison or even giving him a death sentence.[20] In addition, the Michigan statute included a rape shield aspect

[17] Linda Wolfe, "New Rape Laws Ending the Anti-Victim Bias," *The New York Times,* December 1, 1974, 10E

[18] Lesley Oelsner, "'Because Ladies Lie,'" *The New York Times,* May 14, 1972, E5.

[19] David A. Andelman, "New Law on Rape Signed by Wilson," *The New York Times,* Feb. 20, 1974, 34L

[20] "In 22 states a convicted rapist can get up to life in prison. . . . In Mississippi, rape is punishable by death." Timothy Harper, "Enormous Change in U.S. Rape Laws," *The Associated Press,* April 28, 1984.

that prevented defense teams from cross-examining rape victims about their past sexual experiences.[21]

Activists also worked to redefine the legal view of rape from a violent expression of sex into an act of violence and dominance.[22] Feminist and journalist Susan Brownmiller led the movement on this front with her 1975 work, *Against Our Will: Men, Women, and Rape*. Likening rapists to "shock troops" who inadvertently, but effectively, put the fear of men into women for the benefit of other men, Brownmiller argued that throughout history, rape was used as a form of domination.[23] At the same time, other advocates for women's rights argued that to reduce sexual violence in the future, the roles of men and women must change through mass education. Florence Rush, a New York feminist, presaging arguments that continue to exist, stated to a conference of thirty activists, "We must educate even very young children, and stop raising little boys to be aggressive and assertive and little girls to be passive."[24]

With their success at the state level in improving sexual violence laws, the year 1975 also saw feminist leaders pressing for the allotment of federal funds to women's groups to allow them to organize local rape crisis centers. Proponents of such funding believed that local police departments were not equipped for the challenge of comforting rape victims and gathering information from them in a way that did not make the victim feel as though she was not trusted.[25]

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[21] Wolfe, "New Rape Laws."
[22] Timothy Harper, "Enormous Change in U.S. Rape Laws," *The Associated Press,* April 28, 1984.
[23] Jerrold K. Footlick, "A Feminist's View," *Newsweek,* November 10, 1975, 72; see also Susan Brownmiller, *Against Our Will: Men, Women, and Rape,* (New York: Simon and Schuster, 1975). Brownmiller argues that men have used rape since time immemorial to show dominance over women, including the women of a defeated population after war.
[24] "Feminists Ask Role in Establishment of Rape Crisis Unit," *The New York Times,* August 24, 1975, 38L.
[25] Ibid.

A *Newsweek* article that year, which focused on the growing national problem, quoted a Northern Virginia police academy official as saying, "Policemen are problem-oriented so they respond to the problem, not the victim." However, in the same article, the magazine also reported that nearly every major city had a special sexual-offense unit. The state of Massachusetts mandated such units for every community, and the police academy of northern Virginia was teaching all officers who might encounter sexual assault victims to treat them with decency and respect.[26] Although the states made great strides in protecting and caring for their citizens, Congress became convinced to get involved as well, and in July it created a National Center for the Prevention and Control of Rape. With a planned budge of $10 million, the center's role was to disseminate information nationally about the causes and prevention of rape and to study further rape law reform.[27] During the late 1970s, however, states tightened their budgets in response to the nation's poor financial condition. As they did so, roughly a quarter of the 600 rape crisis centers nationwide were forced to shut down. Women's rights activists again turned to the federal government for help and in 1981 finally got the support they had lobbied for when Congress authorized block grants to states to support the centers.[28] Massachusetts for example, received $75,000 in 1983 to support rape counseling in 12 centers.[29]

The drive to prevent sexual assault on women also focused on family violence issues. Referring to an English common law heritage that relegated women to be treated as the property

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[26] Jerrold K Footlick, Lucy Howard, Diane Camper, Elaine Sciolino, and Sunde Smith, "Rape Alert," *Newsweek,* November 19, 1975, 70.
[27] "For Victims of Rape: Many New Types of Help," *U.S. News and World Report,* December 8, 1975, 44.
[28] Stuart Taylor, Jr., "Rape Crisis Centers Reduced," *The New York Times,* 4B.
[29] Mary Wessling, "State Launches Campaign Against Rape," *The Associated Press,* May 16, 1983.

of the male head of household, the crime of rape was not seen as offensive because of its effects on the female victim but was instead seen an infringement on the property rights of one man by another. Through this prism, a head of a household was responsible for the actions of all the members of his household and he thus had the right to treat those members as his property and discipline them as he wished. Thus, state officials typically did not concern themselves with wife beating and child abuse if what they understood to be "public order" was maintained. However, these ideas changed over time and especially with the advent of the women's movement as women strove for greater independence and equality.

In this connection, idiosyncratic second-wave feminist, lawyer, and political scientist Catharine A. MacKinnon controversially articulated a thoroughgoing feminist critique of law that frustrated and perplexed many conservative and liberal activists interested in improving the legal rights of women. From about 1983 through 1989, she publicized widely her view of law as an organic part of a socially male state, which had arisen over thousands of years from customs and practices fashioned by men and entirely consistent with male dominance. While taking Marx to task for presupposing that women's responsibility for child rearing was a "natural" gender, or sex, role – MacKinnon, it seems, employed several Marxian theories to elaborate how bourgeois "knowledge" normalized sex inequality. Consequently, contemporary society had little capacity to recognize the existing patriarchal hierarchies embedded in the foundations of the law. Men's thoroughgoing domination of women, socially and economically, and through the employment of violence, was grounded in everyday life long before modern political thinkers began to conceptualize understandings of social compact, state-building, the rule of law, and equality.[30]

[30] Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs*, Vol. 8, no. 4 (Summer, 1983): 635-658.

MacKinnon's project was to reveal the deep gender bias permeating extant law and its implications for violence by men against women. With this perspective, she boldly recast legal debate on a whole host of issues connected to sex-based discrimination, sexual abuse, prostitution, pornography, sexual harassment, rape, and other forms of violence western society and states had long authorized men to inflict on women to whom they laid claim. Most pertinent to this discussion was MacKinnon's distinctive argument that rape was, fundamentally, an expression of inequality between women and men. Her linkages between the male state and rape were, to say the least, provocative:

> The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying, or de jure prohibiting its excesses when necessary to its normalization. Substantively, the way the male point of view frames an experience is the way it is framed by state policy. To the extent possession is the point of sex, rape is sex with a woman who is not yours, unless the act is so as to make her yours.

MacKinnon, it seems, was not entirely hopeful that even the most liberal lawmakers and jurists in the United States, or elsewhere, might quickly take meaningful steps to ameliorate the grim impact of the male state on women. According to MacKinnon, "As male is the implicit reference for human, maleness will be the measure of equality in sex discrimination law."[31] By the late 1980s, as will be discussed hereafter, the extraordinarily iconoclastic views of activists such as Catharine MacKinnon had contributed to a reaction within the ranks of feminism –

[31] Ibid., 644. Fred R. Shapiro provides substantial evidence tending to show that MacKinnon's 1983 journal article had an inordinate impact, at least for a time, on legal academics. Shapiro, "The Most-Cited Law Review Articles Revisited," *Chicago-Kent Law Review*, Vol. 71 (1996): 751. See also Catharine MacKinnon, *Toward A Feminist Theory of the State* (Cambridge, Massachusetts: Harvard, 1989), 161.

centered on debates over the meanings and boundaries of acceptable female sexuality, including opposing views over pornography, prostitution, and lesbian relationships.[32]

Amid a seething debated within feminism over the proper goals of women's rights advocacy, the 1980s saw new national leadership beset with the challenge of further dismantling the male state and shifting to a more conservative line of policymaking. Having responsibility for the welfare of their citizens since the founding, States had typically taken the lead on family violence issues, as they had in matters of rape and sexual abuse; however, in Ronald Reagan's 1984 State of the Union Address, as a "rededication to values" he promised, "This year we will intensify our drive against these and other horrible crimes like sexual abuse and family violence."[33] Although the National Coalition against Domestic Violence criticized him for reducing federal funding for domestic violence programs, he committed the federal government to family violence prevention and support in two ways.[34] First, U.S. Attorney General William French Smith established the Department of Justice's Task Force on Family Violence. The task force was responsible for creating reports on the frequency and impact of family violence in America and to provide recommendations to local law enforcement. Upon announcing the task force's first report, French stated, "This is essentially a state and local matter. Nevertheless, as in other areas, the federal government is ideally suited to provide leadership and to provide

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[32] Jane F. Gerhard, *Desiring Revolution: Second-Wave Feminism and the Rewriting of American Sexual thought, 1920 to 1982* (New York: Columbia University Press, 2001); Lisa Hunter Duggan and Nan D. Hunter, *Sex Wars: Sexual Dissent and Political Culture* (New York: Routledge, 1995); Dorchen Leidholdt and Janice G. Raymond, eds., *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon Press, 1990).

[33] Ronald Wilson Reagan, "State of the Union Address (January 25, 1984)," The Miller Center, University of Virginia. http://millercenter.org/president/speeches/detail/5457 (accessed February 5, 2012).

[34] Joan Mower, "Washington Dateline," *The Associated Press,* March 1, 1985.

education and training." The report recommended that the justice system treat people charged with family crimes just as if there was no relationship between the alleged attacker and the victim. The report also suggested that, "Whenever possible, prosecutors should not require family violence victims to testify at the preliminary hearing," instead allowing hearsay evidence to suffice, and for cases in which a child was the victim, the child's trial testimony could be presented via videotape so the child would not have to confront the defendant in the courtroom. In addition, prosecutors were advised, "The victim should not be required to sign a formal complaint against the abuser before the prosecutor files charges, unless mandated by state law."[35] Seemingly contradicting these suggested deviations from typical prosecutions, Detroit Police Chief William Hart, the task force chairman, noted in presenting the report, "The legal response to family violence must be guided by the nature of the abusive act, not the relationship between victim and abuser."[36] The second federal jump into the family violence realm in 1984 occurred when Congress passed the Family Violence Prevention Services Act. Passed as Title III of the Child Abuse Prevention and Treatment Act, the Act authorized money for funding domestic violence shelter care facilities, police training related to domestic violence and elder abuse, and setting up an information clearing house.[37] The funding equaled $11 million in fiscal year 1985, and $26 million for fiscal years 1986 and 1987 and was reported by the *American Bar*

[35] William L. Hart, et. al., Family Violence. Attorney General's Task Force Final Report, September 1984, 35; Gene Grabowski, "Byline," The Associated Press, September 19, 1984; Cheryl Frank, "News: Family Violence: Task Force Takes a Hard Line," *ABA Journal*, Vol. 70, No 26, (December 1984).
[36] Grabowski, "Byline."
[37] Pub. L. 98-457.

Association Journal to have been the result of a six-year lobbying campaign by women's and children's advocates.[38]

The Department of Justice was not the only federal agency to join in the fight against sexual assault and rape. In 1985, President Reagan's Surgeon General, C. Everett Koop, assembled a task force of his own comprised of 175 health professionals from around the country. Koop stated in a Senate subcommittee on health meeting that, "The traditional response by Americans has been to strengthen the forces of law and order, enlarge our prison capacity and reform our laws concerning the punishment of perpetrators of these kinds of crimes." He argued instead that that health professionals step away from their detached, professional manners and get more involved in discovering if abuse was occurring when patients came in for treatment. He suggested that health professionals had a role to play in reporting abuse when they suspected it as part of the national fight against domestic violence.[39]

As the funding for federal women's projects began to be allocated, groups outside of the women's liberation movement, who took a more conservative view of how to respond to sexual violence, requested funds for their projects as well and controversy ensued. In 1985, the Justice Department provided a grant to the National Coalition against Domestic Violence, a women's rights advocacy group. Seeing those funds as counterproductive to preventing domestic violence and only encouraging a feminist anti-male agenda, Phyllis Schlafly, an ardent foe of the Equal Rights Amendment and leader of the conservative group, The Eagle Forum, encouraged a group

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[38] Family Violence Prevention and Services Program summary. http://www.acf.hhs.gov/programs/fysb/content/docs/FVPSA_program_summary.pdf (accessed February 5, 2012). Cheryl Frank, "LawScope: Getting into the Act," *ABA Journal,* Vol 70 (December 1984): 27.

[39] Joan Mower, "Surgeon General Urges Doctors to Help Curb Domestic Violence," *The Associated Press,* October 30, 1985.

closely aligned with hers to apply for a similar grant for their organization, The Task Force on Families in Crisis. The *Washington Post* reported that Schlafly said that while there is a place for women's shelters, she also stated, "The feminist ideology is that all men would be wife-beaters if they got the chance. We do not accept that ideology. Surely the whole answer cannot be to punish the woman by taking her out of her own home."[40] Instead of creating more shelters, the task force leaders applied for a grant of $622,905 to educate mainstream America about family violence to enlist civic and religious groups to help in prevention of spousal and child abuse.[41] Liberal groups were outraged at the idea. People for the American Way called the award "a scandalous abuse of public funds" and the group's president, Anthony T. Podesta, wrote a letter to Congress decrying the grant as "a vehicle for the Eagle Forum to garner federal support to advance its controversial views."[42] In April 1986, having made the point that they could garner taxpayer funds, the task force withdrew its application. Tottie Ellis, leader of the task force explained, "The only reason we made the application in the first place was because we believe the government has an obligation to balance the tremendous amounts of government money already given to feminist groups who pursue their own agenda at taxpayers' expense."[43] Undeterred by the withdrawn application, Rep. Patricia Schroeder (D-CO) charged that the grant might have been illegal since the funds were supposed to be used exclusively for shelters and not education. Rep. John Conyers (D-MI), Chair of the House Subcommittee on Criminal Justice, believed that Congress should start an investigation immediately, but because the application had

[40] Howard Kurtz, "Crisis Intervention for Traditionalists? Activist Schlafly Secures U.S. Funding for Alternative Task Force, *The Washington Post*, June 4, 1986, A21.
[41] Jill Lawrence, "U.S. Grant to Women's Group Stirs Conservative-Liberal Row," *The Associated Press,* June 5, 1986.
[42] Kurtz, "Crisis."
[43] David E. Anderson, "Washington News," *United Press International,* June 4, 1986.

been withdrawn and no money went to the task force, the issue lost its punch as other issues gained in importance.[44]

Champions of women's rights next turned their attention to rape and sexual assault on college campuses. An increasing number of rapes on campuses were reported throughout the early 1980s. While it was unclear whether the increase was due to more reporting of the crime or more frequent occurrences, rape became college officials' primary security concern. For example, the *New York Times* reported that the Rape Treatment Center at the Santa Monica Hospital Medical Center saw a "dramatic increase" in the number of women reporting assaults on campus; the facility saw sixty-five more rape victims in 1987 than in 1986. The medical center was so concerned about the rise that it prepared a booklet entitled "Sexual Assault on Campus: What Colleges Can Do," which it distributed to 3,200 college presidents and campus newspapers. Also of concern to rape prevention activists was that incidents of what came to be known as "date rape" or "acquaintance rape," i.e. instances in which the victims knew their attackers, were possibly more frequent than sexual violence committed by strangers. Campus women's rights advocacy groups, like Stanford's Rape Education Project and the Center for the Study of Campus Violence at Towson State University in Towson, Maryland, distributed pamphlets to students to raise student awareness about campus sexual violence.[45]

Women's rights activists began to press colleges to develop new policies condemning sexual violence against women, developing educational programs on rape, and instituting procedures to modify living arrangements if a victim and the accused lived in the same dormitory. The *New*

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[44] Jill Lawrence, "Justice Department Grant to be Investigated," *The Associated Press,* June 19, 1986.

[45] Deirdre Carmody, "Increasing Rapes on Campus Spur Colleges to Fight Back," *The New York Times,* January 1, 1989, 1.

York Times reported that during the fall semester of 1988 students staged protests around the country in which they demanded stricter policies on sexual violence targeting women. UCLA responded with new lighting systems, additional security guards, escort services, rape awareness sessions, and the distribution of 5,000 whistles. Brown University saw a three-hundred-student protest and a candlelight vigil afterward organized by the school's Women's Political Coalition. Five hundred students held a similar protest at the University of Illinois.[46] Clearly, advocates for women's rights had succeeded in making students across the nation aware of the problem.

As women's-rights advocates pressed colleges to develop new rape prevention policies, a debate raged about the statistics on sexual assault on women, employed to support the cause, as well as a debate about the definition of the term "rape." *The New York Times* detailed an FBI report that incidents of rape rose across the nation thirty-five percent from 1978 to 1987. These numbers were somewhat nebulous, however, as some experts suspected only half of rapes were reported while others suggested that it was more likely that only one in ten rapes was reported. Figures about the proportion of rapes committed by strangers and acquaintances varied as well. A Justice department study found that forty-five percent of rape victims reported their assailants as being "non-strangers" while a study done in Massachusetts found that number to be seventy-two percent. St. Luke's-Roosevelt Hospital in Manhattan estimated eighty to ninety percent of its patients who had been raped knew their attackers. Perhaps some of the discrepancy can be attributed to what exactly constitutes a rape. The definition of rape in the 1960s was generally defined as a brutal, forced, sexual act; however, by 1989, what constituted this crime was less constrained and included any form of non-consensual sex whether force was used or not.

[46] Ibid.

University of New Mexico sociologist Gary D. LaFree perhaps said it best when he said rape was defined first by the victim but ultimately "rape is whatever a jury says it is."[47]

Amidst this controversy arose one of the most horrific and hence sensational events that affected the campaign to stop sexual violence against women, the case of the "Central Park Jogger." On April 19, 1989, Trisha Meili, a slightly built, twenty-eight-year-old, white, investment banker, was brutally beaten and raped in Central Park while jogging at night. She was left for dead and found four hours later bound and gagged, laying in a puddle, comatose, and suffering from hypothermia and two skull fractures.[48] On that same night, a group of over thirty black and Hispanic boys from Harlem, aged thirteen to fifteen, went on what came to be called a "wilding" in which they robbed a man, threw rocks at a taxicab, and assaulted a male jogger and two bicyclists. Nine of the boys were arrested and five later charged with the rape. Stories began to emerge from the interrogations of the boys that only heightened the tensions surrounding the case. Fifteen-year-old Yusef Salaam was said to have confessed, "It was something to do. It was fun."[49] Detectives referred to the accused as being "smug" about their actions. Although all five confessed to the crime before trial, they all recanted their admissions, saying that the police had coerced them. However, the five boys were convicted a year and half later and were given sentences of five to thirteen years. Locally, the trials of the boys helped make law-and-order candidate Rudy Giuliani attractive to voters in his New York mayoral

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[47] Laura Mansnerus, "Ideas and Trends: Sketchy Statistics: The Rape Laws Change Faster Than Perception," *The New York Times,* Sect. 4 p. 20.

[48] Craig Wolff, "Youths Rape and Beat Central Park Jogger," *The New York Times,* April 21, 1989, B1; "Key Dates in Case of Central Park Jogger," The Associated Press, August 19, 1990; Chris Smith, "Central Park Revisited," *New York Magazine.* http://nymag.com/nymetro/news/crimelaw/features/n_7836/ (accessed February 8, 2012).

[49] "8 Accused in Rape Act 'Smug'; 'It Was Something to Do; It Was Fun,' Youth Says," Palm Beach Post (Florida), April 23, 1989, 3A.

election.[50] Nationally, the case was closely watched and caused concern over rising violent crime.[51]

One of the issues that arose during the Central Park Jogger episode was whether the name of a sexual assault victim should be released to the public. Unlike other crime victims, those who were raped commonly faced stigma and suspicion. Major news outlets did not release Trisha Meili's name during the trial; instead she was referred to as the "Central Park Jogger." However, in February 1990, *The Des Moines Register* published a five-part story about the experience of Nancy Ziegenmeyer, a rape victim, written by the paper's editor, Geneva Overholser. Overholser had previously editorialized that by withholding the names of sexual assault victims, including those who are brutally raped, the press compounded the stigma surrounding the victims. She wrote, "As long as rape is deemed unspeakable—and is therefore not fully and honestly spoken of—the public outrage will be muted as well."[52] Ziegenmeyer's graphic and heart-wrenching story made national news and became a thing of controversy. Many *Register* readers were moved to write letters to the paper's editor about the story. James E. Smith, of Sioux Center seemed to represent a consensus view. "The disgusting and degrading details of Nancy Ziegenmeyer's rape have no place in a family newspaper the caliber of *The Register*. . . .

[50] Tom Wicker, "The Political Uses of Jogger's Adversity," *The New York Times*, May 6, 1989, 3B.

[51] The convictions of the five boys were vacated December 19, 2002, after Matias Reyes, a convicted rapist and murderer serving a life term, confessed to having been the sole perpetrator of the crime. DNA evidence was used to support his confession. Susan Saulny, "Convictions and Charges Voided in '89 Central Park Jogger Attack," *The New York Times*, December 20, 2002, 1A.

[52] David Margolick, "A Name, a Face and a Rape: Iowa Victim Tells Her Story," *The New York Times*, March 25, 1990, Sec. 1, Part 1, p. 1.

Unfortunately, we have to face such violent crimes at a very personal level before we are aroused to action and commitment."[53]

The *Register's* story certainly started a national dialog about the issue of naming victims. Journalists who advocated naming names argued that many other people have their names released into the news media with no choice in the matter. Additionally, naming names adds credibility to a news report. Those working to improve women's rights argued that the stigma of rape was sustained by treating the offense as different from other crimes. Susan Brownmiller was reported to have said, "By not printing a name, you're just perpetuating the myth that rape is the worst possible thing that can happen to a woman."[54] Another viewpoint was made by Attorney Carey Haughwout, who argued that identifying the victim provides the public a face with which to place its sympathy, which could be advantageous to obtaining a conviction. She pointed out how in a recent case of an alleged "date rape" by Sen. Edward Kennedy's (D-MA) nephew, William Kennedy Smith, Smith had the public relations advantage provided by daily illustrations of Smith and his family's pains and stresses. "These pictures brought Will to us, helped us know him and judge him. On the other side, we had an alleged victim; no name, no face. I believe this contributed to the public's attitude that supported Mr. Smith and applauded the jury's verdict"[55]

While the debate continued about the naming of rape victims, the issue Haughwout mentioned, date rape, provided yet another controversy presaging the VAWA. "Judging by the

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[53] Ibid.

[54] Shann Nix, "Rape Victims: Should They Go Public? Does it Heal the Victims' Stigma or Just Compound Their Trauma?" *The San Francisco Chronicle,* May 14, 1990, B3.

[55] Cary Haughwout, "Naming Names; Lifting Veil of Anonymity Would Help End the Shame," *Palm Beach Post,* December 22, 1991, 1E; p McLean, "Mystery Woman Names 'Rapist' Kennedy Dynasty Rides the Rumor Train; - Again," Herald Sun, April 4, 1991.

news and entertainment media, the problems of date rape and acquaintance rape have reached crisis proportions in recent years," wrote *Reason* magazine's Stephanie Gutmann in July 1990.[56] Throughout the late 1980s many college campuses reported large increases in rape and sexual assault, mostly involving friends or acquaintances. One of the more notable reports, by University of Arizona professor Mary Koss, concluded that among 3,187 women surveyed at thirty-two college campuses, 27.5 percent had been victims of rape or attempted rape; most of them by acquaintances.[57] The *St. Petersburg Times* reported a study suggesting that fifty-seven percent of all sexual assaults were committed by aggressors known by the victims.[58] The University of Illinois sexual assault task force mailed surveys to 1,460 women on the campus of 25,950 undergraduate students; 537 women responded and of them 16.4 percent reported "criminal sexual assault," defined as "intercourse with a clearly expressed lack of consent;" furthermore, in sixty percent of the cases the attackers were fraternity members.[59]

However, reports of rape to campus and city police in college towns did not reflect those numbers. "Few of the incidents were reported to police," stated an article detailing the Illinois study. On Missouri campuses, the story was similar; in the first four months of 1989, only one date rape was reported to the Washington University campus police and only one rape was

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[56] Stephanie Gutmann, "'It Sounds Like I Raped You': How Date-Rape 'Education' Fosters Confusion, Undermines Personal Responsibility, and Trivializes Sexual Violence," *Reason,* July 1990, 23.

[57] Mary Koss, "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education," in Ann Wolbert Burgess, ed., Rape and Sexual Assault, vol. 2 (New York: Garland Publishing, 1988), 8, 10, 16; Jo Mannies, "'Date Rape' Stirring Debate at Mizzou," *St. Louis Post Dispatch,* April 23, 1989, 1A.

[58] Bill Stevens, "The Burden is on Men, Society to End Date Rape, *St. Petersburgh Times,* June 4, 1989, 2.

[59] Gutmann, "It Sounds Like," 24; Christopher Wills, "Campus Debates Rape Survey Conclusions," *St. Louis Post-Dispatch,* February 12, 1990, 1A.

reported in the city of Columbia, Missouri, home of the University of Missouri.[60] Likewise, at the University of California, Irvine, only one rape was reported and Columbia University's security department saw no rapes reported in the five years prior to 1989.[61] Meanwhile, FBI data showed that while reported cases of rape rose from thirty-five per 100,000 women in 1970 to seventy in 1980, between 1980 and 1988, reported cases of rape remained nearly constant at seventy per 100,000 women.

Additionally, the National Crime Survey of the Bureau of Justice Statistics (BJS), which included an estimate of unreported cases, indicated a decline from 150 to 113 per 100,000 women between 1980 and 1987.[62] While the numbers are certainly horrific, they fail to correlate with the higher numbers reported by campuses. Two things were likely causing the seeming discrepancy. First, women were reporting their cases to campus rape crisis centers rather than to the more formal security and police forces. "Date rapes normally are not reported to the police," said Columbia, Missouri's deputy chief of police in a 1989 interview.[63] The reason for the lack of reporting, some crisis counselors reasoned, was that victims of date rape were usually embarrassed by the incidents since alcohol was often involved and the women involved often blamed themselves.[64] A second reason that women reported on surveys that they had been victims of date rape but hadn't reported the incidents to police was that they didn't know the definition of the term "date rape" and hence didn't realize that they had been involved in such an

[60] Mannies, "Date Rape," 1A.
[61] Gutman, "It Sounds Like," 24.
[62] U.S. Bureau of the Census, Statistical Abstract of the United States 1981 (Washington D.C.: Government Printing Office, 1981), 173 in Neil Gilbert, "The Phantom Epidemic of Sexual Assault," *The Public Interest*, No. 103 (Spring, 1991): 57.
[63] Mannies, "Date Rape," 1A.
[64] Ibid.

incident. For instance, in a work by Clark University professor Christina Hoff Sommers, in which Sommers analyzes the 1988 Mary Koss' report, she states, ''only 27 percent' of the women [Koss] counted as having been raped labeled themselves as rape victims. Of the remainder, 49 percent said it was 'miscommunication,' 14 percent said it was a 'crime but not rape,' and 11 percent said they 'don't feel victimized."[65] Indeed, students were unaware of their victimization because the term "date rape" wasn't defined in a standard way among rape counselors. Dr. Andrea Parrot, a psychiatry professor at Cornell University defined date rape as "Any sexual intercourse without mutual desire," she went on, "[a]nyone who is psychologically or physically pressured into sexual contact is as much a victim of rape as the person who is attacked on the streets."[66] The Swarthmore College's Acquaintance Rape Prevention Workshop defined the term more broadly, stating, "Acquaintance rape . . . spans a spectrum of incidents and behaviors ranging from crimes legally defined as rape to verbal harassment and inappropriate innuendo."[67] Such definitions, and the implications thereof, became items of intense debate for at least the next decade.

Outspoken feminists, such as UCLA law professor Susan Estrich, argued that women should be "empower[ed] in potential consensual situations with the weapon of a rape charge." Others, seeing young women who were confused by the dilemmas presented by their morals in the wake of the sexual revolution, were concerned that those women saw the new definition of date rape as a sort of escape from responsibility for their actions. "If they say 'date raped,' they don't have to think about their own behavior; they don't have to think about their feelings. There's no

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[65] Christina Hoff Sommers, *Who Stole Feminism?* (New York: Simon & Schuster, Inc., 1990), 209-226.
[66] Gutmann, "It Sounds Like," 23.
[67] Ibid.

complicity, there's no responsibility, and that's the nonfeminist piece of it as far as I am concerned," said Catherine Nye of the University of Chicago's counseling service.[68] UC-Berkeley social welfare professor Neil Gilbert likened the broad definitions of rape to a feminist social reprogramming of society. He wrote, "The feminine prescription redefines conventional morality so as to give women complete control of physical intimacy between the sexes. Advances by males, in almost any form, that do not receive clear and explicit consent are deemed coercive or assaultive."[69] Clearly there was a great deal of debate over what constituted rape, but just as clearly, the topic had great potential politically at the national level.

The heated debate over the law of rape and legitimate female sexual intimacy reflected the emergence of what many activists and scholars have identified as "third wave feminism." Gaining a public profile in the late 1980s and early 1990s, this new phase of activism entailed several diverse lines of feminist endeavor, arising, in part, as a reaction to the perceived failures of second wave feminism. The new framework certainly involved a broadening of feminist thought and action to include women of diverse racial, ethnic, religious, and class backgrounds, as well as lesbian and other kinds of female sexuality.[70] But the movement also challenged second-wave feminist thought that had attempted, with special zeal, to de-legitimize prostitution and pornography. While second-wave feminists strictly identified these practices with male domination and violence against women, third-wave feminists understood them, at least in some

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[68] Ibid.

[69] Neil Gilbert, "The Phantom Epidemic of Sexual Assault," *The Public Interest,* No. 103 (Spring, 1991): 61

[70] Rosemarie Tong, *Feminist Thought: A More Comprehensive Introduction*, 2nd ed. (Boulder: Westview Press, 1998), 193-211; Becky Thompson, "Multiracial Feminism: Recasting the Chronology of Second Wave Feminism," pp. 39-60, in Nancy A. Hewitt, ed., *No Permanent Waves: Recasting Histories of U.S. Feminism* (New Brunswick: Rutgers University Press, 2010).

cases, as modes of female empowerment. Quite similarly, third-wave feminists rejected entirely second-wave theories that cast women persistently as victims of male domination and, thus, bereft of the autonomy and power to shape their own gender identities. Wendy Brown articulated a potent third-wave view that called on the liberal state, ultimately, to live up to its promises for female freedom and equality – but criticized feminist efforts to outlaw pornography and misogynist hate speech because such initiatives cast women as victims in need of government protection.[71] Former legal aid attorney Wendy Kaminer, who had opposed efforts to censor pornography in the 1970s on both feminist and First Amendment grounds, published *A Fearful Freedom: Women's Flight from Equality* (1990). This influential book explored the conflict between "protectionist feminism" and a more individualized field of feminist thought and activity open to women who assertively took control of their own lives and destinies – a feminism that would be, in the view of its proponents, truly empowering and egalitarian.[72]

In this turbulent ideological context, Senator Joseph Biden (D-DE) introduced the first version of the Violence Against Women bill, along with three cosponsors, in the Senate on June 19, 1990.[73] He co-wrote the bill with staffer and future University of Wisconsin law professor Victoria F. Nourse.[74] Titled S. 2754, a companion bill, H.R. 5468 was introduced in the House of Representatives by Representative Barbara Boxer (D-CA) on August 3, 1990.[75] The Senate

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[71] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, N.J.: Princeton University Press, 1995).

[72] Kaminer vigorously opposed the drive organized by Catharine MacKinnon and writer-activist Andrew Dworkin to have pornography featuring women made a civil rights violation. Wendy Kaminer, "Feminists Against the First Amendment," *The Atlantic*, November 1992.

[73] Victoria F. Nourse, "Where Violence, Relationship, and Equality Meet: The Violence Against Women' Act's Civil Rights Remedy," *Wisconsin Women's Law Journal,* Vol. 11, No. 1 (1996): 7.

[74] Joe Biden, *Promises to Keep: On Life and Politics,* (New York: Random House, 2007), 240.

[75] 1990 S. Rep. 101-545, 29.

Judiciary Committee held thee hearings on the bill, addressing gender issues in rape cases, campus sexual assaults, and crimes of domestic violence.[76] Mary Koss was a witness in the second hearing, providing the findings from her 1988 report. The report produced by the committee stated that "[m]ore college women will be raped this school year than will be struck by any other major crime," and that 125,000 women could expect to be raped in 1990, or any school year.[77] "These numbers show that rape has reached epidemic proportions in our country…American women are in greater peril now from attack than they have ever been in the history of our nation," the *Washington Post* reported Senator Biden as saying upon release of the first report.[78] The Senator's bill would have doubled the federal penalties for rape committed on federal property, authorized $300 million in federal block grants to local law enforcement to fight sexual assault, and redefined rape as a "hate crime," thus allowing victims to sue their attackers.[79] While Biden presented a passionate case for his bill, it failed to make it to a floor vote in 1990. Regarding the bill, "I remained a lonely voice in the Senate," Biden lamented in his biography.[80]

He reintroduced the bill, joined by twenty-five co-sponsors on January 14, 1991 as S. 15 and on March 20, Representative Boxer (D-CA) again introduced a companion bill, H.R. 1502, along with twenty-two co-sponsors in the House.[81] The Judiciary Committee held one hearing on the bill, on April 9, 1991. The hearing focused on the civil rights remedy for gender-motivated

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[76] 1991 S. Rep. 102-197, 35.
[77] 1990 S. Rep 101-545, 43.
[78] Michael Isikoff, "Record Number of Rapes Reported in U.S. in '90," *The Washington Post,* March 22, 1991, A3.
[79] Ibid.
[80] Joe Biden, *Promises,* 245.
[81] Elizabeth A. Brown, "Legislation Aims to Aid Victims of Rape and Abuse," *Christian Science Monitor,* April 1, 1991, 9.

crime. Professor Cass Sunstein of the University of Chicago School of Law and Professor Burt Neuborne of the New York University School of Law agreed that Congress held the constitutional power to enact such a provision.[82] The second attempt to pass the bill showed that it had at least some support by the states. The Illinois attorney general publicly supported the bill while the Iowa attorney general pleaded, "Please make stopping violence against women a very high federal priority, just as it has become an urgent project in Iowa and other states."[83]

Meanwhile, another precursor to the Bryzonkala case was emerging as an issue of societal discussion. A May 1991 edition of *Mademoiselle* written by Jill Neimark included an article on Athletes and Rape illustrating an alarming link between the two.[84] Neimark reported that athletes on group sports teams and fraternities could become prone to committing gang rape, "From June 1989 to June 1990, at least 15 alleged gang rapes involving about 50 athletes were reported." She postulated that athletes on teams become extremely bonded over years of playing together and gang rapes are yet another manifestation of such bonding. They also become quite confident that they are desired by women and assume that their sexual advances will be accepted, regardless of whether a woman verbally consents. Neimark also concluded that the men categorized women into sexual classes such as "nice-girl girlfriend" and "party girl rape victim." Generally speaking, "party girls" were categorized as such if they wore lots of makeup, wore tight clothes, were buxom, or had had sex with one of the group before.[85] *USA Today* reported a similar link between athletes and the crime of rape in August, providing a litany of examples in

[82] 1991 S. Rep. 102-197, 35.
[83] "Rapes in U.S. 'Out of Control' Senator Says," *The Toronto Star,* April 10, 1991, A2.
[84] Jill Neimark, "Out of Bounds: The Truth About Athletes and Rape," *Mademoiselle,* May 1991, 196-199, 244-46. http://www.interactivetheatre.org/resc/athletes.html (accessed February 20, 2012).
[85] Ibid.

which groups of three to five teammates participated in their crimes. The report also suggested that in most cases the participants failed to recognize that they had done anything wrong due to a sense of entitlement and that fear of losing respect within their group was more of motivator than fear of prosecution.[86]

As Senator Biden's bill gained momentum in the Senate, and was approved by the Judiciary Committee in July, it met another roadblock, this time from Chief Justice Rehnquist. Rehnquist wrote in his 1991 year-end report on the federal judiciary that the federal court system was nearing the point of becoming overburdened. He recommended that crimes such as domestic violence and firearms murders were best handled at the state and local levels. He warned that justice could suffer if the federal system became overburdened with cases without national import. He spoke specifically against what would become § 13981 of the VAWA, saying that its definition of a new crime "is so open-ended, and the new private rights of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes."[87] The Senator wrote later that he certainly didn't appreciate the Chief Justice "sticking his nose in congressional business."[88] With the unwanted input of Justice Rehnquist, Senator Biden's second attempt at passing the VAWA would fail, as had the first.

Biden suffered another major defeat during 1991 when Clarence Thomas was confirmed onto the Supreme Court. President George H. W. Bush nominated Thomas to replace the retiring Thurgood Marshall on July 1, 1991. Biden's Senate Judiciary Committee held hearings the following October. Although the hearings were contentious, they became much more so when a

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[86] David Leon Moore, "Athletes and Rape: An Alarming Link," *USA Today,* August 27, 1991, 1C.
[87] Michael Hedges and Jerry Seper, "Rehnquist Rips Bills on Federal Crimes," *The Washington Times,* January 1, 1992, A4.
[88] Biden, "Promises," 245.

leaked FBI investigation was revealed concerning allegations of Thomas' sexual harassment of one of his aides, University of Oklahoma law professor Anita Hill. Hill was called before the committee on Oct 11 and her testimony included accusations that Thomas had offered unsolicited comments to her about, among other things, pornographic movies and his own sexual prowess. Thomas denied all these allegations. Two other women made similar accusations but did not wish to address the committee. Several other women provided their support for Thomas, suggesting that Hill was not telling the truth. Thomas denied all the charges as well and took the offensive in his defense, stating to the committee: "This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus. It's a national disgrace. And from my standpoint, as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree."[89] Thomas' nomination was moved to the Senate as a whole, but the judiciary committee was unable to agree on whether to recommend him or not. The Senate, on October 15, 1991, confirmed Thomas by a vote of 52-48. The vote was one of the closest in history but was *not* split down by party lines.

Thomas' confirmation to the Supreme Court was still on voters' minds during the election of 1992. Although Thomas was confirmed to the Supreme Court, his confirmation had effects on the composition in the Senate. Many women's rights activists decried the fact that there were no

[89] Hearing of the Senate Judiciary Committee on the Nomination of Clarence Thomas to the Supreme Court, Electronic Text Center, University of Virginia Library, October 11, 1991. http://etext.lib.virginia.edu/etcbin/toccer-new-yitna?id=UsaThom&images=images/modeng&data=/lv6/workspace/yitna&tag=public&part=24 (accessed February 20, 2012).

women on the Senate Judiciary Committee during Thomas' hearings. State Senator Patty Murray (D-WA) claimed that she decided to run for the U.S. Senate because of her frustrations over the hearings. San Francisco mayor Diane Feinstein (D-CA) won a race to complete an unfinished Senate term in California while Representative Barbara Boxer won the other Senate seat. Additionally, Carol Moseley Braun (D-IL) won her election to become the first female African American Senator. Because of their victories, 1992 became known by the news media as "The Year of The Woman" as the Senate added four new female senators to the two who already held Senate seats.[90] Two of the women, Diane Feinstein and Carol Moseley-Braun, accepted Senator Biden's invitations to join the Judiciary Committee.[91]

With the election of Bill Clinton to the presidency in November 1992, the addition of the four women, as well as the support of Senator Orin Hatch (R-UT) in the Senate Judiciary Committee, Biden believed the time was right with the new Congress to reintroduce the VAWA.[92] On January 21, 1993, the first day of the legislative session of the 103rd Congress, he and, now Senator, Boxer introduced S. 11, and the bill amassed sixty-seven co-sponsors.[93] In the House, Representative Pat Schroeder (D-CO), along with Representatives Louise Slaughter (D-

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[90] "January 3, 1993, 'Year of the Woman,'" *United States Senate Historical Minute Essays.* http://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm (accessed February 20, 2012).

[91] "Job for a Woman," *USA Today,* December 9, 1992, 14A; "About the Committee," *United States Senate Committee of the Judiciary.* http://www.judiciary.senate.gov/about/PreviousCommitteeMembership.cfm#110-101 (accessed February 20, 2012).

[92] Biden, "Promises," 277.

[93] "Bill Summary and Status, 103rd Congress (1993-1994), S.11, All Congressional Actions," Thomas (Library of Congress). http://www.thomas.gov/cgi-n/bdquery/z?d103:SN00011:@@@X (accessed February 20, 2012); Victoria F. Nourse, "Where Violence, Relationship, and Equality Meet: The Violence Against Women' Act's Civil Rights Remedy," *Wisconsin Women's Law Journal,* Vol. 11, No. 1 (1996): 26.

NY), Charles Schumer (D-NY), and Constance Morella (R-MD) introduced the companion house version, H.R. 1133, on February 24, eventually gathering 225 cosponsors.[94] In selling his bill, Senator Biden pointed out that violence against women was a federal issue because it addressed issues of civil rights as guaranteed by the Constitution's Fourteenth Amendment.

> Our criminal laws must be judged by their effectiveness in responding to the injustices done to victims of violence. This is the covenant of equal protection guaranteed by our Constitution—that our criminal justice system shall not make distinctions in practice that cannot be sustained in law. . . . Long ago, we recognized that an individual who is attacked because of his race is deprived of his right to be free and equal we should guarantee the same protection for victims who are attacked because of their gender. Whether the violence is motivated by racial bias or ethnic bias or gender bias, the law's protection should be the same.[95]

Senator Biden's views on the right not to be sexually assaulted or raped as a fundamental human right reflected a growing international view about the rights of women as well. As news emerged from Bosnia during the civil war in the former Yugoslavia during 1992 and 1993, it became evident that thousands of Bosnian women suffered systematic rapes as part of the Serbian war effort. Media outlets such as the *St. Louis Post-Dispatch* urged the U. N. Conference on human rights to encompass women's rights and pledge to guarantee those rights.[96]

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[94] "Bill Summary and Status, 103rd Congress (1993-1994), H.R.1133, "All Congressional Actions," Thomas (Library of Congress). http://www.thomas.gov/cgi-bin/bdquery/z?d103:HR01133:@@@X (accessed February 20, 2012); Nourse, "Where Violence," 26.

[95] Joseph R. Biden, Jr., "Introduction," in Majority Staff of the Senate Judiciary Committee, *The Response to Rape: Detours on the Road to Equal Justice* [Part 1 of 9], May 1993. http://www.lexisnexis.com.proxy.mul.missouri.edu/hottopics/lnacademic/ (accessed February 20, 2012).

[96] "Women's Rights, Human Rights," *St. Louis Post-Dispatch,* June 3, 1993, 2C

The two versions of the VAWA were debated throughout 1993 and 1994. Committee hearings from earlier versions of the bill included discussions about the legislation's constitutionality. Before the *Lopez* decision in 1995, it was assumed that bills based on the Commerce Clause would stand judicial scrutiny if challenged. University of Chicago Law School Professor, Cass Sunstein, testified in 1991, "the constitutional objections to the bill are quite weak."[97] Written testimony from Sunstein and Professor Burt Neuborne, of New York University School of Law, explained that, "under that Clause, Congress has 'exceptionally broad' power to regulate any activity exerting a 'substantial economic effect' on interstate commerce."[98] Sunstein went on the explain that "Congress might reasonably find that sex-related violence affects interstate commerce not simply by deterring women from engaging in certain interstate commercial activities, but also by producing large losses in interstate productivity after the violent acts have occurred."[99]

If the Commerce Clause support for the bill was believed to be substantial, the equal rights portion supported by the Fourteenth Amendment was more problematic. The text of Section 1 states "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The language clearly applies only to actions perpetrated by the states; however, the bill's crafters reasoned that the bill created a substantive "right to be free from gender-based violence" that could provide a plaintiff a remedy at the federal level.[100]

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[97] 1991 S. Hearing 369 at 105 in Nourse, "Where Violence," 18 n. 96.
[98] Ibid., 18, no. 97-98.
[99] 1991 S. Hearing 369, 116-117 (written statement of Prof. Cass Sunstein) in Nourse, "Where Violence," 19, n. 100.
[100] Ibid., 25.

The Senate and House versions of the bill were similar when they were introduced, but were modified over time. The Senate version was a compromise between the Biden bill and a similar anti-assault bill, S. 6, produced by Senator Hatch. The compromise included the civil rights remedy, known as Title III of the legislation, and could claim bipartisan support as the Biden-Hatch crime bill exited the judiciary committee for review by the entire Senate. In the House, Representatives compromised as well but removed the civil rights remedy to make the bill less controversial, thus giving it near unanimous support. On November 1, 1993, Senator Biden introduced S. 1607, which was an omnibus crime bill. On November 4, 1993 the VAWA was incorporated into the larger bill and on November 19, 1993 the Senate passed the bill.[101] On November 20, 1993, the House passed its bill as well by a vote of 421-0, but without the civil rights provision.[102] The Senate rejected this bill and it sat idle for five months. Eventually, the Senate amended the House bill by striking all its text and replacing it with the language from the Senate bill. Over the spring and summer of 1994, the House and Senate held conferences over the bill, finally reaching a compromise in late August. The House committee members agreed to keep the civil rights provision in the legislation while the members of the Senate agreed to remove the "litter" from the bill by removing the judiciary committee's findings, which had been included in the text of the bill, and placing them instead into the legislative history. On August 21, 1994 the House passed the revised bill with a vote of 235-195. On August 25, 1994, the Senate voted on the bill and it passed 61-38. President Clinton signed the bill into law on September 13, 1994. "Let us roll up our sleeves to roll back this awful tide of violence and reduce crime in this country . . . . We have the tools now. Let us get about the business of using

[101] Ibid., 33-34 and 34 n.182.
[102] Ibid., 35.

them,"[103] the President said as he signed the bill. The VAWA was designated Title IV of the Violent Crime Control and Law Enforcement Act of 1994.[104]

The civil rights remedies for the criminal offense of gender-motivated violence were set out in § 13981 of Title 42 of the United States Code.[105] But it should be noted that the Violence Against Women Act otherwise included a wide array of progressive initiatives. These ranged from the enhancement of sentences for those convicted of a violent crime involving a woman victim when such convicts had previously been found guilty of such an offense; grants to state and local law enforcement agencies to reduce crimes involving violence against women; funding to improve security for women in public transportation; new evidentiary rules to be employed at trial when female victims of violent crime were called to testify; funding and programs to provide assistance to victims of sexual assault and domestic violence; counseling services for preventing family violence; guidelines for protecting the confidentiality of abused women and children; data collection and research on violence against women and children; and funding to promote cooperative efforts between law enforcement officials, prosecutors, local communities, and victim advocacy groups to investigate and prosecute incidents of domestic violence and child abuse, provide treatment and counseling to the victims of such crimes, and develop education and prevention strategies to deter them.[106]

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[103] William Jefferson Clinton, "Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994," *University of Dayton Law Review,* Vol. 20, No. 2 (1995): 567.
[104] Nourse, "Where Violence." 36.
[105] Section 40302, Title IV. Violence Against Women Act, Violent Crime Control and Law Enforcement Act of 1994. Pub. L. 103–322, 108 Stat. 1941, approved September 13, 1994, codified as § 13981, Part C. Civil Rights for Women, Title 42. The Public Health and Welfare, United States Code.
[106] Violence Against Women Act of 1994, 42 U.S.C. §§ 13701-14040.

Drafters of § 13981 of the VAWA, as indicated, had been highly aware of the necessity of providing defensible foundations for the measure in the realm of public opinion and the Constitution. The section first declared that its purpose was to "to protect the civil rights of victims of gender motivated violence by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." Part and parcel of establishing the new criminal offense providing the basis for that cause of action was a declaration that "All persons within the United States shall have the right to be free from crimes of violence motivated by gender." Alluding to an extant section of the United States Code, one subsection defined a "crime of violence" to mean "the use, attempted use, or threatened use of physical force against the person or property of another." Another subsection defined a "crime of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." The key provision of § 13981 maintained that "[a] person. . . who commits a crime of violence motivated by gender and thus deprives another of the right declared . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." The civil remedy was good, furthermore, regardless of whether the perpetrator had been criminally charged, prosecuted or convicted of any violent act constituting a felony under federal law. Equally prominent was a discreet declaration of the constitutional authority for § 13981:

> Pursuant to the affirmative power of Congress to enact this subtitle under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting

interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.[107]

The language of § 13981 seemed to open the door wide for law suits that had little or nothing to do with sexual assault or rape of women by men. While much of the debate over passage of the VAWA had concentrated on the national problem of sexual assault and rape of women, the new criminal offense, in fact, proscribed any gender-motivated "crime of violence," regardless of the gender of the perpetrator or victim. Again, under the definition of the offense set out in § 13981, any person, adult or minor, male or female, could successfully sue another for the use of violence against her or him or the threatened use of violence – if the violence or threat of violence was made "on the basis of gender, and due, at least in part, to an animus based on the victim's gender." The chances of success for plaintiffs in the sole cause of action authorized by § 13981 were optimized. As in all civil cases, determinations of guilt in actions brought under the provision would necessarily be based on a preponderance of the evidence, rather than, as in a criminal prosecution, a finding of guilt beyond a reasonable doubt. And, yet, § 13981 closed with language demonstrating, it seems, the solicitude of the Senate for the actual intended beneficiaries of the act – female rape victims: "It is the sense of the Senate that news media, law enforcement officers, and other persons should exercise restraint and respect a rape victim's privacy by not disclosing the victim's identity to the general public or facilitating such disclosure without the consent of the victim."[108]

A week after the VAWA was passed, on September 21, 1994, a female college student at Virginia Polytechnic University was alleged to have been raped repeatedly by two of her

[107] Section 40302, Violence Against Women Act, codified in 42 U.S.C. at § 13981.
[108] Ibid., Section 40304.

classmates when she visited them late one night in their dormitory room.[109] Christy Brzonkala had entered Virginia Tech that fall and was a prospect for the women's softball team.[110] Antonio J. Morrison, also a freshman, was a highly recruited, 222-pound reserve linebacker for the Virginia Tech Hokies football team.[111] Prior to college, he was a Group AAA All-state quarterback and defensive back as well as a standout basketball player at Indian River High School in Chesapeake, Virginia.[112] James Crawford was a freshman member of the football team as well and was Morrison's roommate. Brzonkala alleged that Morrison held her down and raped her, Crawford then did so, and, afterward, Morrison raped her a second time. She also claimed that Morrison verbally abused her, saying, "You better not have any . . . diseases."[113] Additionally, Brzonkala claimed that she told Morrison "no" twice during the incident. While Morrison admitted that he had intercourse with Brzonkala, he claimed the sex was consensual; however, Crawford denied having any sexual contact with Brzonkala that night.[114]

Brzonkala did not report the incident for four months, she said, because she was embarrassed, afraid, and ashamed. In January 1995, she told a friend about the alleged attack; in

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[109] Allison Blake, "Tech Hears of Sex Crimes; Lessening of Punishment Explained," *The Roanoke Times,* December 6, 1995, A1; "James Kilpatrick, Virginia Case Tests the Violence Against Women Act," *The Virginian-Pilot,* January 3, 1997, A15.
[110] *Christy Brzonkala v. Virginia Polytechnic and State University, et. al.*, 935 F. Supp. 781.
[111] "Morrison's Suspension Was Result of Rape Claim; Two-Semester Ban Later Was Declared 'Excessive' by Tech," *The Virginian-Pilot,* December 1, 1995, C1; Allison Blake and Betty Hayden, "Assault Records Revealed; Athlete's Case Raises Campus Court Questions," *The Roanoke Times,* December 2, 1995, C1.
[112] "Grand Jury Declines to Indict Va. Tech Players; But the Athletes Still Face a Civil Suit," *The Virginian-Pilot,* April 11, 1996, A1.
[113] Jan Vertefeuille and Betty Hayden, "Tech Wants Rape Case Dismissed; Accuser Changed Story, School Claims," *The Roanoke Times,* January 20, 1996, C1; *United States v. Morrison,* 529 U.S. 602.
[114] Betty Hayden and Jan Vertefeuille, "Ex-student Sues Tech, 2 Players; $8.3 Million Lawsuit Claims 3 1994 Rapes," *The Roanoke Times,* January 3, 1996, A1.

March she received counseling at Virginia Tech's Women's Center.[115] Brzonkala left Tech that spring to live with her parents and did not return to Virginia Tech in fall 1995 because she did not want to risk seeing the two men again on campus. She said she did not file criminal charges because there was no physical evidence to support her accusation and she did not want to face her attackers. She did, however, file charges through the University Judicial System and on May 3, 1995 Morrison was suspended for two semesters by a university disciplinary panel that found him guilty of "sexual misconduct." However, the charges against Crawford were dismissed due to a lack of sufficient findings of guilt. Morrison appealed the university disciplinary panel's ruling, claiming that the suspension violated his due process rights and that "the sanction was unduly harsh and arbitrary."[116] Morrison hired a lawyer, David Paxton of Roanoke, who discovered that the university's sexual misconduct policy had not been published in the school's student handbook at the time of the alleged incident. As a result, Morrison was given a second hearing, and charged with "sexual assault," a more serious charge that was included in the student handbook current in September 1994. Both Morrison and Brzonkala had legal representation at the second hearing and the panel ruled on July 21, 1995, that it was "unable to come to a conclusion of sexual assault;" instead, it determined that "Morrison's actions represented only abusive conduct, because of language used toward Brzonkala," reported the *Roanoke Times.*[117] His sentence remained the same, suspension for the next two semesters. On August 21, 1995, after a review of the case by Virginia Tech Provost Peggy Meszaros, Morrison's punishment was reduced to probation and a one-hour counseling session. The provost, "the first woman to hold the job at the once all-male military college," had determined

[115] *The Virginian-Pilot,* December 1, 1995.
[116] Ibid.
[117] *The Roanoke Times,* December 2, 1995, C1.

that the suspension was "excessive when compared with other cases" of abusive conduct.[118] Although the case to this point had been held in secret, as was usual for the university's disciplinary panel proceedings, Brzonkala decided to break her pledge of confidentiality because Virginia Tech refused her demand for it to pay for her to attend another university. *The Virginia Post* reported her frustration, "I feel kind of helpless, except for going public…The worst part is, I can't go to college where I choose. He was found guilty and he's going to college on a scholarship."[119]

On December 27, 1995, Brzonkala filed suit in U.S. District Court for the Western District of Virginia in Roanoke seeking $8.3 million in damages against Virginia Tech, Morrison, and Crawford. Tech's football team had recently been awarded $8.3 million for accepting an invitation to play in the New Year's Eve Sugar Bowl game against Texas (which Tech would win, 28-10).[120] Although other women had filed criminal charges based on the federal statute, Brzonkala would be the first to file a civil action under § 13981 of the VAWA.[121] Brzonkala's attorney saw the case as a test for the civil rights remedy section included in the VAWA that had been passed fifteen months before.[122] The United States intervened shortly thereafter to defend the constitutionality of § 13981[123]

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[118] Elizabeth Obenshain, "Painful Case Brings Difficult Lessons," *The Roanoke Times, New River Edition,* May 21, 2000, p. 2; *The Virginian-Pilot,* December 1, 1995.
[119] *The Virginian-Pilot,* December 1, 1995.
[120] *Christy Brzonkala, Petitioner v. Antonio J. Morrison, et al*., No. 99-29, United States District Court for the Western District of Virginia; "Sugar Bowl is TV Ratings Bomb; Woman Sues Va. Tech; Auburn Fires Hall," *Austin American-Statesman,* January 4, 1996, D2.
[121] Associated Press, "Va. Tech Rape Case is Testing Violence Against Women Act," *The Virginian-Pilot,* March 23, 1996, B5.
[122] Betty Hayden and Jan Vertefeuille, "Ex-student Sues Tech, 2 Players; $8.3 Million Lawsuit Claims 3 1994 Rapes," *The Roanoke Times,* January 3, 1996, A1.
[123] *United States of America, Petitioner v. Antonio J. Morrison, et al.,* No. 99-5, United States District Court for the Western District of Virginia.

Brzonkala began her action with a single attorney, but as the case achieved notoriety, other attorneys joined it. Brzonkala's first attorney, Eileen Wagner, was a Richmond higher education law specialist. Wagner had a strong history of defending students and professors against college administrations. She sued The College of William and Mary and Virginia Commonwealth University on behalf of women students who said they were sexually harassed by their professors. She also filed a friend of the court brief in 1993 arguing that the Virginia Military Institute should either accept women or become a private institution. Claiming that she was a victim of sexual assault herself, she believed that the only way that victims of alleged harassment or assault could get a fair hearing in the male-dominated court system was by presenting their cases in the court of public opinion.[124] By March 1996, Julie Goldscheid of the National Organization of Women Legal Defense Fund had joined Eileen Wagner on Brzonkala's legal team.[125] Brzonkala increased her lawsuit to $10 million and added All-American defensive end Cornell Brown to the suit because, according to Brzonkala, he watched the assault and failed to intervene.[126] Virginia Tech was part of the lawsuit as well because Brzonkala charged that the school "sexually discriminated against her by giving favorable treatment to Morrison in university judicial proceedings because he was a valuable member of the football team."[127]

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[124] Allison Blake, "A Lawyer Who Thrives on David-And-Goliath Fights," *The Roanoke Times,* April 28, 1996, B1; Betty Hayden Snider, "VMI Accepts Future Pilot, But She May Fly Elsewhere," *The Roanoke Times,* December 9, 1996, A1. Lauren Wagner, Eileen Wagner's daughter, was offered a full scholarship to the school in 1996.

[125] Ibid.

[126] Associated Press, "Tech Student Adds Brown as Defendant in Civil Lawsuit," *The Virginian-Pilot,* March 2, 1996, C3.

[127] Associated Press, "Police Finish Va. Tech Rape Investigation; A Prosecutor Will Decide Whether to Charge the Football Players," *The Virginian-Pilot,* April 5, 1996, B3.

Meanwhile, Michael Rosman of the Center for Individual Rights joined Morrison's attorney David Paxton in Morrison's defense. The Center for Individual Rights had taken on high-profile college cases in the past as well. They were successful in a fight against the University of Virginia where a student argued that the School had to fund his Christian magazine the same as it did other campus activities. It also achieved a victory in court against the University of Texas affirmative action policy on behalf of white applicants.[128] Rosman and Paxton made clear that they would defend their client by showing that the VAWA was itself an unconstitutional use of congressional power.[129]

As the civil lawsuit proceeded, the state of Virginia conducted an inquiry into criminal aspects of the case as well; however, the state police investigated the case for two months but were unable to reach a conclusion about Morrison and Crawford's guilt or innocence. On April 10, 1996, a grand jury in Montgomery County, Virginia found that there was insufficient evidence to indict either of the men, thus closing the criminal aspect of the case.[130] On April 27th, however, Brzonkala achieved some level of success as the Justice Department filed court documents in U.S. District Court for the Western District of Virginia to defend the constitutionality of the law. Their efforts were thwarted somewhat on May 7, when U.S. District Court Chief Judge Jackson Kiser dismissed Virginia Tech from the lawsuit, ruling that Brzonkala had not shown that the school's actions were based on sexual discrimination. *The Virginian-Pilot* quoted from Kiser's ruling, "In the final analysis, Brzonkala has alleged a flawed judiciary

[128] Jan Vertefeuille, "Big Guns Square Off in Lawsuit; D. C. Firm, Justice Dept. Hold Forth on Brzonkala, *The Roanoke Times,* June 11, 1996, C1.
[129] Associated Press, "Va. Tech Rape Case is Testing Violence Against Women Act," *The Virginian Pilot,* March 23, 1996, B5.
[130] "Grand Jury Declines to Indict Va. Tech Players; But the Athletes Still Face a Civil Suit," *The Virginian-Pilot,* April 11, 1996.

proceeding, the outcome of which disappointed her, but she has failed to allege facts that would support the necessary gender bias to state a claim."[131] Chief Judge Kiser determined that Virginia Tech's preferential treatment of the football players was not based upon Brzonkala's sex, but upon the player's status as athletes. The following month, Brzonkala's attorney, Eileen Wagner, filed a motion to dismiss Cornell Brown from the lawsuit after a witness made it clear that Brown could not have been present during the alleged attack.[132] On June 10th, Kiser heard the case between the two remaining defendants and Brzonkala.

While Chief Judge Kiser considered the arguments of both sides, the VAWA was undergoing scrutiny in a separate federal distinct court as well. Judge Janet Bond Atherton, in New Haven, Connecticut, presented a verdict on June 19th upholding the statute in a case where a wife was suing her husband for repeatedly threatening to kill her, beating her, throwing objects at her, and forcing her, as the *New York Times* reported, "to be a 'slave' and perform all manual labor."[133] The judge ruled that the four-year legislative history of the law showed that Congress was within its authority to create the VAWA. She wrote, "A rational basis exists for concluding that gender-based violence is a national problem with substantial impact on interstate commerce."[134] She further stated that because existing state and federal laws were inadequate to protect against gender-motivated violence, then it was appropriate for Congress to legislate in the area.[135]

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[131] Associated Press, "Judge Dismisses Tech from Ex-student's Suit Alleging Campus Rape," *The Virginian-Pilot,* May 8, 1996, B3.
[132] Associated Press, "Virginia Tech Rape Lawsuit Could Lose Defendant," *The Virginian-Pilot,* June 5, 1996, B7.
[133] James Barron, "Federal Judge Upholds Law on Violence Against Women," *The New York Times,* June 20, 1996, B4.
[134] James Kilpatrick, "Virginia Case Tests the Violence Against Women Act," *The Virginian-Pilot,* January 3, 1997, A15.
[135] Barron, "Federal Judge," June 20, 1996.

Although the outcome of the case was encouraging for Brzonkala, she and her lawyers opted to file backup civil cases against Virginia Tech and Morrison, Crawford, and Brown in state court. *The Roanoke Times* reported, "Wagner said she has no plans at this point to serve notice on the defendants, which formally notifies them that they are being sued and requires them to respond. But the state suits can be served if the pending federal suit is dismissed."[136]

Wagner's backup plan was prudent; on July 26, 1996, Chief Judge Kiser ruled counter to his northern counterpart and dismissed the suit against Morrison and Crawford after determining that the VAWA was not sustainable under the Commerce Clause or the Fourteenth Amendment.[137] In his forty-one-page ruling Kiser ruled that gender-based violence against women was beyond the commerce power of Congress and that, because the Fourteenth Amendment concerned only state action, not the individual acts of private persons, the law was not sustainable under that amendment. As far as the Commerce Clause issue was concerned, the district court duly recited the clarified substantial relations test set out in *Lopez*. Similarly to the Gun Free School Zones Act, wrote Chief Judge Kiser, § 13981 of the VAWA sought to suppress "intrastate activity which is not commercial or even economic in nature." § 13981 was, furthermore, part of a criminal statute, but the text of the measure did not include a jurisdictional element explicitly tying gender-based violence to interstate commerce under an "in commerce or affecting commerce" rationale.[138] "Without a doubt violence against women is a pervasive and

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[136] Jan Vertefeuille and Lisa K. Garcia, Rape Case Grows; State Lawsuits Set as Backup," *The Roanoke Times,* July 25, 1996, B1.

[137] *Christy Brzonkala v. Virginia Polytechnic and State University, et. al.*, 935 F. Supp. 779 (W. D. Va. 1996).

[138] Chief Judge Kiser did not discuss the case-by-case assessment, outlined in *Lopez,* that a court was required to employ in the case of a criminal statute containing a jurisdictional element. *Christy Brzonkala v. Virginia Polytechnic and State University, et. al.*, 935 F. Supp. 779, 791-792 (W. D. Va. 1996); *United States v. Lopez,* 514 U.S. 549, 561 (1995).

troublesome aspect of American life which needs thoughtful attention. But Congress is not invested with the authority to cure all the ills of mankind," the judge wrote.[139]

As was the case after the *Lopez* judgment, Congress was less than enthusiastic about Chief Judge Kiser's ruling. "This [judge] is the same guy who ruled [Virginia Military Institute] could keep women out," Senator Biden said, referring to the 1991 trial in which Kiser ruled in favor of VMI's all male admission policy.[140] Senator Hatch stated that while he was not a great proponent of the civil rights provision of the statute, he believed that is was constitutional and would like to "keep it alive."[141] Eileen Wagner was trying to keep the statute alive as well. On September 12, 1996, she filed an appeal to the Fourth Circuit Court of Appeals in Richmond.[142] Within a week, the Justice Department also appealed the ruling.[143]

While Morrison's litigation difficulties made his future unclear, his fortunes in college athletics seemed to vacillate. On the football field he was doing quite well. As a sophomore he played several games and he started six games as a linebacker in his junior year. However, he continued to have run-ins with the police that kept him off the field. In April 1995, he was convicted of reckless driving and the following December he was charged with public intoxication, petty larceny, and destruction of property after a disturbance at a local bar. Because of the bar incident, he was removed from the roster for Virginia Tech's appearance at the Sugar Bowl. Later, in relation to the December incident, he was found guilty on a fake driver's license

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[139] Laurence Hammack, "Judge Dismisses Suit Against Tech's Morrison in Student Rape Case," *The Virginian-Pilot,* July 30, 1996, B1; *Brzonkala,* 801.
[140] Mark Johnson, "Va. Judge Might Be Overruled; Kiser Had Ruled Against Part of Violence Against Women Act," *Richmond Times Dispatch,* July 31, 1996, B-1.
[141] Ibid.
[142] "Former Student Appeals Ruling in Tech Rape Case," *The Virginian-Pilot,* September 14, 1996, B7.
[143] "Brzonkala Could Get Second Chance," *The Roanoke Times,* September 20, 1996, B3.

charge, but the other charges were dismissed once he paid court costs. During his junior year, he was sidelined for five games because of injuries and because of a suspension for an undisclosed disciplinary problem. Following his junior year season, Virginia Tech's coach, Frank Beamer, decided to drop Morrison from the football team. In a statement released to the press on March 24, 1997, Beamer wrote, "This decision was made after a meeting between Tony and me. The meeting was private and personal and I will have no further comment on it, or the decision which has been made. All of us connected with Virginia Tech football wish Tony Morrison well in his future endeavors."[144] Morrison had no comments about the decision. When asked about it, he responded, "I don't want to comment on anything. Whenever I do say something, you only put in the article what you want anyway."[145] Morrison's high school coach, Bob Parker, did add some insight saying, "From everything I kept hearing, the coaches were behind him, the student body wasn't."[146] Indeed, the Virginia Tech coaching staff searched for colleges where Morrison could finish his senior year, believing that the Virginia Tech campus atmosphere was too volatile for him. "They thought highly of him, and thought he deserved a second chance," said Hampton University coach Joe Taylor. Morrison joined Hampton University, an NCAA Division I-AA school, near his hometown of Chesapeake, Virginia, in fall 1997.

At the end of the fall football season in 1997, Morrison had a lawsuit served that he had filed in Richmond Circuit Court in November 1996. He was suing Virginia Tech's *Collegiate Times* newspaper seeking $10.3 million in damages for articles and opinion pieces that the paper began

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[144] Steve Carlson, "Tech's Morrison Deals with His Ordeal; 'It's Far from Over,' Chesapeake Linebacker Says of Rape Case," *The Virginian-Pilot,* August 15, 1996, C1; Steve, Carlson, "Va. Tech Drops Morrison From Team; No Details Given," *The Virginian-Pilot,* March 25, 1997, C1.
[145] Ibid.
[146] Ed Miller, "Morrison Starts New Football Life at Hampton; The Linebacker Is Hoping to Leave Troubled Past Behind," *The Virginian-Pilot,* August 29, 1997, C1.

publishing in fall 1995. Morrison claimed the paper, and its then-editor, Terry Paladino, carried out a "vendetta" against him and "recklessly published details about his confidential campus judicial hearings and portrayed him as guilty of criminal assault."[147] Although the lawsuit caused a stir, Morrison would eventually abandon the suit in May 1998, as the Fourth Circuit Court of Appeals considered Brzonkala's case against him.[148]

On June 4, 1997, the Fourth Circuit Court of Appeals heard *Brzonkala v. Morrison.* The Fourth Circuit panel that heard the case was composed of three federal judges; Diana Gribbon Motz, Kenneth Keller (K.K.) Hall, and Michael Luttig. Judge Motz came to the Fourth Circuit as a nominee of Bill Clinton in 1994 having achieved notoriety as Assistant State Attorney General in Maryland for her role in recovering thousands of dollars in bribes received by Spiro Agnew when he was the Governor of the state.[149] Judge Hall was a World War II veteran of the Navy and former mayor of Madison, West Virginia. Although he was a Democrat, Richard Nixon appointed him to be a U.S. district judge in 1971 and Gerald Ford nominated him for the Fourth Circuit in 1976. He had ruled on several controversial cases including one in which he overturned long-standing West Virginia abortion statutes and another in 1976 in which he granted injunctions against a wildcat coal strike.[150] The third judge, J. Micheal Luttig, had a

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[147] "Former Hokie Linebacker Sues Virginia Tech Student Newspaper," *The Virginian-Pilot*, December 16, 1997, B6.

[148] Ian Zack, "Ex-Player's Newspaper Suit Dismissed, Defamation Lawsuit Could be Filed Again," *The Roanoke Times*, May 6, 1998, B4.

[149] "Motz, Diana Jane Gribbon," *Biographical Directory of Federal Judges.* http://www.fjc.gov/servlet/nGetInfo?jid=1705&cid=999&ctype=na&instate=na (accessed April 15, 2012); "Diana Gribbon Motz," *Maryland Women's Hall of Fame.* http://www.msa.md.gov/msa/educ/exhibits/womenshall/html/motz.html (accessed April 15, 2012).

[150] "Hall, Kenneth Keller," *Biographical Directory of Federal Judges.* http://www.fjc.gov/servlet/nGetInfo?jid=946&cid=999&ctype=na&instate=na (accessed April 15, 2012); Tom D. Miller, "K. K. Hall," *e-WV, The West Virginia Encyclopedia*.

rather close association with the Supreme Court as he had served in the Office of the Administrative Assistant to the Chief Justice from 1976 to 1978, as a law clerk for then D. C. court of appeals judge Antonin Scalia in 1982 and 1983, and clerked for Chief Justice Warren Burger from 1983 to 1984. In various capacities as special assistant to the White House Counsel, assistant attorney general of the United States and counselor to the attorney general at the Department of Justice, Luttig helped prepare future justices Sandra Day O'Connor, David Souter, and Clarence Thomas for their Senate confirmation hearings. George H. W. Bush appointed Luttig to the Fourth Circuit in 1991.[151]

On December 23, 1997, the three-judge panel issued its decision that § 13981 of the VAWA authorizing the civil remedy was a constitutional use of the Fourteenth Amendment and the Commerce Clause. In a 2-1 majority opinion written by Judge Motz and affirmed by Judge Hall, the court stated, "After four years of hearings and consideration of voluminous testimonial, statistical, and documentary evidence, Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce."[152] The majority ruled that in order to satisfy the substantial effects test, the court only needed to see that a rational basis existed for Congress' actions in order for the statute to be deemed constitutional. In Motz's view, Congress' findings satisfied the economic link that was missing in *Lopez*.[153]

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http://www.wvencyclopedia.org/print/Article/128 (accessed April 15, 2012).

[151] "Hall, Kenneth Keller," *Biographical Directory of Federal Judges.* http://www.fjc.gov/servlet/nGetInfo?jid=946&cid=999&ctype=na&instate=na (accessed April 15, 2012); "J. Michael (Mike) Luttig," *Executive Biography* http://www.boeing.com/companyoffices/aboutus/execprofiles/luttig.html (accessed April 15, 2012).

[152] *Brzonkala v. Virginia Polytechnic Inst. & State Univ.* and *United States v. Morrison.,* 132 F.3d 949 (4th Cir. 1997), 968.

[153] Ibid., 973

Judge Luttig, in his dissent, blasted the majority for its lack of deference to the Supreme Court's new view of the Commerce Clause as illustrated in *Lopez* and its clarification of the substantial effects test – which demonstrated that the rulings of the Supreme Court going back to the New Deal had held that the commerce power could only reach intrastate activity that was commercial or, at least, economic activity. Intrastate non-economic activity was beyond the bounds of the commerce power, even if such non-economic activity did, in fact, have a substantial effect on interstate commerce. Luttig argued that the majority was proceeding as if the decision in *Lopez* had never occurred. "Indeed, as the majority tacitly acknowledges, with understandable reluctance, it views *Lopez*, the most significant Commerce Clause decision in more than half a century, as an aberration, a case limited in its reach to section 922(q), of Title 18, of the United States Code" [the Gun-free Schools Zone Act].[154] Luttig hoped that the full Fourth Circuit or the Supreme Court would reverse the majority's opinion, as he saw "the Commerce Clause challenge to the instant statute pristinely present[ing] the Court with the logical next case in its considered revisitation of the Commerce Clause." Indeed, Luttig's hopes came to fruition as the full Fourth Circuit eventually reviewed the case on March 3, 1998 at the request of the Virginia Attorney General's office.[155]

On March 5, 1999, a 7-4 majority of the Fourth Circuit Court of Appeals, sitting en banc, ruled that § 13981 of the VAWA "simply cannot be reconciled with the principles of limited federal government upon which this nation is founded."[156] Writing the majority opinion was

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[154] Ibid., 977.

[155] "Virginia – Briefs," *The Virginian-Pilot,* February 8, 1998, B7.

[156] Michael Hemphill, Judge Blocks Suit; Ruling: Victims of Gender Violence Can't Collect for Civil Rights Violations, *The Roanoke Times,* March 6, 1999, A1; *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc),cert. granted sub nom. *United States v. Morrison,* 120 S. Ct. 11 (1999); Chief Judge Wilkinson and Judges Hamilton,

Judge J. Michael Luttig, joined by Chief Judge Harvey Wilkinson and judges Hiram E. Widener, William Wilkes, Paul V. Niemeyer, Clyde H. Hamilton, and Karen J. Williams. That the position of the majority was grounded in a determination to redeem state sovereignty from unwarranted federal encroachments was quite evident in the opening lines of the opinion:

> We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves.

The majority amplified its point with a quote from the opinion of Chief Justice John Marshall in *Marbury v. Madison*: "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." According to the Court "[t]hese simple truths of power bestowed and power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.[157]

Once again, Judge Luttig belabored the fact that, under *Lopez*, the clarified substantial effects rationale could only extend commerce power to intrastate activity that was commercial activity, or, at a minimum, *economic* activity – and that gender-motivated violence was, therefore, outside the scope of the commerce power. As in his December 1997 dissent, he pointed out that, in *Lopez*, the Supreme Court "emphasized that, any dictum in its previous cases notwithstanding . . . it had never extended the substantial affects test to uphold the regulation of a

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Niemeyer, Widener, Wilkins, and Williams joined Luttig's opinion; Wilkinson and Niemeyer also authored concurring opinions while Judge Motz dissented, joined by Judges Ervin, Michael, and Murnaghan; *Brzonkala*, 169 F.3d 889.

[157] *Brzonkala*, 169 F.3d 825-826, quoting Chief Justice John Marshall in *Marbury v. Madison*, 1 Cranch 137, 176 (1803).

noneconomic activity."[158] Obviously somewhat exasperated that appellants and the dissenting judges were either unable or unwilling to consider the prime holding in *Lopez*, Judge Luttig reiterated that "[t]he [*Lopez*] Court repeatedly pointed to a distinction between the regulation of, on the one hand, those activities that are commercial or economic in nature—or arise out of or are connected with a commercial transaction—and, on the other hand, those activities that are not."[159] As far as the VAWA was concerned, Judge Luttig was unequivocal, if not blunt:

> Appellants do not contend that section 13981 regulates economic activity. Nor could they. The statute does not regulate the manufacture, transport, or sale of goods, the provision of services, or any other sort of commercial transaction. Rather, it regulates violent crime motivated by gender animus. Not only is such conduct clearly not commercial, it is not even economic in any meaningful sense.[160]

Having also determined that § 13981, as a criminal statute, contained no jurisdictional element tying the measure to interstate commerce, the Court declared that "the Congress having exceeded its constitutional authority . . . the district court dismissing plaintiff-appellant Brzonkala's claims . . . . is affirmed."[161]

The majority opinion closed with language no less solemn than its opening. Judge Luttig observed that, given the serious purpose of the Violence Against Women Act and the highly-provocative label, or title, appended to it, judges no less than politicians could only be tempted to affirm § 13981, simply, to right a crying injustice or avoid the appearance of not having sympathy for its victims. But his larger point was that the current political environment had

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[158] *Brzonkala*, 169 F.3d 831.
[159] Ibid., 832.
[160] Ibid., 834.
Ibid., 889.

placed intense partisan pressures on both lawmakers and judges to do so by abandoning the Constitution and the rule of law:

> We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the latter. And, when we, as courts, have not participated in this most perniciously Machiavellian of enterprises ourselves, we have acquiesced in it by others, allowing opinions of law to be dismissed as but pronouncements of personal agreement or disagreement. The judicial decision making contemplated by the Constitution, however, unlike at least the politics of the moment, emphatically is not a function of labels . . . . And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.[162]

The ruling, thus, went against Christy Brzonkala in *Brzonkala v. Virginia Polytechnic Inst. & State University* – and against the government in the case with which it was joined, *United States v. Morrison.*[163] Attorney Julie Goldscheid of the National Organization of Women Legal Defense and Education Fund and other lawyers, on behalf of Brzonkala, as well as Solicitor General Seth P. Waxman and other attorneys for the Clinton administration immediately petitioned the Supreme Court for a writ of certiorari. Six months after the Fourth circuit issued its ruling, on September 28, 1999, the Court issued its writ. The case had made its way to the Supreme Court.[164]

Ibid.

[163] As indicated, in deciding *Brzonkala v. Virginia Polytechnic Inst. & State University*, Fourth Circuit Case No. 96-1814, 169 F. 3d 820 (1999), the Fourth Circuit Court also decided *United States v. Morrison*, Fourth Circuit, Case No. 96-2316.

[164] Laurie Asseo, "Law Allowing Rape Victims to Sue Will Be Tested," *The Virginian Pilot,* September 29, 1999, A3; *Christy Brzonkala v. Antonio J. Morrison, et. al.*, 527 U.S. 1068, cert. granted (September 28, 1999). Assisting Julie Goldscheid with briefs were Martha F. Davis, Eileen N. Wagner, Carter G. Phillips, Richard D. Bernstein, Katherine L. Adams, Jacqueline Gerson Cooper, and Paul A. Hemmersbaugh. Assisting Solicitor General Seth P. Waxman with briefs were Acting Assistant Attorney General David W. Ogden, Deputy Solicitor General Barbara D. Underwood, Barbara McDowell, Mark B. Stern, Alisa B. Klein, and Anne Murphy. *United States v. Morrison*, 529 U.S. 598, 600 (2000).

The oral argument in the Supreme Court took place on January 11, 2000. Julie Goldscheid argued first to sustain the law. Her first argument was that after four-years of legislative fact-finding, Congress concluded that "gender-based violence and the fear of that discriminatory violence deters women's travel interstate, restricts women's choice of jobs and ability to perform those jobs, reduces national productivity, and increases medical and other costs."[165] Justice Scalia immediately interrupted her argument by asking whether all the cases that Congress used in its findings were based solely on instances in which the aggressor was acting purely upon his animus towards women generally, or did the findings include *all* cases of violence against women? Goldscheid conceded that such a differentiation was not made but that clearly within the findings some instances were discriminatory. Based upon the Commerce Clause justification of § 13981 of the VAWA and Goldscheid's assertion that sexual violence substantially affects commerce, Justice Scalia then wondered, if the Court found § 13981 of the VAWA constitutional, what would prevent Congress from enacting a federal murder law or a federal robbery law? Goldscheid countered that it has historically been a federal responsibility to address concerns of discrimination, thus Congress was justified in creating the statute in question. Justice Ginsburg then posited that were that the case, cases of marital distribution, where courts often favored men over women, could also become a federal concern. Following Julie Goldscheid, Solicitor General Seth P. Waxman then responded that Congress had not made findings about such matters but it had made findings about violence against women, thus making the statute sustainable. The Court members then pressed Waxman on why, based upon purely Commerce Clause grounds, could the federal government not enact a federal murder statute,

[165] "United States v. Morrison," The Oyez Project at IIT Chicago-Kent College of Law. http://www.oyez.org/cases/1990-1999/1999 99 5 (accessed March 12, 2012).

considering the economic impact of murder on the country's economy. Although Waxman tried to offer a theory that the civil provisions set out § 13981 of the VAWA set the law apart from a localized violent crime as another avenue for victims to use against their aggressors, the members of the Court seemed unconvinced. Waxman argued that Congress made the criminal portion of § 13981 of the VAWA wholly separate from the civil portion; crimes had to occur across state lines to fall under the act, while discrimination touched upon the protections of the Fourteenth Amendment. The Chief Justice was skeptical that it would be more beneficial for a plaintiff to sue in federal court if the jurors, with the same prejudices, were drawn from the same pool of potential jurors as were drawn by the states. At best, Waxman could offer the federal remedy as an "alternative forum"[166] for a victim to turn to. As Waxman concluded his arguments, several of the justices seemed to have remained convinced that, if the VAWA civil remedy were upheld, there would be nothing to prevent Congress from passing a similarly grounded murder statute, a crime traditionally and historically under the authority of the States.

Michael E. Rosman then presented his arguments; first, that "this Court has not yet held that Congress can regulate any violent crime non-economic in scope and without any jurisdictional element tying it to interstate commerce in the specific instance," and second, that "[w]ith respect to section five [of the Fourteenth Amendment], this Court has not yet held that Congress can remedy violations of the Section 1 prohibition against State denials of equal protection by regulating purely private behavior that could not possibly violate Section 1."[167] Regarding the Commerce Clause justification of the statute, the main point of contention was between Rosman and Justice Stevens, who wanted to know from Rosman whether the congressional findings were

[166] Ibid.
[167] Ibid.

trustworthy or even relevant to the case. Rosman argued that the findings were too broad and not limited to just gender-based and animus-motivated conduct, but included simply gender-based conduct as well, thus inflating the economic impact on the economy. Additionally, argued Rosman, the *Lopez* ruling set a precedent that non-economic activity would no longer fall under Congressional commerce power. Justice Souter appeared unconvinced considering Congress had found a $3 billion effect on the economy during its legislative history. Indeed, when pressed by Justice Souter about the constitutionality of a national law against growing marijuana for personal use, Rosman argued that such a statute could be differentiated from the one sustained in *Wickard v. Filburn* because marijuana is not a legally tradable product. In a preview of the ruling in *Gonzales v. Raich,* Justice Stevens offered his agreement with Rosman on the point.

Rosman was also asked about his argument against sustaining the Violence Against Women Act under the Fourteenth Amendment. Justice Kennedy asked Rosman to imagine a scenario in which it is found that if black people are assaulted within the states, prosecutors did not treat the crime with the same seriousness as they did in cases in which white people were assaulted. "Could Congress pass a two part statute, severable: one, making it a federal crime to assault a black person on . . . on account of his race; two, giving a civil remedy to a black person who was assaulted so that the black person could sue the white person . . . [u]nder its Fourteenth Amendment powers[?][168] Rosman argued that such a law would be unconstitutional because "the text of the statute says that Congress will enforce the prohibitions . . . I don't believe that [a Federal remedy] would be enforcement litigation because it would be doing . . . legislation . . . . it would be doing nothing to the States to get them to comply with the Fourteenth Amendment. It would be as if Congress decided that instead of having schools in the south [sic] to segregate in

[168] Ibid.

the 1950's, they would offer separate federal schools. That would not be enforcement legislation." Rosman had the last word in the oral argument.[169]

Court watchers got busy during the interval between oral argument and the announcement by the Supreme Court of its determination. University of Pittsburgh School of Law professor and recognized expert in administrative law and federal regulation Peter M. Shane weighed in on the decision of the Fourth Circuit in late April 2000. In the opening lines of an article he published in the *Villanova Law Review,* Shane highlighted the concurrence in *Brzonkala* authored by Chief Judge of the Fourth Circuit Harvie Wilkinson. Shane quoted language from the concurrence to show that, while the chief judge had joined Judge Luttig in the majority opinion, he had also made it clear that the ruling of the Fourth Circuit, and its dependence on *Lopez*, marked "[t]his century's third and final era of judicial activism . . . an interest in reviving the structural guarantees of dual sovereignty. . . states as entities having residual sovereign rights." According to Shane, the decision of the Fourth Circuit marked nothing less than an ill-conceived, rogue judicial movement intended to undermine the beneficial regulatory authority of Congress.[170] And while Chief Judge Wilkinson had allowed that conservative judicial activism might be constructive, Shane hastened to set the record straight:

> Chief Judge Wilkinson is unjustified. . . in his optimism for the current conservative project of devising new doctrinal tools for cutting back Congress' commercial regulatory powers in order to protect the states' sovereign rights. These doctrinal tools, I believe, are overwhelmingly likely to prove unworkable . . . . And, because they are likely to be employed by judges less willing than Chief Judge Wilkinson to acknowledge their activist role forthrightly, these doctrinal maneuvers will often be dressed up in discussions of history or precedent that will be wrongheaded and misleading.[171]

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[169] Ibid., 20.

[170] *Brzonkala*, 169 F.3d 889-90; Peter M. Shane, "Federalism's 'Old Deal': What's Right and Wrong with Conservative Judicial Activism," *Villanova Law Review*, Vol. 45, no. 2 (2000): 201-243, 201.

[171] Ibid., 202-203.

In mid-February 2000, former legal aid worker, ACLU lawyer, and third-wave feminist Wendy Kaminer conveyed her views on the pending case in an editorial she published in *The American Prospect*. Feminists, she emphasized, had long considered rape to be a hate crime and a "particularly vicious form of bigotry" and a tool of "social control." Kaminer acknowledged that there was widespread feminist support for the VAWA. She dismissed out of hand conservative attacks that had associated the legislation with misguided and over-zealous "victimism." Much was at stake in the upcoming decision of the Supreme Court, she insisted. Certainly, the Court would be called on to uphold, or not, a new civil right for the benefit of women threatened with or injured by gender-motivated violence. On the other hand, she declared, "this is not simply a case about civil rights. It is a case about federal power, which can be used to extend or restrict the rights of individual citizens." On balance, she surmised, a commerce clause power turned into a judicially-enshrined, federal authority to make law on all subjects might not be so good for women or anyone else. In her view, the decision involved nothing less than a test of the limits of congressional police power:

> If Congress can regulate handgun possession under the Commerce Clause because of its potential, indirect impact on the economy, then what can't Congress regulate? Does this seem like legalese? Try the common sense test: When you think of a rape in a college dormitory, do you think about interstate commerce? . . . . Sexual violence does have a general connection to the economy. It affects women's employment decisions, spending habits, and mobility as well as the nation's health care expenses, as supporters of VAWA assert. But virtually all crimes and most conduct, within and outside the home, can be said to have economic impact. So what? Do you want Congress to enjoy unrestricted regulatory power over you?[172]

[172] Wendy Kaminer, "Sexual Congress," *The American Prospect*, February 14, 2000.

The Supreme Court issued its decision in *United States v. Morrison* on May 15, 2000. The case was decided by a 5-4 majority with the opinion written by Chief Justice Rehnquist; Justice Thomas again filed a concurring opinion while Justice Souter filed a dissenting opinion shared by Justices Stevens, Ginsburg, and Breyer. Justice Breyer also filed a dissenting opinion that was joined by Justice Stevens in whole and in part by Justices Souter and Ginsburg.

Chief Justice Rehnquist began his opinion by emphasizing that "[e]ven under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.[173] Unlimited commerce power, he said, would spell the end of the federal constitutional order. And to make the point, he invoked none other than the seminal New Deal decision both liberal and conservative jurists understood well to mark the beginning of the "modern" era to which he referred:

> In *Jones* & *Laughlin Steel,* the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[174]

Reciting the "three broad categories of activity" identified in *Lopez* that Congress was authorized to make law under the Commerce Clause, Chief Justice Rehnquist concluded that petitioners all agreed that the "substantial effects test" was to be the framework of assessment for the case at hand.[175] He noted that the Court had upheld a "wide variety" of congressional enactments under this rationale. Quoting from *Lopez,* however, he reiterated that "Where economic activity substantially affects interstate commerce, legislation regulating that activity

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[173] *United States v. Morrison,* 529 U.S. 598, 608 (2000), quoting *Lopez* at 557.
[174] *Morrison,* 608, quoting *Jones & Laughlin Steel* at 37.
[175] Ibid., 608.

will be sustained."[176] And he took exception to the effort of the petitioners, as well as Justice David Souter in his dissent, "to downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis." Even in *Wickard*, which was "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," the activity involved had been "economic activity."[177] Chief Justice Rehnquist could not have been more deliberate and unequivocal:

> *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of *economic* endeavor.[178]

Similarly to the Gun-Free School Zones Act at issue in *Lopez*, said Chief Justice Rehnquist, the difficulty with the civil cause of action set out in § 13981 derived from the novel criminal offense on which it was based. As a criminal statute, § 13981 of the VAWA included "no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." Nothing in the statute, in other words, explicitly described the relationship of the offense of gender-motivated violence with interstate commerce. With this omission, Congress had "elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime."[179] According to Chief Justice Rehnquist, quoting from *Lopez*, "'simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' Rather 'whether

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[176] Ibid., 610, quoting *Lopez* at 560 and included references to *Wickard v. Filburn (1942), Hodel v. Virginia Surface Mining* (1981), *Katzenbach v. McClung* (1964), and *Heart of Atlanta Motel v. United States* (1964).
[177] Ibid., 610, quoting *Lopez* at 561.
[178] Ibid., 611, referencing *Lopez* at 559-560. [Emphasis added]
[179] Ibid., 613.

particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" Equally important, if not more so, Chief Justice Rehnquist noted that Congress's findings were substantially weakened because they relied so heavily on an unworkable method – that is, by reasoning that gender-motivated violence deterred interstate travel and employment in interstate business, which diminished national productivity; increased medical costs; and reduced the supply of and the demand for interstate products.[180] As in *Lopez*, such an argument would allow Congress to "use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." The ill consequences of accepting such a rationale were all too obvious:

> If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part . . . . Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez,* be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.[181]

Before closing this segment of his opinion, Chief Justice Rehnquist took the opportunity to emphasize, once again, that the prime difficulty with § 13981 of the VAWA was that the activity to be penalized, that is gender-motivated violence, was not economic activity for the purposes of Commerce Clause adjudication under the substantial effects test:

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[180] Ibid., 615, referencing H. R. Conf. Rep. No. 103-711, at 385.
[181] Ibid., 615-616.

> With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While 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 intrastate activity only where that activity is *economic* in nature.[182]

To discount the arguments made by petitioners and the government based on the Fourteenth Amendment, Chief Justice Rehnquist relied upon the precedents set in *United States v. Harris* and the *Civil Rights Cases*, both settled in 1883.[183] In both cases, the Court determined that the authority provided by Congress by § 5 of Fourteenth Amendment could only be employed to make enactments that restrained the action of state officials – not regulate or impose sanctions upon private individuals; thus, the civil remedy provided victims of gender-motivated violence by § 13981 of the VAWA was outside of Congress' remedial power under § 5**.** The chief justice pointed out that the principles for assessing congressional legislation under that section were well settled. Section 5 of the Fourteenth Amendment stated that Congress may "'enforce' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law,' nor deny any person 'equal protection of the laws.'"[184] Alluding to the ordeal suffered by Christy Brzonkala, Chief Justice Rehnquist declared that, "If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."[185]

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[182] Ibid., 613, referencing *Lopez* at 559-560, and the cases cited therein. [Emphasis added]
[183] *United States v. Harris,* 106 U.S. 629 (1883). The Fourteenth Amendment only applies to states, not individuals: *Civil Rights Cases,* 109 U.S. 3 (1883), Congress could not outlaw racial discrimination by individuals based upon the Fourteenth Amendment.
[184] *Morrison,* 619.
[185] Ibid., 627.

Justice Thomas joined the Rehnquist opinion in full, but added his own thoughts. As he had done in the *Lopez* ruling, he posited once again that the "substantial effects" test was inconsistent with the original understanding of Congress' powers under the Commerce Clause. Instead, he urged the Court to take up a standard more reflective of an originalist view. "By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." In the view of Justice Thomas, the holdings of the Court in Lopez and Morrison, clarifying the reach of the commerce power under the substantial effects test to economic activity was not enough:

> Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.[186]

In response to the opinion of the chief justice, Justice Souter provided a dissent joined by justices Stevens, Ginsburg, and Breyer. Souter opted not to address the holding of the Court that § 5 of the Fourteenth Amendment provided no basis for § 13981 of the VAWA, declaring that the Commerce Clause alone sustained the provision. He opened his dissent with a reminder that Congress had a much larger capacity for gathering evidence and taking testimony than the Court; thus, the Court's duty was to review the congressional assessment, "not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact."[187] He went on to enumerate, according to congressional research, several of the most significant impacts on the national economy attributable to domestic violence and rape. Those figures included an aggregate cost annually of $3 billion in 1990 and a considerably less exact figure of $5 to $10

[186] Ibid.
[187] Ibid., 628.

billion in 1993.[188] Justice Souter sought to counter the majority's argument that "the listing in the Constitution of some powers implies the exclusion of others unmentioned," such as states' traditional police powers. Instead, he maintained that, given that Congress was provided the power to regulate commerce and that federal authority was supreme, "it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce."[189] He went on to argue, however, that, under the holdings of the Court in *Wickard* and *Darby*, the substantial effects test placed no categorical limits on the power of Congress, which should be allowed to respond to the urgent national problem posed by gender-based violence against women.

In the view of Justice Souter, the Framers believed that politics would determine the balance of power between the states and the federal government since the several states would be represented in Congress by sending Senators to represent their interests. Passage of the Seventeenth Amendment, allowing for the popular election of U.S. Senators, certainly tipped the balance away from the states. But, he suggested somewhat facetiously, this change did not require the Supreme Court to overturn congressional enactments made by Congress based on the Commerce Clause: "The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power."[190] Convincing Justice Souter that § 13981 of the VAWA should stand was the preponderance of political will in favor of the measure, the fact that thirty-six states and the Commonwealth of Puerto Rico had filed *amicus* briefs in support of it, and that a majority of the Supreme Court had yet to overturn any major

[188] Ibid., 635.
[189] Ibid., 638-639.
[190] Ibid., 652.

Commerce Clause precedent since 1937. In his view, the clarified, or revamped, substantial effects test articulated in *Lopez* and *Morrison* constituted a wrong-headed attempt to institute judicially new lines of demarcation between federal and state power – an approach that would prove unworkable and short-lived.[191]

Justice Breyer agreed with Justice Souter on every point made by the latter but added his own views. According to him, "Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance." Justice Breyer, however, seems to have had more faith than Justice Souter that congressional members would, under the Commerce Clause doctrines articulated by the majority, continue to represent state and local concerns, noting that "the bulk of American law is still state law, and overwhelmingly so."[192] As well, it was apparent to Justice Breyer that, in the case at hand, states had been properly represented through their attorneys general and that, consequently, federalism was working. He, too, declined to take a position on arguments made that § 13981 of the VAWA was sustainable under the Fourteenth Amendment. But he noted that, even if the statute did not operate to impose restraints on state officials for failure to provide women equal protection under their criminal laws, the VAWA may lead state actors to improve their own remedial systems, primarily through example."[193]

The majority's ruling was not a complete surprise to Christy Brzonkala. The *Roanoke Times* reported that she and her attorney, Eileen Wagner, had expected to lose the case since the oral arguments the previous January. Brzonkala had received $75,000 for an out-of-court settlement with Virginia Tech earlier in the year over the school's handling of her allegations. After

[191] One state, Alabama, filed a brief in support of sustaining the lower court rulings that struck down the law, ibid., 601.
[192] Ibid., 660-61.
[193] Ibid., 665.

withdrawing from Virginia Tech following her freshman year, she transferred to George Mason University, which was near her home, but didn't enjoy school, struggled with substance abuse, and eventually withdrew from the university. By the time the Supreme Court decided her case, she had found work as a waitress and assistant manager in a live music blues bar in downtown Washington, D.C. She had no plans to press the case against Morrison or Crawford further in state court. However, even though she had lost in the Supreme Court, she planned to continue fighting for women's rights by joining her lawyer "in lobbying Congress for more effective legislation to combat gender-based violence."[194]

Antonio Morrison had spent only one semester at Hampton University and returned to Virginia Tech to finish a degree in human nutrition, foods, and exercise. His dreams of becoming a professional football player had long since been dashed, and he had come to believe his degree was of little value as he looked unsuccessfully for work as an athletic trainer. In the wake of the decision, Morrison's lawyer stated, "How's he going to get hired by a college once people realize he's the guy all the stuff has been written about? His good name has been completely trashed."[195]

The Washington Post didn't take long to begin publishing pieces highly critical of the decision in *Morrison*. The day after it was rendered, an anonymous editorial in the paper discussed how the majority opinion had recognized that the Violence Against Women Act was aimed at a "terrible problem" – but that state courts, not federal ones, were the proper venues for

[194] Michael Hemphill, "Brzonkala, Tech Reach Settlement in Lawsuit; U.S. Supreme Court Case Will Proceed," *The Roanoke Times,* February 26, 2000, A1; Michael Sluss, "Brzonkala Loses at High Court; Justices Quash Provisions of Violence Against Women Act in Virginia Tech Rape Case," *The Roanoke Times,* May 16, 2000, A1.
[195] Brooke A. Masters, "'No Winners' in Rape Lawsuit; Two Students Forever Changed by Case That Went to Supreme Court," *The Washington Post,* May 20, 2000, B01.

dealing with it. According to the editorial, "[t]he case was about the balance of congressional and state power under the Constitution."[196] On May 19, 2000, quite similarly, correspondent Brooke Masters, who covered the criminal justice beat for the newspaper, concluded that the decision in *Morrison* had turned on considerations of federalism "not sexual politics."[197] But, in a longer essay appearing two days later, Peter M. Shane thoroughly condemned the decision. He emphasized that the attorneys general from thirty-six states had declared that § 13981 of the VAWA was "a particularly appropriate remedy for the harm caused by gender-motivated violence." According to Shane, "[t]heir collective judgment exposes one of the more bizarre aspects of the Supreme Court's recent activism on behalf of state sovereignty: From the states' point of view, this campaign is often pointless and sometimes counterproductive." Shane discounted entirely conservative argumentation emphasizing that, with passage of the VAWA civil remedy, Congress had overstepped its authority, concluding that "[t]he Constitution gives each branch of government a variety of exclusive and far-ranging powers that are plainly susceptible to abuse." But, in his view, "[i]t's the Supreme Court, not Congress, that has gone too far. If Congress needs to be curbed, that is a job better left to voters. As for the states, they're doing just fine without the court's help."[198]

Within a week of the decision in *Morrison*, advocates for women's rights responded to it publicly. Some resorted to protests, including one quickly held at Georgia Tech and a more carefully organized event in Washington D.C.[199] *New York Times* Supreme Court correspondent and Pulitzer Prize winner Linda Greenhouse observed that the decision in *Morrison* represented

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[196] "States' Business," *The Washington Post*, May 16, 2000, A20.
[197] Masters, "No Winners in Rape Lawsuit," B01.
[198] Peter Shane, "In Whose Best Interests? Not the States," *The Washington Post*, May 21, 2000.
[199] Sarah Cagle, "Tech Protest Targets High Court Ruling," *The Roanoke Times New River Edition,* May 26, 2000, 13.

"a convergence between the court's focus on a Congress of limited powers and its newly found solicitude for state sovereignty . . . ." She emphasized that the ruling had suddenly brought to prominence a major judicial upheaval heretofore largely unnoticed:

> Beginning with the Lopez decision, which invalidated a law few people had ever heard of, most of the court's federalism rulings have involved obscure statutes or obscure constitutional provisions like the 10th and 11th Amendments. As a result, a constitutional development of potentially enormous significance has been unfolding -- albeit in plain sight -- largely outside the realm of public discussion.

In her estimation, it seemed likely that Americans would now awaken to the New Federalism orientation of the Supreme Court. "Not too many years ago," she said, it would hardly have seemed likely that questions about federalism might dominate a Supreme Court confirmation hearing. Now that prospect seems likely when the next vacancy occurs."[200] Kathy Rodgers, one of Christy Brzonzkala's attorneys from the National Organization of Women Legal Defense and Education Fund, expressed deep concern that the outcome of the case would have a "chilling effect" on Congress' motivation to legislate for the improvement of women's rights.[201]

In an article appearing in the November 2000 edition of the *Harvard Law Review*, Catharine MacKinnon denounced *Morrison* for its "implicitly patriarchal" rationale. In her estimation, the decision was proof positive that the federal judiciary deemed "male issues" more important than domestic violence against women. She allowed that *Morrison* represented "a high-water mark of this Court's specific notion of federalism." But the inherent bias of the male state was all too obvious in the ruling:

> *Morrison* can be seen to employ ostensibly gender-neutral tools to achieve a substantive victory for the socially unequal institution of male dominance. Read substantively,

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[200] Linda Greenhouse, "Battle on Federalism," *The New York Times*, May 17, 2000, A18.
[201] Laurie Asseo, "Law Letting Rape Victims Sue in Federal Court Struck Down 5-4 Supreme Court Ruling Another Expansion of States' Rights," *The Virginian-Pilot*, May 16, 2000, A3.

> *Morrison* is not an abstract application of neutral institutional priorities but a concrete refusal to allow Congress to redress violence against women – a problem of substantive sex inequality that the Court declined to see as one of economic salience or national dimension.

While emphasizing that the Court had revived against women the same states' rights doctrine that had been employed to justify slavery and uphold Jim Crow, she completely denied the contention that state courts were fit to handle the problem of gender-motivated violence: "*Morrison* leaves women who are denied the effective equal protection of state criminal laws against battering and rape without adequate legal recourse."[202] As she would argue in her 2005 book *Women's Lives, Men's Laws*, MacKinnon insisted that the prime factor at work in *Morrison* was not federalism, as the justices claimed, but the maintenance of male power.[203]

In the next decade or so, periodic congressional reauthorization of the VAWA, sans § 13981, remained a contentious proposition. A letter authored by Director of the ACLU Caroline Fredrickson encouraged the Senate Judiciary Committee to reauthorize the VAWA shortly before it was set to expire under its sunset clause on September 30, 2005. According to Frederickson,

> VAWA is one of the most effective pieces of legislation enacted to end domestic violence, dating violence, sexual assault, and stalking. It has dramatically improved the law enforcement response to violence against women and has provided critical services necessary to support women and children in their struggle to overcome abusive situations . . . . VAWA 2005 is a landmark piece of legislation that makes great inroads toward ending violence against women. We strongly urge you to support the Violence Against

[202] Catharine A. MacKinnon, "Disputing Male Sovereignty: On *United States v. Morrison*," *Harvard Law Review*, Vol. 114, no. 1 (November 2000):135-178, 135.
[203] MacKinnon, "Disputing Male Sovereignty," 173-177; Catharine A. MacKinnon, *Women's Lives, Men's Laws* (Cambridge: Belknap Press of Harvard University Press, 2005), 345-351.

> Women Act of 2005. The lives of battered women and children depend on your support of this important legislation.[204]

President George W. Bush and the Republican-controlled Congress renewed the VAWA in January 2006. But after it lapsed again in 2011, conservative activists went public with their opposition. Senior fellow at Concerned Women for America Janice Shaw Course, for example, characterized the VAWA as a "boondoggle" that generated an unfair stereotype of men as inherently violent and one of women as victims.[205] At about the same time, Phyllis Schlafly, outspoken opponent of the Equal Rights Amendment in the 1970s and founder of Eagle Forum, similarly derided the VAWA as a mechanism for filling "feminist coffers" and a regime that undercut marriages and fomented undue hatred of men.[206]

Culture wars political mobilization against gender-based violence produced the Violence Against Women Act of 1994, while the highly-publicized action brought under the VAWA by Christy Brzonkala against Antonio Morrison and James Crawford fanned the flames of controversy over the statute in the ensuing six-year period. From the perspective of those who

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[204] Caroline Fredrickson, Director, and LaShawn Y. Warren, Legislative Counsel, American Civil Liberties Union, Letter to the Senate Judiciary Committee Regarding the Violence Against Women Act of 2005, S. 1197. https://www.aclu.org/letter/aclu-letter-senate-judiciary-committee-regarding-violence-against-women-act-2005-s-1197 (accessed October 16, 2017).

[205] Janice Shaw Crouse, "The Violence Against Women Act Should Outrage Decent People," *U.S. News and World Report*, March 19, 2012.

[206] Jonathan Weisman, "Women Figure Anew in Senate's Latest Battle," *The New York Times*, April 19, 2012. The Violence Against Women Act of 1994 was reauthorized in 2000, 2006, and 2013: Victims of Trafficking and Violence Protection Act, Pub. L. 106-386, October 28, 2000; Violence Against Women and Department of Justice Reauthorization Act, Pub. L. 109-162, January 5, 2006; Violence Against Women and Department of Justice Reauthorization Act, Pub. L. 109-162, January 5, 2006; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, March 7, 2013. See 42 U.S.C. §§ 13701-14040.

strongly supported the civil remedy set out in § 13981 of the VAWA, federalization of judicial authority over domestic violence properly marked gender-based violence against women as a serious national problem. Such violence was, indeed, a widespread source of misery and a crying injustice that congressional leaders amply verified. On the other hand, the empathy, compassion, and moral certitude that spurred strong support of the VAWA civil remedy predisposed many such well-intended partisans to discount or ignore altogether the larger implications for limited government, federalism, and personal liberty of a judicially-authorized Commerce Clause-based police power that would know no bounds. The urgent felt need among activists for a fast and powerful solution to gender-based violence, essentially, drove such considerations beyond the constitutional horizon and out of view. The ruling of the Supreme Court in *United States v. Morrison* constituted a great setback for those who had expended much time and effort to supply federal courts with the remedial tools activists deemed necessary to suppress gender-based violence against women. Vigorous feminist critiques utterly condemned the decision in *Morrison* for being, simply, emblematic of a federal judiciary little concerned with improving women's rights and insensitive to the plight of women targeted by gender-motivated violence.

As had been the case in *Lopez*, the Supreme Court in *Morrison* was called upon to decide a question of great moment, indeed, one that went beyond solving the national problem of gender-motivated violence: Would the Court allow Congress to rely on the Commerce Clause to establish an unlimited federal police power. In *Morrison*, the Court upheld and reiterated the substantial effects rationale clarified in *Lopez* – but, this time, in a controversy that drew widespread public attention to this holding and its New Federalism foundations. The Court declared once again that none of its decisions had ever extended commerce power, under the substantial effects test, to non-economic intrastate activity. Even when a given non-economic

intrastate activity, aggregated with all other instances of it, had a substantial impact on interstate commerce, such activity was beyond the commerce power. Congress could regulate intrastate activities that were commercial or, in and of themselves "economic in nature" – but not non-economic intrastate activity, such as gender-motivated violence or gun possession in a school zone or myriad other non-economic intrastate activities exclusively within the purview of state civil and criminal law. Last, *Morrison* reaffirmed that part of the clarified substantial effects test set out in *Lopez* holding that, for the commerce power to justify a criminal statute, it was required to include a jurisdictional element tying the offense to interstate commerce under an "in commerce or affecting commerce" rationale, which would permit a court to make the required case-by-case determination if the offense at issue, indeed, fell within the commerce power.

Chapter Seven

Medical Marijuana and

Gonzales v. Raich (2005)

If originalist court watchers had begun to see a paradigm shift in Commerce Clause jurisprudence in *Lopez* and *Morrison*, their hopeful expectations were confounded by the decision of the Supreme Court in *Gonzales v. Raich*.[1] Six of the nine justices decided that a California statute allowing the use, or consumption, of marijuana for medicinal purposes was unsustainable under the Commerce Clause-based federal Controlled Substances Act (CSA).[2] The case arose in August 2002 after a three-hour standoff between county officials and Drug Enforcement Agency (DEA) agents. The DEA agents finally prevailed and destroyed the six marijuana plants owned by Diane Monson of Oroville, California. Monson used cannabis to treat the pain she suffered from a car accident. Seeking to confirm her right to use marijuana for medical purposes with a court order, Monson was joined by Angel Raich of Oakland. Raich used homegrown marijuana supplied to her by others to treat her many ailments, including cancer, because she was allergic to synthetic medications. Monson and Raich, joined by Raich's suppliers, sued in federal district court for an injunction, arguing that the CSA, as applied to those using a locally produced product for state-sanctioned medicinal purposes, was a violation of the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, as well as the common law doctrine of medical necessity. The plaintiffs were

[1] 545 U.S. 1 (2005).

[2] The CSA is Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L 91-513, 84 Stat. 1236.

unsuccessful at the district court level; they found a favorable ruling in the Ninth Circuit Court of Appeals but then ultimately lost their case in the Supreme Court. At the time of the ruling, eight states, in addition to California, had statutes allowing the medical consumption of cannabis, whether by smoking the leaves of the plant, inhaling vapors derived from its oil, or by ingesting it, which indicated rather clearly that the electorate of California was not unique in its desire to legalize and regulate the drug for specific uses in ways that conflicted with federal law.[3]

As indicated, the case that raised the question of medical marijuana to the level of constitutional controversy engaged directly the strictures of the 1970 Controlled Substances Act. That federal statute was the product of incremental changes in American law, dating from the nineteenth century, that permitted an absolute prohibition of beverage alcohol, a process that reconfigured constitutional understanding to facilitate the absolute proscription of other mind-altering intoxicants. Novel federal government tax policies that effectively suppressed cannabis, as well, constituted signal precursors of the 1970 Controlled Substances Act – the first federal anti-illicit drug measure to be based on the Commerce Clause. The CSA marijuana ban, however, also resulted from a growing public concern after 1900 with a narcotic associated originally with African-American jazz musicians, the criminal underworld, and an insurgency of Mexican immigrants whose "locoweed" seemed to portend "reefer madness" among the youth of the nation. Setting the stage for the challenge to the CSA ban on cannabis that was at the center of *Gonzales v. Raich* were the counterculture insurgency of the 1960s, turbulent culture wars contention over the problem of rising drug abuse and addiction, and a campaign by marijuana advocates to legalize cannabis and free medical marijuana from federal and state controls, the latter of which produced the California Compassionate Use Act of 1996. While the decision of

[3] 545 U.S. 3-4 (2005).

the Supreme Court in *Raich v. Gonzales* upheld the CSA in its entirety, the decision met with the disapproval of conservatives who had anticipated that New Federalism principles would prevail to rein in further the commerce power – even as it produced partisan reactions across the political spectrum. But the prime holdings in *Gonzales v. Raich*, nonetheless, followed other key Rehnquist Court Commerce Clause decisions – all of which held the line against the further expansion of commerce power that had begun during the New Deal-era – and fixed in place the Commerce Clause holdings set out in *Lopez*.

Criminal penalties for the mere possession and private consumption of beverage alcohol would seem to be inconsistent with the natural law outlook of the Founders. But in the nineteenth century, with the rise of the temperance movement, a series of state and federal court decisions eroded long established assumptions about property rights.[4] The process began with the *License Cases* of 1847, in which Chief Justice Roger B. Taney stated that there was nothing in the United States Constitution that could prevent a state from attempting to promote the safety of its citizens by regulating or prohibiting the production or trafficking of alcoholic beverages within its borders.[5] Several state courts then followed Taney's lead and took the view that as long as a state's legislature had determined alcoholic beverages had an adverse effect on its citizens' public health, safety, or morals, and there was no specific state constitutional restriction, then societal self-protection would eclipse private property rights.[6] Not all courts accepted this

[4] Richard J. Bonnie and Charles H. Whitebread, II, "The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition," *Virginia Law Review*, Vol. 56, No. 6 (Oct. 1970), 991-110.
[5] 46 U.S. (5 How.) 504 (1847).
[6] *Lincoln v. Smith*, 27 Vt. 328 (1855), *State v. Guerney*, 37 Me. 156 (1853), *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877). See also William J. Novak, *The People's Welfare: Law &*

argument of course. Notable decisions in New York (*Wynehamer v. People*) and Indiana (*Beebe v. State* and *Herman v. State*) undergirded the right to possess beverage alcohol by invoking the natural rights articulated in the Declaration of Independence -- and enshrined as a substantive right under the due process guarantees set out in the constitutions of the two states, rulings that courts continued to rely upon through the nineteenth century.[7] But eventually, the public safety argument prevailed. At the federal level, nineteen years after ratification of the Fourteenth Amendment, in the case of *Mugler v. Kansas*, the United States Supreme Court specified that the manufacturer or seller of intoxicating liquors had no recourse under either the Privileges or Immunities Clause or the Due Process Clause that would protect him from state police power. A state, if its legislature so chose, could forbid manufacture *even for personal use*.[8]

While federal courts had never questioned the sovereign authority of the states to regulate their purely internal manufacturing and trade, prohibiting the mere possession of private property in the form of beverage alcohol was more problematic for federal courts. Tavern and public house licensing, as well as the regulation of wholesale and retail liquor sales, were well

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Regulation in Nineteenth Century America (Chapel Hill and London: University of North Carolina Press, 1996) for a broader discussion of state police powers in the nineteenth century.

[7] *Wynehamer v. People*, 13 N.Y. 378 (1856) ruled that no act of a legislature could deprive a man of his property; this decision dealt with a ban on the sale of legally-acquired alcohol. An Indiana statute that prohibited the private manufacture and sale of liquor while allowing county authorities to produce such products was found incompatible with the state constitution. *Beebe v. State*, 6 Ind. 501 (1855); *Herman v. State*, 8 Ind. 545 (1855). Invoking Judge Perkins, who wrote the opinion in *Herman*, legal scholar Monrad G. Paulsen wrote, "While some undertakings were of 'a public character,' certainly 'the ordinary pursuits of a private citizen' were not, for these pursuits existed before the organization of government and if the government were to seize upon them it would be 'subversive of the very object for which . . . [the government] . . . was created." Paulsen, "'Natural Rights'-- A Constitutional Doctrine in Indiana," *Indiana Law Journal*, Vol. 25, no. 2 (Winter 1950): 123-147, 125; Bonnie and Whitebread, "Forbidden Fruit," 995.

[8] 123 U.S. 623, 662 (1887).

established in the Anglo-American legal tradition. But a total ban on the simple possession of beverage alcohol was another matter entirely.[9] It was not until the case of *Crane v. Campbell* in 1917 that the United States Supreme Court decided that a state (Idaho in this case) could outlaw the mere possession of alcohol.[10] With Justice James Clark McReynolds writing for the majority, the Court reasoned that, if states had the power to prohibit the sale and manufacture of alcohol, then they also had the power to "adopt such measures as are reasonably appropriate to or needful to render exercise of that power effective."[11] Justice McReynolds went on to state that, "the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge."[12] So much for "the pursuit of happiness." At any rate, it came as no surprise that, in the 1922 decision *Corneli v. Moore*, the Court also upheld a provision in the federal Volstead Act that outlawed the possession of intoxicating liquor.[13] The legal rationales and precedents established in *Crane* and *Corneli* could now be applied to narcotics and cannabis possession at the national level.

Although temperance advocates focused on alcohol during the years prior to the Civil War, thereafter, drug addiction became a significant concern to elected officials. The war spawned an army of addicts; physicians freely prescribed opium and morphine in hospitals, and many wounded veterans became habitual users. Also, many non-prescription patent medicines of the

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[9] Novak, *The People's Welfare*, 149-190. Novak demonstrates that early modern common law nuisance doctrine warranted substantial police restrictions on private property rights, especially imposing limitations on the keeping of gunpowder and highly-combustible wooden buildings in municipalities. The welfare of the public, as he emphasizes, prevailed over individual rights within a centuries-old mode of governance he denominates "the well-regulated society." Ibid., 51-82.

[10] 245 U.S. 304 (1917).

[11] Ibid., 307.

[12] Ibid., 308.

[13] 257 U.S. 491 (1922).

period contained doses of addictive agents, such as cocaine and opium, as well as alcohol. But consumers, without knowing the contents or dosages, commonly became inadvertently addicted to these medications. Both practices resulted in addiction, not a consequence of pleasure-seeking but, instead, unintentionally.

While accidental addiction was a problem in the eastern states, society typically treated it sympathetically, and addicts could receive medical treatment for their misfortune. In contrast, some of the first anti-narcotics laws to treat "pleasure addiction" originated in western states that had relatively large numbers of persons originally from east Asia, a prime source of opium. In the 1800s, narcotics were typically classified as "poison" and, hence fell, under state poison control statutes. Statutes in western states were enacted primarily to prevent the spread of opium smoking. Specially targeted were Chinese immigrants, commonly derided with the epithet "heathen Chinee," as evidenced by the 1886 Oregon federal district court decision *Ex parte Yun Jon*.[14] Nine years prior to that case, Nevada had become the first state to enact an anti-narcotics statute, prohibiting the retail sale of opiates for nonmedical purposes. Between 1877 and 1911, eighteen states passed statutes making opium dens illegal or prohibiting opium smoking entirely.[15]

The first federal statute to address problems arising from narcotic drugs came near the turn of the twentieth century, an act that dealt with the problem of inadvertent addiction resulting from the use of patent medicines. Based on the Commerce Clause, the Pure Food and Drug Act of 1906 required that products containing certain habit-forming drugs that were to be shipped in

[14] Ralph M. Susman, "Drug Abuse, Congress and the Fact-Finding Process," *Annals of the American Academy of Political and Social Science*, Vol. 417 (Jan. 1975): 16-26 and *Ex parte Yung Jon*, 28 F. 312 (D. Ore., 1886).
[15] Bonnie and Whitebread, "Forbidden Fruit," 985-86.

interstate commerce, including marijuana, but also including cocaine, heroin, and morphine, be properly labeled with their contents and prescribed dosages.[16] By requiring producers to list the ingredients of their products for consumers to review, the Pure Food and Drug Act of 1906 largely accomplished its goal of protecting the public from accidental addiction; however, it also nearly eliminated the patent medicine industry in the process. In addition to the impact of the new statute on accidental addiction, corporate laboratories developed new non-addictive painkillers and anesthetics that made post-operative addiction to such medications less likely.[17]

The Pure Food and Drug Act ushered in a new role for the federal government in the trafficking and distribution of illicit drugs. Prior to 1906, states occupied the primary role in drug control and regulation. But, as state statutes regulating opium use in the West became more common, and as the United States became more influential in world affairs, public health experts and reformers demanded that the federal government legislate in the area as well. In 1909, Congress passed the Smoking Opium Exclusion Act, which barred the importation of opium suited for smoking.[18] Congress passed the act primarily at the behest of the State Department and President Theodore Roosevelt, with the intention of bringing the United States in line with other nations that were working to limit the smoking or ingestion of opium or intravenous injection of its derivatives. Congress also intended the act to improve relations with China. The act comported with the effort of that nation to reduce its exportation of the drug and limit the opium

[16] Ch. 3915, 34 Stat. 768, repealed by Act of June 25, 1938, ch. 675, Sec. 902(a), 52 Stat. 1059; Rayburn D. Tousley, "The Federal Food, Drug, and Cosmetic Act of 1938," *Journal of Marketing*, Vol. 5, No. 3 (Jan. 1941): 259-269, 259.
[17] Bonnie and Whitebread, "Forbidden Fruit," 985.
[18] 21 U.S.C. §§ 176-185 (1909) (repealed 1970).

trade in the Pacific colonies acquired by the United States during and after the Spanish American War.[19]

As the crusade against drugs and alcohol gathered strength in the United States amid the initial wave of "progressive" activism, anti-narcotics reformers again called on the federal government to act. Touting dire warnings about "'Chinamen' seducing white women with drugs," such advocates argued that it was the duty of the white race to save the supposedly-inferior races from the evils of narcotics.[20] Such talk, undergirded by progressive understandings of Social Darwinism, made the Harrison Narcotics Tax Act of 1914, signed into law by President Woodrow Wilson, especially palatable to southerners. Residents and politicians from the southern states were, amid the tightening of Jim Crow, most reluctant to brook federal encroachments upon the sovereign powers of the states.[21] Besides the racist impulses and racial sensationalism that promoted the act, Congress also framed it as a revenue measure to ease concerns about its constitutionality. The statute imposed a tax on, and required registration of, people who imported, produced, dealt in, sold, or issued opium, cocaine or their derivatives. A special Bureau of Internal Revenue form had to be used to transfer legally the items of concern from one person to another; this documentation would allow revenue agents to track sales through tax records. Only those persons, typically physicians and pharmacologists, registered with the federal government could obtain the forms.

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[19] Dale Gieringer, "The Opium Exclusion Act of 1909." http://www.counterpunch.org/2009/02/06/the-opium-exclusion-act-of-1909/ (accessed February 17, 2013).

[20] Editorial, "How did We Get Here?" *The Economist*, July 26, 2001; Joseph D. McNamara, "The American Junkie," *The Hoover Digest*, No. 2 (2004), April 30, 2004. https://www.hoover.org/research/american-junkie (accessed October 25, 2017).

[21] Harrison Narcotics Tax Act, Pub. L. Ch. 1, 38 Stat.785, approved December 17, 1914.

The effect of the Harrison Narcotics Tax Act was immediate. Physicians quickly learned that supplying addicts of any type with maintenance doses to sustain their habits was illegal under the tax act. While the Harrison statute was firmly based on the power of Congress to tax, its regulatory aspects brought about constitutional challenges. On March 13, 1919, the United States Supreme Court narrowly sustained the act by a five-to-four decision in *United States v. Doremus*, followed on the same day, and with the same five-to-four margin, by *United States v Webb*, which also sustained the statute.[22] Physician Charles T. Doremus paid the taxes required to acquire heroin; however, he then sold the product to sustain the heroin habit of one of his patients without completing the revenue form as required by the statute. He argued that Congress was using its taxing authority to invade the police power of the state of Texas. The Supreme Court rejected Doremus's defense. With Justice William R. Day writing for the majority, the Court held that "[t]he act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress – that is sufficient to sustain it."[23]

The Harrison Act lumped both inadvertent and pleasure-seeking addicts into a category of individuals whom society harshly judged, even as those beset by addiction turned to underground economies to obtain their "fixes." The black market, in response to the new demand, grew significantly as prices rose. For instance, after March 1, 1915, when the Harrison Act went into

[22] *United States v. Doremus,* 249 U.S. 86 (1919); *Webb v. United States*, 249 U.S. 96 (1919). "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, such order is not a physician's prescription under exception (b) of § 2 of the act." *Doremus*, 96.

[23] Ibid., 94.

effect, the street price of heroin rose from $6.15 per ounce to about $100 per ounce.[24] Those addicted to heroin commonly turned to desperate means to obtain funds for the drug, while all illicit narcotic use and commerce came to be associated with lawlessness and immorality. In turn, public authorities increasingly considered such unfortunates, in each case, to be a "social menace."[25]

In August 1917, Congress began considering the passage of a resolution for what would become the Eighteenth Amendment. If ratified, the amendment would prohibit the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."[26] The proposed amendment, which was ratified in January 1919, said nothing about mere possession of liquor. In October of the same year, Congress overrode the veto of President Wilson to pass the National Prohibition Act, commonly known as the Volstead Act, which largely implemented the amendment.[27]

The felt need by federal authorities to suppress the use of marijuana as a mood- and perception-altering agent arose only slowly after 1900, along with the entry of marijuana consumption into American culture. While accounts vary, the earliest recorded uses of the plant in the United States, at least as a psychotropic substance, date from the first decade of the twentieth century. New Orleans musicians, such as Louis Armstrong, opted for pot over alcohol

[24] Paul M. Gahlinger relates that, in the aftermath of World War I, "[w]ar veteran addicts scrounged for money to buy drugs, often picking up scrap metal. They became known as "junk men" and then simply as "junkies." Gahlinger, *Illegal Drugs: A Complete Guide to Their History, Chemistry, Use, and Abuse* (New York: Penguin Group, 2004), 59-60.
[25] Bonnie and Whitebread, "Forbidden Fruits," 988.
[26] U.S. Constitution, Amendment XVIII, Sec. 1, ratified January 16, 1919.
[27] The National Prohibition Act, Pub. L. 66-66, 41 Stat. 305 (1919).

because the former provided them stamina for all-night jam sessions. In the view of many of these artists, the smoking of marijuana helped them to render more imaginative and unique sounds. Indeed, observers commonly concluded that jazz and swing music derived primarily from this practice.[28] By the 1920s, black musicians also made cannabis available to their listeners, even as the weed became known in larger cities by a steadily widening array of rubrics, ranging from "Rose Maria" to "grifa." Authorities, who invariably identified as "white," increasingly associated the use of marijuana with supposedly inferior persons of color, especially those who frequented jazz bars and bordellos in the port cities – and with urban underworld criminality.[29]

By the mid-1930s, government officials and a large segment of the American public had come to associate smoking marijuana with "wild" music, incomprehensible behavior, and with the two races deemed by whites to be at the bottom of America's racial and social hierarchy. The 1910 Revolution in Mexico sent waves of peasant immigrants into the United States Southwest. These refugees brought with them their traditional custom of smoking marijuana, a practice they did not always separate from the arduous work routines they pursued as itinerant laborers.[30] More troubling, by the early 1930s, were rumors that circulated among police officers in Texas that Mexican immigrants were distributing the diabolical weed to American school children. [31]

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[28] Ernest L. Abel, *Marihuana: The First Twelve Thousand Years* (New York: Plenum Press, 1980), 219-221.
[29] Harry Shapiro, *Waiting for The Man: The Story of Drugs and Popular Music* (New York: William Morrow & Co., 1988), 60-67; Martin A. Lee, *Smoke Signals: A Social History of Marijuana - Medical, Recreational and Scientific* (New York: Simon & Schuster, 2012), 9-14.
[30] Nick Johnson, "Workers' Weed: Cannabis, Sugar Beets, and Landscapes of Labor in the American West, 1900-1946," *Agricultural History*, Vol. 91 no. 3 (Summer 2017): 320-341.
[31] Eric Schlosser, "Reefer Madness," *The Atlantic*, August 1994; Eric Schlosser, *Reefer Madness: Sex, Drugs, and Cheap Labor in the American Black Market* (Boston: Houghton Mifflin, 2003), 1-74.

According to Isaac Campos, however, Mexican officials and prominent leaders were no less suspicious of marijuana use and trafficking than their counterparts in the United States. In fact, the Mexican government banned cannabis in 1920, and much of the rhetoric warning of "reefer madness" originated with the Mexican leadership. The 1936 Louis J. Gasnier film of the same name struck terror in the hearts of law-abiding Americans concerned about the vulnerability of their children to the "Mexican menace." But the movie advanced a dire morality tale originating from the same country supposed to have launched the dreaded "locoweed" into the United States.[32] In any case, New Orleans banned marijuana in 1923, the state of Louisiana did so in 1927, and many states took this step in the coming decades.[33]

It was in this context that the United States government established an enforcement apparatus to give effect to its entanglement in the policing of narcotics and beverage alcohol. Since the Harrison Act was a federal taxation statute, it assigned enforcement to the Bureau of Internal Revenue – later the Internal Revenue Service, situated within the Department of the Treasury. Commissioner of the Internal Revenue Service Daniel C. Roper established a Narcotics Division within the IRS, made part of the Prohibition Unit in 1920 after the passage of the Volstead Act. In 1927, the Prohibition Unit outgrew the IRS and became an independent bureau, which included the Narcotics Division. In 1930, the Narcotics Division became an independent agency – the Federal Bureau of Narcotics (FBN).

The new FBN was led by Harry Jacob Anslinger, a Pennsylvania-born expert in the investigation and policing of international drug trafficking. At the time of his appointment, he

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[32] Isaac Campos, *Home Grown: Marijuana and the Origins of Mexico's War on Drugs* (The University of North Carolina Press, 2012), Ch. 8; Johnson, "Workers' Weed," 320-341; Lee, *Smoke Signals*, 38-42.

[33] Larry Sloman, *Reefer Madness: A History of Marijuana* (New York: St. Martin's Griffin, 1998), chs. 1-3.

was the Assistant Commissioner of Prohibition and, thereafter, worked hard to justify and expand his new organization by educating the public about the dangers of illegal drug use, which sometimes amounted to sensational propaganda. All the while, he took an aggressive stance against narcotics trafficking with little toleration of, much less sympathy for, those addicted to such drugs.[34] Anslinger made a significant impact on developing drug legislation. According to Ralph Susman, Associate Director of the National Commission on Marijuana and Drug Abuse, "[Anslinger's] bureaucratic achievements and his capacity to influence and lead docile and uninformed congressional committees for the many years of his tenure is probably unmatched in the history of the nation."[35]

For the first four years of the FBN's existence, its focus was on opium and other narcotics. The bureau perceived marijuana use, whether by smoking or other modes of consumption, to be a problem among Mexican-Americans, but the bureau took the position that state government agencies were competent to control the relatively limited involvement of that population with the plant.[36] In 1930, sixteen states had placed restrictions on marijuana, but the statutes were generally a low priority for law enforcement, and penalties were not generally harsh.[37] However, in the mid-1930s, cannabis suddenly became an item of high interest to the bureau. The *New York Times* reported on the enforcement activities of Anslinger in December 1934, noting that the commissioner was "investigating the use by school children in Cleveland and other areas of marijuana, a mild narcotic reported to change the qualities of valor and courage to fear and

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[34] "How Did We Get Here?" *The Economist*, July 26, 2001.
[35] Ralph M. Susman, "Drug Abuse," 18.
[36] Michael Schaller, "The Federal Prohibition of Marijuana," *Journal of Social History*, Vol. 4, No. 1 (Autumn 1970): 61-74, 65.
[37] Note, "The Legalization of Marijuana: A Realistic Approach," *Vanderbilt Law Review*, Vol. 21 (May 1968): 517-544, 531.

insanity."[38] Scholars disagree whether the FBN or western state governments were the primary impetus for a federal response to the perceived threat posed by cannabis. But it does seem apparent that, at the least, the FBN began a campaign to educate citizens nationwide about the disastrous individual and social destruction wrought by the smoking or other ingestion of cannabis.[39] Popular journals and newspapers cast marijuana smokers as violent criminals who were also habitual users of heroin, cocaine, and other addictive substances.[40] Noting "increasing abuse" of the drug, the bureau pleaded with state officials to increase their efforts against the spread of marijuana intoxication in the form of standardized state legislation through the National Conference on Uniform State Laws.[41] By May 1937, FBN agents were meeting with civic groups involved in the education of youth to encourage "[r]elentless warfare on marijuana." Former assessor to the League of Nations Opium Advisory Committee Elizabeth Wright, now special representative of the FBN to the National Congress of Parents and Teachers, called the drug "the latest narcotic menace to youth" and "the most pernicious of drugs."[42] Whether the

[38] Special to the *New York Times*, "Narcotic Arrests Are Raised to 793," *The New York Times*, Dec 11, 1934.

[39] John F. Galliher and Allynn Walker, "The Puzzle of the Social Origins of the Marijuana Tax Act of 1937," *Social Problems*, Vol. 24, No. 3 (Feb. 1977): pp. 367-376. Newspaper articles decrying the use of marijuana were also common. Examples include "War on 'Reefers,'" *The Chicago Defender* (National Edition) September 11, 1937, 16; "Bronzeville in Chicago," ibid., July 10, 1937, 10.

[40] William D. Armstrong and John Parascandola, "American Concern Over Marijuana in the 1930's," *Pharmacy in History*, Vol. 14, no. 1 (1972): 25-35.

[41] Michael Schaller, "The Federal Prohibition," 65, quoting from the U.S. Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1935* (Washington, 1936), 30-34.

[42] "War on Marijuana Urged on Parents," *The New York Times*, May 4, 1937, p. 26.

FBN campaign was actually the motivator, by the end of 1937 all states had passed statutes prohibiting the smoking or other consumption of cannabis.[43]

In 1937 Congress began to focus on the supposed growing threat to the public posed by marijuana use and trafficking. As discussed in preceding chapters, before 1937 the United States Supreme Court had not given the Commerce Clause the expansive interpretation that it was to receive in decisions such as *NLRB v. Jones & Laughlin Steel*, *Wickard v. Filburn*, and *United States v. Darby*. The policing of marijuana remained within the traditional general police powers of the states. A January 1937 *New York Times* article reported, "The Federal bureau has admitted that its hands are tied by the fact that the marijuana weed is indigenous to so many states that its distribution is an intrastate problem."[44] However, just as the 1914 Harrison Act used the taxing power of Congress to limit the use and distribution of narcotics, with tax collection processes and related forms, the federal government would eventually employ a similar method to address the perceived problem of marijuana use.

If scholars differ on the extent to which the Federal Bureau of Narcotics influenced the decision of Congress to establish the federal Marijuana Tax Act of 1937, it seems almost certain that FBN Commissioner Harry Anslinger provided a strong voice to promote passage of the act during congressional hearings, which ran from April 27th to May 4, 1937.[45] One might weigh carefully the probative value of the evidence Anslinger offered during hearings to support the conclusion that there was a national cannabis disaster in the making -- newspaper opinion pieces

[43] Galliher and Walker, "The Puzzle," 367, 371.
[44] "Campaign Battles Marijuana Weed," *The New York Times*, January 3, 1937, D6.
[45] Anslinger continued his education campaign even as the bill was crafted. See Harry J. Anslinger and Courtney Ryley Cooper, "Marijuana, Assassin of Youth," *The American Magazine*, Vol. 124 No. 1 (July 1937): 18-19, 150-153.

authored by FBN employees.[46] With a perceived national crisis at hand, that Congress would pass the new tax statute was a forgone conclusion. The only medical doctor who appeared during hearings was William C. Woodard, who represented the American Medical Association as both a physician and a lawyer. He argued that cannabis had not been studied enough for experts to be able to conclude whether cannabis had any salutary medicinal applications, and he urged some lessening of the restrictions on marijuana set out in the bill. Representative John Dingell, Sr. (D-MI), however, dismissed Dr. Woodard curtly after he had presented his testimony and conclusions: "You are not cooperative in this. If you want to advise us on legislation you ought to come here with some constructive proposals rather than criticisms, rather than trying to throw obstacles in the way of something that the Federal Government is trying to do."[47] The bill passed easily through the Senate and became law shortly afterward on October 1, 1937.

The Marijuana Tax Act of 1937 was very similar to the Harrison Act. It required a registration of, and an occupational tax on, any person who sold marijuana.[48] It also placed a tax on all transfers of marijuana, which were to be verified with forms similar to those that the Harrison Act required. Possession without the required documentation was presumptive evidence of guilt.[49] The act was challenged in 1950 in *United States v. Sanchez* with the argument that the measure constituted an attempt by Congress to regulate trade beyond its authority.[50] Overturning

[46] Galliher and Walker, "The Puzzle," 373-74.
[47] U.S. Congress, House Ways and Means Committee, Hearings on H.R.6385: Taxation of Marijuana, 75th Congress, 1st Session, April 27, 1937, p. 117, in Lester Grinspoon and James B. Bakalar, *Marijuana, the Forbidden Medicine* (New Haven: Yale University Press, 1993), 1-22. 1.
[48] Marijuana Tax Act of 1937, Pub. L. 75-238, 50 Stat. 551, effective October 1, 1937.
[49] Donald J. Cantor, "The Criminal Law and the Narcotics Problem," *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 51, No. 5 (Jan. – Feb. 1961): 512-527, 515.
[50] 340 U.S. 42 (1950).

the decision of the United States District Court for the Northern District of Illinois, the United States Supreme Court reasoned that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."[51]

A year after Sanchez unsuccessfully challenged the Marijuana Tax Act, Congress passed the Boggs Act of 1951 to stiffen penalties for drug users and dealers.[52] The years from 1947 to 1951 saw a rise in narcotics abuse and addiction, or at least this was the conclusion of authorities, most alarmingly among people under the age of twenty-one. Amid rising fears of international communism and radical subversion within, the *New York Times* reported in July 1951 that "Commissioner Anslinger and his staff of 180 agents have been waging an admittedly losing battle with the drug traffic, particularly among juvenile offenders, for the last couple of years."[53] Representative Thomas Hale Boggs, Sr. (D-LA), stated during congressional debates on the bill that there was a seventy-seven percent increase in arrests for narcotics violations between 1948 and 1950.[54] In addition, the conclusion that narcotics trafficking and use were on the rise also affected committee and house debates over the bill. During the House floor debate, Boggs emphasized what he believed to be the critical dynamics of youth addiction:

> Our younger people usually start on the road which leads to drug addiction by smoking marijuana. They then graduate into narcotic drugs – cocaine, morphine, and heroin. When these younger persons become addicted to the drugs, heroin, for example, which costs from $8 to $15 per day, they very often must embark on careers of crime . . . and prostitution . . . to buy the supply which they need.[55]

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[51] Ibid., 44.

[52] Boggs Act of 1951, Pub. L., ch. 666, 65 Stat. 767, approved November 2, 1951.

[53] Cabell Phillips special to the *New York Times*, "Fight against Narcotics Waged by U.S. and U.N," *New York Times*, July 8, 1951, p. 111.

[54] Bonnie and Whitebread, "Forbidden Fruits," 1062.

[55] United States Congress, Congressional Record, 1951: 8197-8198, in *The Report of the National Commission on Marijuana and Drug Abuse*, Commissioned by President Richard M.

Opposition to the bill was not substantial; it passed easily through Congress, and President Harry Truman signed it into law in early November 1951.

Two features of the Boggs Act marked the measure as a stern response to a perceived narcotics threat of significant proportions. First, it increased penalties for existing statutes. Second, it made uniform and mandatory the penalties for marijuana or narcotic use, thereby placing the smoking or other consumption of marijuana on par with the use of opium and heroin. A first-time offender for marijuana possession could now expect a minimum sentence of from two to five years with a fine of up to $2,000.[56]

Five years later the lawmaking process was repeated with the Narcotic Control Act of 1956.[57] The new statute increased the already harsh mandatory penalties of the Boggs Act, especially for those convicted of "peddling," and prohibited any possibility of parole except for first time offenders in the possession category.[58] Minimum sentences now ranged from two years for first time offenders and fines of up to $20,000.[59]

While the 1950s saw increased official concern about marijuana use, the 1960s saw a substantial, albeit complicated, retreat from its censure. The counterculture of the 1960s rejected middle-class norms that had held sway in the Cold-War dominated 1950s. Along with denouncing Jim Crow in the South and, after 1967, the increasingly bloody war in Vietnam, American youth eschewed materialism, corporate capitalism, technocratic society, traditional authority, and repressive sexual norms. Counterculture warriors embraced civil rights for racial

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Nixon, 1972. http://www.druglibrary.org/schaffer/library/studies/nc/nc2_7.htm (accessed September 30, 2013).

[56] Bonnie and Whitebread, "Forbidden Fruits," 1067.

[57] Narcotic Control Act of 1956, Pub. L. 728-629, 70 Stat. 567, approved July 18, 1956.

[58] Ibid., *Report of the National Commission on Marijuana and Drug Abuse.*

[59] Cantor, "The Criminal Law and the Narcotics Problem," 515.

minorities, communitarian experimentation, free speech, and commitments to world peace, along with psychedelic rock music, "pop-art" and new understandings of spirituality. Within the movement, intertwining currents drove activism in favor of improving women's rights and feminism, environmentalism, and a holistic understanding of the relations of human beings with Mother Earth.[60] A virtual revolution in thinking among the mostly white middle-class champions of a new and better age readily indulged their appetites for experimentation with mind-altering substances, especially marijuana – which became an emblem of this youthful cultural insurgency.[61] According to Martin A. Lee, the smoking and other consumption of cannabis in the 1960s emerged as a defining force in a culture war that would persist into the twenty-first century.[62]

Marijuana consumption, as indicated, increased most rapidly among white youth and young adults. As a result, the extremely harsh sentences, formerly imposed usually on members of racial and ethnic minorities and low-income users, came to be applied to this far more populous and politically well-connected segment of society. The response was a reevaluation of marijuana

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[60] Charles Kaiser, *1968 in America: Music, Politics, Chaos, and Counterculture, and the Shaping of a Generation* (New York: Weidenfeld & Nicolson, 1988); Richard Goldstein, *Reporting the Counterculture* (Boston: Unwin Hyman, 1989); Theodore Roszak, *The Making of a Counter Culture: Reflections on the Technocratic Society and its Youthful Opposition* (Garden City, New York: Doubleday, 1969).

[61] John Markert, "Sing a Song of Drug Use-Abuse: Four Decades of Drug Lyrics in Popular Music – From the Sixties through the Nineties," *Sociological Inquiry*, Vol. 71, no. 2 (Spring 2001): 194-220; Charles Levi, "Sex, Drugs, Rock & Roll, and the University College Lit: The University of Toronto Festivals, 1965-69," *Historical Studies in Education*, Vol. 18, no. 2 (September 2006): 163-190; David Farber, "The Intoxicated State / Illegal Nation: Drugs in the Sixties Counterculture," pp. 142-170, in Peter Braunstein and William Doyle, eds, *Imagine Nation: The American Counterculture of the 1960s and '70s* (New York and London: Routledge, 2002).

[62] Lee, *Smoke Signals*, 72-115.

as a dangerous drug and the addition of addiction treatment as an appropriate governmental response, rather than merely tougher prison sentences. Both the Kennedy and Johnson administrations commissioned studies that concluded marijuana was not the "stepping stone" to more dangerous illicit drugs, as experts had previously declared, and that use of cannabis was not likely to induce violence.[63] Additionally, as recreational consumption of marijuana increased, anecdotal evidence regarding its medicinal possibilities began to surface.[64]

In February 1968, President Lyndon B. Johnson merged the Federal Bureau of Narcotics with the Bureau of Drug Abuse Control (BDAC). The FBN had been under the auspices of the Treasury Department, while the BDAC was located within the Department of Health, Education, and Welfare. The new agency, which officially went into operation in early April 1968, was designated the Bureau of Narcotics and Dangerous Drugs (BNDD). Its home would be within the Department of Justice, the primary law enforcement agency of the federal government.[65] This reorganization reflected President Johnson's concerns about the widespread use of illegal drugs among youth and young adults associated with the counterculture.[66] But the creation of the BNDD also constituted, in part, a response to growing unease among many Americans about the increasingly violent direction of the Civil Rights Movement, which had produced dozens of major race riots in American cities from 1964 through the summer of 1967.[67] Such concerns

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[63] PBS Frontline, *Busted: America's War on Marijuana.* http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (accessed October 2, 2013).
[64] Grinspoon and Bakalar, *Forbidden Medicine,* 1-22.
[65] Reorganization Plan No. 1 of 1968, 80 Stat. 393, Transmitted February 7, 1968, effective April 8, 1968.
[66] The Drug Enforcement Administration Museum and Visitor Center, "A Tradition of Excellence: A History of the DEA." http://www.deamuseum.org/dea_history_book/beginnings.html (accessed October 2, 2013).
[67] The 1967 riot season had prompted President Johnson to appoint a National Advisory Commission on Civil Disorders. Executive Order 11365, President Lyndon B. Johnson, July 28,

intensified after the assassinations of the Reverend Martin Luther King, Jr., on April 4, 1968, and of Democrat party presidential candidate New York Senator Robert F. Kennedy on June 6, 1968, after which President Johnson and Congress passed the Omnibus Crime Control and Safe Streets Act on June 19, 1968.[68]

Having run in fall 1968 on a "law and order" platform, newly-elected President Richard M. Nixon was well-positioned to engage the growing national problem of drug abuse. The Kennedy and Johnson administrations had viewed adverse socioeconomic and cultural circumstances as the prime explanations of rising urban crime rates. But Nixon openly condemned civil unrest and disrespect for the law, which he combined with promises to get tough on law breakers.[69] He also attributed much of the "moral looseness" and lawlessness he associated with the "youth revolt," or counterculture, to the use of illicit drugs.[70]

Shortly after Nixon took office, Harvard psychology professor and writer Timothy Leary also helped establish the conditions for a revamping of the federal illicit drug regime. The Harrison Act had used cumbersome tax and registration forms to monitor and dissuade illicit drug use, and it had been the model for the Marijuana Tax Act of 1937. That statute imposed an occupational tax upon all those who dealt in cannabis, required such individuals to register with the IRS, and

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1967; John Charles Boger, "The Kerner Commission Report in Retrospect," pp. 8-36, in *Race and Ethnicity in the United States: Issues and Debates,* ed. Stephen Steinberg (Malden, Mass: Blackwell, 2000).

[68] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, approved June 19, 1968; Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1212-2, approved October 22, 1968.

[69] James D. Calder, "Presidents and Crime Control: Kennedy, Johnson and Nixon and the Influences of Ideology," *Presidential Studies Quarterly,* Vol. 12, no. 4 (December 1982): 574-589; Michael Flamm, "Politics and Pragmatism: The Nixon Administration and Crime Control," *White House Studies,* Vol. 6, no. 2 (February 2006): 151-162.

[70] Seth E. Blumenthal, "Nixon's Marijuana Problem: Youth Politics and 'Law and Order,'" *Sixties: A Journal of History, Politics & Culture,* Vol. 9, no. 1 (June 2016): 26-53.

imposed a "transfer tax" on all transfer of marijuana, which had to be documented with the completion of a form. On May 19, 1969, however, the United States Supreme Court declared portions of the Marijuana Tax Act unconstitutional in *Leary v. United States*. Timothy Leary was then widely known for his controversial, if not infamous, explorations of the therapeutic potential of psychedelic drugs, especially lysergic acid diethylamide, or LSD. Leary argued, after his arrest on charges of possessing marijuana in violation of the Marijuana Tax Act, that, to comply with the act, he would, in effect, be admitting to the federal government his possession of a substance for which he could be criminally prosecuted in state courts. According to the Supreme Court, with Justice John Marshall Harlan writing for the majority, the order form and transfer tax provisions of the Marijuana Tax Act violated Leary's privilege against self-incrimination "as they force the defendant either to violate their requirements or to classify himself as a person inherently suspect of criminal activities." [71]

From the beginning of his presidency, Richard Nixon had wanted to streamline the various anti-illegal drug statutes that the federal government had enacted over the previous decades. The judicial victory of Timothy Leary at least served as the occasion for Congress to repeal both the Marijuana Tax Act and the Harrison Act and revamp and repackage such strictures within a comprehensive scheme to regulate both legal and illicit drugs. So, two years after President Johnson had reorganized the drug control bureaucracy with the creation of the Bureau of Narcotics and Dangerous Drugs, President Nixon and a Democratic party controlled Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.[72] Within this statute

[71] *Leary v. United States*, 395 U.S. 6 (1969).

[72] Title II, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, also known as the Controlled Substances Act, approved October 27, 1970, codified at 21 U.S.C. ch. 13 § 801, et seq.

was Title II, the Controlled Substance Act (CSA), which would figure importantly in the legal challenge to the CSA brought by Angel Raich and Diane Monson in October 2002.

The Controlled Substances Act of 1970 constituted a major departure from earlier drug statutes in that Congress based the measure on its power to regulate interstate commerce rather than on its power to tax. The act constituted one of the most extensive deployments of commerce power on behalf of conservative demands that fueled the gathering culture wars. The opening section of the CSA, § 801, included an explicit finding and declaration by Congress that the comprehensive regulation of drug manufacture, possession, distribution, and use was within its Article I commerce power:

> The Congress makes the following findings and declarations:
>
> (1) Many of the drugs included within this title have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
>
> (A) after manufacture, many controlled substances are transported in interstate commerce,
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
>
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed

> interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.[73]

The Controlled Substances Act provided federal law enforcement with license to police in areas historically reserved to the states – and with the aim of shutting down all possibility of illegal drug possession, distribution, and use. In doing so, the CSA categorized drugs into five categories or "schedules." Schedule I drugs were said to have no medicinal purposes, pose a high probability of abuse, and have no approved safety standard for use. In other words, they had no redeeming value, and the public interest required that they be eradicated. Such drugs included heroin, LSD, marijuana, and many others. The other schedules included drugs that Congress determined to have medicinal value; the act placed various controls upon their production and distribution, depending upon their potential for abuse. The CSA also stipulated that changes to the schedules could be made by Congress or by the Food and Drug Administration, in coordination with the Bureau of Narcotics and Dangerous Drugs.[74]

With a powerful new statutory apparatus in place, President Nixon sought to suppress energetically the widespread illicit distribution and use of narcotics, including marijuana, by declaring, on July 17, 1971, a "war on drugs," which, in his estimation, had "assumed the dimensions of a national emergency." Every administration thereafter employed this rubric as a

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[73] Controlled Substances Act of 1970, § 101 (1) - (6) 84 Stat. 1242, codified at 21 U.S.C. ch. 13, § 801 (1) - (6). The last subsection of § 801, section seven, declared as follows: "The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances. Ibid., referencing 18 U.S.T 1407.

[74] 21 U.S.C. ch. 13, § 801 (1) - (6).

rallying cry and a policy position through the presidency of George W. Bush.[75] In 1973, President Nixon combined the Bureau of Narcotics and Dangerous Drugs with elements of the Customs Agency Service of the Bureau of Customs to form the Drug Enforcement Administration (DEA). The mission of the DEA was to carry out, with exclusive authority, enforcement of federal drug statutes.[76] Indeed, it would be DEA agents who would override the opposition of the Butte County, California, Sheriff's Office to arrest Angel Reich and Diane Monson nineteen years later.

The Drug Enforcement Administration and its predecessors had some notable successes in the war against drugs in the 1970s. The heroin epidemic of the late 1960s and early 1970s passed its peak, arguably, because of successful DEA efforts *outside* of the United States. A significant victory occurred in Turkey, which banned opium within its borders in response to DEA initiatives. Additionally, the breaking of the "French connection" stymied a major heroin smuggling route. In North America, the Mexican government began a program of spraying opium fields, which further limited supply.[77]

Federal government interest in the drug war waned in the 1970s, a decade that saw United States troops returning home in the wake of the war in Viet Nam, a stagnant economy, soaring gasoline prices, and rising tensions in the Middle East. Neither President Gerald Ford nor

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[75] *Gonzales v. Raich,* 545 U.S. 6 (2005); Devin Dwyer, "Obama's Own Drug Use a Backdrop to More Lenient Sentences," ABC News, August 12, 2013. http://abcnews.go.com/blogs/politics/2013/08/obamas-own-drug-use-a-backdrop-to-more-lenient-sentences/ (accessed October 21, 2013).

[76] The Drug Enforcement Administration Museum and Visitor Center, "A Tradition of Excellence: A History of the DEA." http://www.deamuseum.org/dea_history_book/beginnings.html (accessed January 26, 2014).

[77] Peter Reuter, "Why Has U.S. Drug Policy Changed So Little over 30 Years?" *Crime and Justice: A Review of Research,* Vol. 42, No. 1 (2013): 75-140, 81.

President Jimmy Carter mirrored Nixon's interest in putting the suppression of illicit drugs at the top of their agendas. Carter even somewhat endorsed the removal of criminal penalties for the possession of small amounts of marijuana for personal consumption. In a message to Congress on August 2, 1977, he said, "Penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself."[78] However, Congress refrained from acting on this sentiment.

The relative disinterest of the federal government in stemming drug abuse in the 1970s complemented rather well the emergence of a full-fledged drug culture in the United States. To conservatives, this transformation perpetuated one of the most troubling aspects of the 1960s counterculture. While its reform idealism rapidly dissipated, illicit drug use and addiction among teen agers and young adults climbed steadily. American youth experimented increasingly with more dangerous drugs, including cocaine, heroin, amphetamines, barbiturates, and methaqualone. A growing number of young adults combined the use of hallucinogens, especially LSD, with an array of new spiritual movements, although the federal government moved against the manufacture and sale of LSD in the mid-1970s. By the end of that decade, nonetheless, film and other media had begun to advance an alluring cocaine culture in the larger cities. And through the 1970s, a voluminous supply of marijuana from Mexico provided what many deemed to be the "recreational" drug of choice. Mexican government crack-downs on this industry, however, spurred new efforts by Americans to cultivate cannabis in the United States, even as American pot users persisted in laying claims to the harmlessness, consciousness raising, and even health benefits of marijuana consumption.

[78] James T. Wooten, "Carter Seeks to End Marijuana Penalty for Small Amounts," *The New York Times,* August 3, 1977, A1.

Part and parcel of the 1970s drug culture was its commercialization and related efforts to legalize cannabis. Countercultural entrepreneurs, now with an eye toward turning profits, opened "head shops" that offered for sale paraphernalia for enhancing acid trips or for smoking marijuana. Owners of such emporiums touted their wares as emblems of an alternative lifestyle and, at the same time, a symbolically-rich material culture with which they and their customers could identify. According to Joshua Clark Davis, drug culture entrepreneurs fostered the idea that their businesses helped customers expand their minds and improve society – the first order of business for which, however, was the legalization of pot. Head shop owners typically involved themselves in changing state statutes that persisted in making the possession and consumption of marijuana criminal offenses. By the end of the 1970s, such operators numbered in the tens of thousands, had organized into trade groups, and regularly convened to coordinate lobbying campaigns to legalize cannabis. And, by that time, they had succeeded in about a dozen states.[79]

By 1978, the casual smoking of marijuana had entered the public mind as a growing threat to high school-aged children. In that year, nearly one in nine high school seniors reported having used the drug daily in the previous month.[80] By the end of the 1970s, parents' groups and lawmakers had begun to advance a national campaign against "commercialized drug culture."[81] Once in office, President Ronald Reagan reignited the war on drugs, primarily taking aim at the increasing use of cocaine, but also urging law enforcement to crack down on marijuana

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[79] Joshua Clark Davis, "The Business of Getting High: Head Shops, Countercultural Capitalism, and the Marijuana Legalization Movement," *Sixties: A Journal of History, Politics & Culture*, Vol. 8, no. 1 (June 2015): 27-49; Wendy Chapkis and Richard J. Webb, *Dying to Get High: Marijuana as Medicine* (New York: New York University Press, 2008), 13-63; Lee, *Smoke Signals*, 116-156. See Thomas Frank, *The Conquest of the Cool: Business Culture, Counterculture, and the Rise of Hip Consumerism* (Chicago: University of Chicago Press, 1997).
[80] Reuter, "U.S. Drug Policy," 82
[81] Davis, "The Business of Getting High," 27-49.

consumption and trafficking. In October 1982, the president announced the creation of the Organized Crime Drug Enforcement Task Force, a program to be coordinated by federal prosecutors. To demonstrate the seriousness of the problem to be addressed and the depth of his resolve, President Reagan placed Vice President George H. W. Bush in charge of a south Florida task force to stem the rapidly rising influx of cocaine and marijuana through one of the main smuggling points of entry into the United States.[82]

The mid-1980s also saw the emergence of a new and threatening form of cocaine that soon caught the attention of federal authorities. "Crack" cocaine, which made its appearance in 1985, was a purified form of the drug that allowed users to smoke, or "free-base" the substance, rather than inhale the simpler powdered form.[83] A vial of crack could be purchased in New York City for $10 to $20 and the substance proved to be extremely addictive. *The New York Times* reported that treatment centers were seeing "addicts arrive who had been using cocaine not for years but for months or weeks."[84] The new crack addicts, authorities averred, commonly had a direct relationship to rising crime. In the first six months of 1986, areas in which crack use was common saw a dramatic leap in murders, robberies, and other violent crimes. All leading New York newspapers followed the trends, and on May 18, 1986, the *Times, The Daily News*, and *Newsday* all published prominent articles alerting their readers to the crack threat. By September

[82] "Text of President's Speech on Drive against Crime," *The New York Times,* October 15, 1982, A20.
[83] Jane Gross, "A New Purified Form of Cocaine Causes Alarm as Abuse Increases," *The New York Times,* November 29, 1985, A1.
[84] Peter Kerr, "Anatomy of the Drug Issue: How, After Years, It Erupted," *The New York Times,* November 17, 1986, A1.

of that year both NBC news and CBS news telecast special reports about the new dangers posed by crack cocaine.[85]

Adding to the growing public alarm that stemmed from the highly visible new threats posed by the more powerful and addictive cocaine derivative were the deaths in a two-week period of June 1986 of two prominent professional athletes, both a consequence of cocaine overdoses. Len Bias was a first round draft pick from the University of Maryland who played for the Boston Celtics. Don Rogers was the 1984 defensive Player of the Year for the Cleveland Browns. Clearly, reasoned thoughtful observers, if the lives of preeminent professional athletes could be ruined and lost to cocaine addiction, something had to be done. Additionally, 1986 was a congressional election year, and the time was ripe to make political hay of the tragedies. Boston Celtic fans, incensed at the tragic death of Len Bias, inspired House Speaker Thomas P. "Tip" O'Neill, Jr. (D-MA) to situate a "tough on drugs" policy at the center of the Democratic platform. He adopted this tactic to keep the House from going to the Republicans.[86]

On July 23, 1986, Speaker O'Neill assembled eleven House committee chairmen to develop a bipartisan response to the growing illegal drug problem. By September, the Anti-Drug Abuse Act of 1986 was ready for a floor vote.[87] There was little debate over the language of the statute; the primary motivation was to have something passed by November. Representative Claude Pepper (D-FL) captured the sentiment of the moment when he quipped, "Right now, you could put an amendment through to hang, draw, and quarter. That's what happens when you get on an

[85] Ibid.
[86] Eric E. Sterling, "Drug Laws and Snitching: A Primer," PBS Frontline. http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/ (accessed March 29, 2014).
[87] Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207, approved October 27, 1986.

emotional issue like this."[88] The legislation sailed through Congress – few wanted to face voters with a "NO" vote on such a bill. In the House, the vote was 392-16 and, in the Senate, it was 97-2. President Reagan signed the bill into law on October 27, 1986, just in time to let the incumbent candidates of both political parties crow about their tough stances on illicit drug trafficking and use before the November election.[89] The act stiffened mandatory sentencing for drug possession, including possession of marijuana. It focused roughly two thirds of funding on interdiction and sentencing; the final third provided for prevention and rehabilitation efforts. Mandatory sentencing had been removed from federal statutes in 1970 after careful consideration. But, with the new "tough on drugs" outlook stirred by the times, it was again added to the federal code.[90]

Although President Reagan spoke of reducing the size and scope of the federal government, in the realm of illicit drug control the president oversaw federal expenditures increase from $1.5 billion in 1981 to $6.6 billion in 1989.[91] First Lady Nancy Reagan encouraged voluntary action with her "Just Say No" campaign. But when President Reagan attempted on one occasion to reduce funding for law enforcement efforts to suppress illegal drug use, members of both parties roundly criticized him. Representative Charles B. Rangel, a Democrat from Manhattan, complained, "Congress envisioned this program to grow, not to be cut." Another New York Democratic Representative, James H. Scheuer of Queens, noted some irony stating, "All of us are appalled that the President and the Administration are telling us to tell Americans to say no to

[88] Peter Kerr, "Anatomy of the Drug Issue: How, After Years, It Erupted," *The New York Times,* November 17, 1986, A1.
[89] For House and Senate voting data, see https://www.govtrack.us/congress/votes/99-1986/ (accessed February 10, 2014).
[90] Sterling, "Drug Laws."
[91] Reuter, "U.S. Drug Policy," 82.

drugs, when they're also telling us that they're saying no to drug funding." Cogent observers, however, took it for granted that policing illicit drug would continue to be an important federal government commitment [92]

Congress attempted to repeat the drama of creating a popular anti-illegal drug statute before elections two years later. The Anti-Drug Abuse Act of 1988 established the Office of National Drug Control Policy (ONDCP). Its director was supposed to hold a cabinet-level position and oversee and coordinate the actions of more than thirty federal agencies involved in the war on drugs. Known as President George H.W. Bush's "drug czar," the position was first filled by William J. Bennett, who had previously served as Secretary of Education under President Reagan. Although Bush opted not to add another member to his cabinet, Bennett took full advantage of his "bully pulpit" to attack those in favor of general or medical legalization of marijuana.[93] Indeed, the act reauthorizing the position in 1998 included language that specifically ordered the Director of the Office of National Drug Control Policy to,

> ensure that no Federal funds appropriated to the Office of National Drug Control Policy shall be expended for any study or contract relating to the legalization (for a medical use or any other use) of a substance listed in schedule I . . . and take such actions as necessary to oppose any attempt to legalize the use of a substance . . . listed in schedule I . . . [that] has not been approved for use for medical purposes by the Food and Drug Administration.[94]

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[92] Bernard Weinraub, "Reagan Call for Cut in Drug Fight Ignites the Anger of Both Parties," *The New York Times,* January 8, 1987, A1.

[93] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, approved November 18, 1988; Michael Isikoff, "Bennett to Resign as Director of U.S. Drug Control Policy," *The Washington Post*, November 7, 1990, A2.

[94] Title 21 (Food and Drugs), U.S.C. § 1703 (2000 ed.). For the drugs set out in Schedule I of the Controlled Substances Act, see 21 U.S.C. § 812, ibid.

While the Reagan and Bush administrations saw an increase in federal funding to suppress illegal drugs and enlarged the federal counter-narcotics bureaucracy, the Clinton administration appeared, simply, to maintain the status quo. African Americans became increasingly over-represented as the targets of drug interdiction efforts, even as the federal budget remained roughly the same, and the ratio of money spent for enforcement and rehabilitation remained nearly constant. Courts continued to use sentencing guidelines established in 1986. Over time, the effects of long-term mandatory sentences began to show on prison population statistics. Between 1992 and 2000, the number of federal prisoners who had been convicted of drug offenses nearly doubled, climbing from 35,398 to 63,898.[95] The rate of arrest and prosecution for the possession or distribution of illegal drugs in the 1990s, however, grew substantially higher for African Americans than for persons who identified as "white." Consequently, the "war on drugs" steadily took on racial overtones and, because of this, highly politicized meanings.[96]

While drug culture entrepreneurs lobbied successfully for the legalization of marijuana in some states, federal authorities haltingly took steps that controversially raised the possibility that cannabis might have bona fide medical uses. In November 1976, United States District Court for the District of Columbia Judge James A. Washington dropped charges against glaucoma-sufferer Robert C. Randall, who had been charged under the District of Columbia criminal code with possession of marijuana. The court did so by recognizing his novel defense – one that was based on the common law doctrine of medical necessity. In 1978, Randall successfully sued various

[95] Reuter, "U.S. Drug Policy," 84.
[96] Jamie Fellner, "Race, Drugs, and Law Enforcement in the United States," *Stanford Law and Policy Review*, Vol. 20, no. 2 (2009): 257-292. For the decade 2001-2010, see "The War on Marijuana: Billions of Dollars Wasted on Racially Biased Arrests" (New York: American Civil Liberties Union, June 2013).

agencies of the federal government, including the Food and Drug Administration, to obtain lawful access to cannabis for medical purposes, an initiative that spurred the federal government to launch its very limited and experimental Compassionate Investigational New Drug program. The state of New Mexico, in 1978, passed the first legislation recognizing the medical value of marijuana as an analgesic for chronic pain and other ailments. Given the growing trepidation of parent groups and law enforcement authorities across the United States over the rapidly-growing incidence of recreational marijuana use among teen-agers and young adults, and the increasing consumption of cocaine and other dangerous controlled substances, this development was politically charged almost from the beginning: Due sympathy for those afflicted with chronic pain, including the terminally ill, collided head-on with intense parental fears. By the mid-1990s, marijuana advocates further augmented their message by emphasizing the racial injustice stemming from illegal drug interdiction efforts that, per capita, increasingly impacted African Americans.[97]

It was about this time that states began to reassert their power to regulate drug use. In 1996, the voters of California passed Proposition 215, which allowed for the medicinal consumption of marijuana under the supervision of a physician.[98] The proposition process was begun by San Francisco resident Dennis Peron, whose gay partner had used marijuana to relieve AIDS-related suffering. Peron had been a strong advocate of legalized medicinal marijuana use since his service in Viet Nam. He opened his San Francisco Cannabis Buyer's Co-op with the intention of distributing marijuana to qualified patients for medical purposes. He succeeded in operating his

[97] Lee, *Smoke Signals*, 234, 201-237; Chapkis and Webb, *Dying to Get High*, 64-210. See also Emily Dufton, *Grass Roots: The Rise and Fall and Rise of Marijuana in America* (New York: Basic Books, 2017).

[98] Anita Manning and Andrea Stone, "Critics Fault Medicinal Marijuana Law, *USA Today,* November 7, 1996, 1A.

business under the auspices of a 1991 city resolution allowing for the consumption of medical marijuana, a measure that he had helped to pass. Although the local community and law enforcement officials permitted his activities, Republican Governor Pete Wilson vetoed medical marijuana bills passed by the California legislature.[99] Peron and his supporters concluded that, perhaps, the people of California could pass a medical legalization statute through the proposition process. Backed by a $350,000 donation from Hungarian-American financier George Soros, along with pledges from other wealthy supporters, Peron amassed the required 400,000 signatures to get his proposition on the ballot for November 5, 1996.[100] With this success, he came under the scrutiny of California Attorney General Dan Lungren, a Republican, who arrested Peron and shut down his business on October 12, 1996, less than a month before the election date. Nevertheless, Proposition 215, entitled the Compassionate Use Act of 1996, passed with a majority of nearly fifty-six percent.[101]

At about the same time, in Arizona, sixty-five percent of voters approved a similar ballot initiative, Proposition 200, which specifically addressed the Controlled Substances Act by stating its purpose: "To permit physicians to prescribe Schedule 1 controlled substances such as marijuana to treat disease or to relieve the pain and suffering of seriously and terminally ill patients."[102] Over the next few years other states would follow California and Arizona. The states

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[99] Michael Malott, *Medical Marijuana: The Story of Dennis Peron, The San Francisco Cannabis Buyers Club and the Ensuing Road to Legalization* (Malott, CreateSpace Independent Publishing Platform, 2009), 6.

[100] Carey Goldberg, "Wealthy Ally for Dissidents in the Drug War," *The New York Times*, September 11, 1996, A12.

[101] Compassionate Use Act of 1996, codified at Section 11362.5, Article 2. Cannabis, Chapter 6. Offenses and Penalties, Division 10. Uniform Controlled Substances Act, State of California Health and Safety Code Annotated, added November 5, 1996, by initiative Proposition 215, Sec. 1. (West Supp. 2001).

[102] "The Letter of the Law in California, Arizona," *USA Today*, November 7, 1996, 3D.

of Oregon and Washington passed medical marijuana legislation in 1998. Alaska and Maine did so in 1999, followed by Colorado in 2000.[103] Also, in 2000, Hawaii enacted a medical marijuana statute through its legislature rather than by ballot initiative.[104]

The case of *Gonzales v. Raich* came about during the presidency of George W. Bush. It is somewhat ironic that candidate Bush included in his campaign platform the position that individual states should choose whether to ban the use of medical marijuana.[105] Whether his administration would have been more accommodating than his predecessors towards state legalization of medical marijuana we will never know. The terrorist attacks of September 11, 2001, spurred President Bush to take a wide array of national actions to support the War on Terror, some of which seemed to violate individual liberties set out in the Constitution, such as the initiatives to ramp up the war on illegal drugs. With all the new state legislation that directly contradicted the restrictions set out in the CSA, it was only a matter of time before litigants challenged the CSA in the federal courts.

The first challenge resulted from enforcement of California's Compassionate Use Act of 1996. In 1998 the United States filed suit against the Oakland Cannabis Buyers' Cooperative to stop the organization from manufacturing and distributing marijuana to qualified patients – since the CSA, under long-established Commerce Clause judicial precedents, preempted the California statute. The district court granted an injunction, but Oakland Cannabis Buyers simply ignored and violated it. When notified that the cooperative was in contempt, its managers argued that they were continuing their activities out of a medical necessity for the well-being of their patients

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[103] Richard Willing, "Attitudes Ease Toward Medical Marijuana," *USA Today*, May 23, 2003, 3A.

[104] *United States v. Oakland Cannabis Buyers' Cooperative,* 562 U.S. 502, n. 4 (2001).

[105] Spencer S. Hsu, "Bush: Marijuana Laws up to States; But GOP Candidate Says Congress Can Block D.C. Measure," *The Washington Post*, October 22, 1999, B07.

since no other medication offered the therapeutic benefits of marijuana. In response, U.S. marshals seized the cooperative's premises. On appeal in the Ninth Circuit, Oakland Cannabis Buyers agreed to cease distribution and manufacture, both to comply with the injunction and regain possession of their facilities. But the cooperative moved to have the injunction modified, reiterating their medical necessity justification. The appeals court agreed and remanded the case to the district court to incorporate a medical necessity defense in which marijuana could be prescribed if the patient had "no reasonable legal alternative to cannabis" and legal alternatives were ineffective or caused intolerable side effects.[106] However, the United States Supreme Court reversed the Ninth Circuit's ruling on May 14, 2001. Writing for the majority, Justice Clarence Thomas concluded that Congress had already contemplated medical necessity when it placed marijuana in the Schedule I category of drugs. By its nature, the decision of Congress reflected "a determination that marijuana has no medical benefits worthy of an exception (aside from government-approved research)."[107] Thus, the Court rejected the medical exception argument for manufacture and distribution by a vote of 8-0. Thomas also noted that "the Cooperative asserts, that shorn of a medical necessity defense, the statute exceeds Congress' Commerce Clause powers, violates the substantive due process rights of patients, and offends the fundamental liberties of the people under the Fifth, Ninth, and Tenth Amendments." However, because the Court of Appeals did not address these constitutional claims, Thomas concluded that the Supreme Court would decline to do so as well.[108]

The decision of the Supreme Court in *United States v. Oakland Cannabis Buyers' Cooperative* did not appear to have much of an effect, at least in the western states. In Alaska,

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[106] *United States v. Oakland Cannabis Buyers' Cooperative*, 562 U.S. 489, n. 2 (2001).
[107] Ibid., 491.
[108] Ibid., 494.

Arizona, California, Colorado, Hawaii, Maine, and Oregon, the state-level legalization of marijuana use continued. In California, medical marijuana licenses continued to be issued to patients with the recommendation of a physician. In Maine, state prosecutors avoided getting involved in enforcing the federal statute, although the state legislature did drop a statute designed to supply medical marijuana to those who needed it. United States Attorney General John Ashcroft did not provide guidance to federal prosecutors on how to approach such violations of federal law. It was as though the Court had ruled for Oakland Cannabis Buyers.[109]

Federal prosecutorial inaction would abate after the attacks of September 11, 2001. The War on Terror required that federal authorities scrutinize every illicit activity possibility related to international Islamic terrorism. On August 15, 2002, deputies from the Butte County Sheriff's Department and DEA agents appeared at the home of Diane Monson of Oroville, California. The officers, to some extent, were responding to what was reported as a "crackdown on medical marijuana" inspired in part by the new anti-terrorism stance of the federal government. President Bush had stated that the illegal drug trade helped finance terrorists.[110]

Diane Monson, the suspect, was a forty-five-year-old office manager and bookkeeper who had suffered from severe chronic back pain and spasms for the previous three years. She described the pain as so severe that the only way to relieve it, even partially, was to lie down, thus making it impossible for her to work effectively. Although she had tried other medications, including muscle relaxers and anti-inflammatories, those types of drugs kept her groggy and unable to perform her work duties. She had even tried more addictive drugs such as Vicodin and

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[109] Associated Press, "High Court's Ruling Having Little Effect; Medical Marijuana States Still Producing," *Lubbock Avalanche-Journal,* June 14, 2001.

[110] Stephen Henderson, "Marijuana, as a Flashpoint; Supreme Court Today Considers a State Law That Allows the Drug as Medicine," *The Philadelphia Inquirer,* November 29, 2004, A03.

Vioxx, but she found these medications were ineffective in relieving her pain and, in addition, made her quite nauseated.[111]

In 1999, Monson first tried marijuana to relieve her back spasms. The plant proved effective; she stated that her spasms were reduced by seventy-five percent. Even when they did occur, she reported, the marijuana relaxed her and did not make her drowsy, thus allowing her to work without pain. Her physicians recommended that she use a vaporizer to ingest the cannabis. In addition, she took the drug sublingually in a spray form. She reported no side effects from the marijuana use.[112]

Monson reported that the deputies accepted that her cultivation of six marijuana plants for medicinal consumption was under the supervision of a physician and legal under California state law. However, the DEA agents argued that the plants must be destroyed to enforce the federal Controlled Substances Act. A three-hour discussion ensued. This complicated conversation involved local district attorney Mike Ramsey in support of Monson and U.S. Attorney for the Eastern District of California John K. Vincent, who backed the DEA agents. Ultimately, the agents prevailed and cut down the plants.[113]

The experience of Angel Raich was somewhat different because she personally did not experience a raid on her premises by DEA agents. In 2002, Raich was under treatment for an extensive variety of medical conditions, which included scoliosis, spinal injuries, muscle spasms, chronic headaches, an inoperable brain tumor, a uterine fibroid tumor, fibromyalgia, and posttraumatic stress disorder resulting from childhood sexual abuse. She stated that the

[111] Declaration of Diane Monson in Support of Motion for Preliminary Injunction, C 02 4872 EMC, U.S. District Court for the Northern District of California.
[112] Ibid.
[113] Ibid.

prescription drugs she used for all these injuries, ailments, and impairments were either ineffective or resulted in nausea or allergic reactions, or some combination thereof.[114]

Raich also stated that, before she became a medical cannabis patient, she opposed the recreational consumption of marijuana; however, on the recommendation of her physician, she tried cannabis in 1997. She found that various strains of the plant gave her positive results. According to Raich, "[o]ne strain of medical cannabis helps my chronic pain, one helps my seizures, one helps me eat and hold onto my weight, and another may [sic] helps control my nausea."[115] Raich obtained her medicinal cannabis through the Oakland Cannabis Buyers' Cooperative beginning in 1998. Indeed, she had not been involved with the cooperative for long before she became enmeshed in the case described previously, *United States v. Oakland Cannabis Buyers' Cooperative.* She was one of fourteen "medical necessity" patients at the center of the controversy.

After the Supreme Court's ruling in *Oakland Cannabis Buyers' Cooperative,* Angel Raich had to find other means for obtaining her marijuana. She described the pitfalls of buying in the black market. In that ever-shifting and unpredictable network of exchange, she had no control over the strain of cannabis she could obtain or the quality and potency of the plant she purchased. She noted, "Black market marijuana is not medical grade cannabis. One really does not know what is in that marijuana. It may contain mold, fungus, pesticides, other drugs, rat droppings, or god [sic] knows what. One does not know how it was grown or processed. It is just not safe."[116] She tried growing the plant but was unsuccessful. Eventually, she found two "caregivers" who

[114] Declaration of Angel McClary Raich in Support of Motion for Preliminary Injunction, C 02 4872 EMC, U.S. District Court for the Northern District of California.
[115] Ibid. para. 49.
[116] Ibid. para. 47.

grew cannabis and provided her with it free of charge – that is, there were no commercial transactions involved. The two caregivers would be part of the future suit as well under the pseudonyms "John Doe Number One" and "John Doe Number Two," and Raich made the point that the growing operations of both suppliers were situated within the state of California.[117]

Because of their treatment by the DEA, Raich, Monson, and the two Does sued the United States for declaratory and injunctive relief on October 9, 2002, in the United States District Court for the Northern District of California. The plaintiffs wanted to be protected from the federal government arresting or prosecuting them, seizing their medical cannabis, causing forfeiture of their property, or seeking civil or administrative actions against them for possessing medical marijuana, or for obtaining or growing marijuana for personal medical use, or, in the case of the Does, for growing medical marijuana to be provided to Raich. The plaintiffs, thus, petitioned the court to declare that the CSA was unconstitutional to the extent that it prevented the plaintiffs from obtaining, possessing, or growing marijuana for medicinal purposes.[118]

Attorneys Randy E. Barnett, Robert A. Raich, and David M. Michael argued the case for the plaintiffs. Barnett, a law professor at the Georgetown Law Center and a senior fellow at the libertarian Cato Institute, commanded expert knowledge about the Commerce Clause and its original and historical meanings.[119] The second attorney, Robert Raich, was Angel's husband at

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[117] Ibid. para. 50.

[118] Complaint for Declaratory Relief and For Preliminary and Permanent Injunctive Relief, C 02 4872 EMC, U.S. District Court for the Northern District of California. http://www.robertraich.com/docs/DistCourtNorthDist/complaint.pdf (accessed March 3, 2014).

[119] "Randy Barnett," Cato Institute. http://www.cato.org/people/randy-barnett (accessed March 4, 2014). Barnett's published work has been referenced throughout this study because it is based on extensive research into the original meaning of the Commerce Clause, which, he maintains, held the term "commerce" to denote, simply, "trade" or "exchange" and not "all gainful activity." Randy E. Barnett, "The Original Meaning of the Commerce Clause," *University of Chicago Law Review*, Vol. 68 (Winter 2001): 101-147, 104.

the time, and he specialized in the law of medical cannabis as well as business and political law. Indeed, the couple had met when he was helping with the *Oakland Cannabis Buyers' Cooperative* case, when she was a member of the cooperative.[120] Both Barnett and Raich had previously taken part in the *Oakland Cannabis Buyers Cooperative* case.[121] Finally, David M. Michael was a San Francisco attorney whose specialties were marijuana law and general criminal defense.[122]

The plaintiffs introduced their argument by emphasizing that the federal government was unconstitutionally seizing private property through harassment, administrative action, and paramilitary raids. They based these claims on the Tenth Amendment, the Commerce Clause, the Ninth Amendment, the Due Process Clause of the Fifth Amendment, and the doctrine of "medical necessity."[123] Counsel for plaintiffs maintained that no authority was more central to the sovereignty of the states than their police powers, which include the responsibility to provide for the health and safety of citizens. Raich's legal team argued that that Congress had no authority under the Constitution to undercut such sovereign rights and duties. "State governments have authority to enact measures reasonably necessary to protect public health. Congress cannot exercise its power over interstate commerce to interfere with a State's police power by prohibiting *wholly intrastate* conduct that the State mandates in the interest of health

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[120] Chris Roberts, "Angel Raich, Cancer Patient, Kicked Out of Hospital for Using Medical Marijuana," *Huffington Post San Francisco*, March 13, 2012. http://www.huffingtonpost.com/2012/03/14/angel-raich_n_1342586.html (accessed March 5, 2014); "Robert Raich Attorney at Law." http://www.robertraich.com/about/ (accessed March 5, 2014); and Evelyn Nieves, "'I Really Consider Cannabis My Miracle'; Patients Fight to Keep Drug of Last Resort, *The Washington Post*, January 1, 2005, A03.

[121] 532 U.S. 485 (2001).

[122] "David Martin Michael," National Organization for the Reform of Marijuana Laws. http://lawyers.norml.org/california/david-martin-michael (accessed March 5, 2014).

[123] Ibid.

and safety."[124] Referring to Madison's *Federalist*, No. 42, the plaintiffs argued that the preservation of state authority over its internal affairs was essential to the maintenance of the federal system of dual government. The Controlled Substances Act was unconstitutional insofar as federal authorities had used it, and might use it in the future, to prosecute Raich, Monson, and the John Does for, simply, taking advantage of state law authorizing their consumption of a medicinal substance wholly outside the scope of interstate commerce. Referring to the Ninth Amendment, which reads, "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," the plaintiffs argued, "[t]he rights to bodily integrity, to ameliorate pain, and to prolong life are closely related. They are distinct rights or specific aspects of the famous trinity of life, liberty, and the pursuit of happiness" in the Declaration of Independence."[125] Therefore, the pursuit of life allowed patients to consult with and act on the treatment recommendations of their physicians.

Countering the arguments of the plaintiffs were attorneys Robert McCallum, Jr., Kevin Ryan, Arthur Goldberg, and Mark T. Quinlivan. McCallum held the B.A. from Yale and was a graduate of its law school and a Rhodes Scholar. As of October 2002, he was the assistant attorney general for the Civil Division of the Department of Justice. McCallum was a 1968 classmate of George W. Bush at Yale and the two were fellow members of the secretive Skull and Bones Society. A rising star in the United States government who had defended the Bush administration on many fronts, McCallum would later become the third-ranking official at the Department of Justice and afterwards the U.S. Ambassador to Australia.[126] Kevin Ryan was also a Bush

[124] Ibid. [Emphasis in original]
[125] Ibid.
[126] Michael Isikoff, "Leak Investigation: An Oversight Issue?" *Newsweek*, August 15, 2005, p. 6; "McCallum Just One of the Boys," *The Canberra Times*, March 12, 2006, A2.

appointee, having recently become a U.S. Attorney only two months prior to the plaintiffs' filing of their complaint.[127] Goldberg worked for McCallum in the Justice Department Civil Division. U.S. Attorney Mark T. Quinlivan came to the case with a record of success in the medical marijuana arena, having been the lead attorney for the government in *Oakland Cannabis Buyer's Cooperative*.[128] This high-powered team suggests that the government took the case very seriously.

The government maintained that the arguments plaintiffs raised had no merit. According to its response, "[g]overning Supreme Court and Ninth Circuit authority forecloses each of the plaintiffs' contentions."[129] Counsel for Justice Department cited *United States v. Bramble*, a Ninth Circuit Court of Appeals decision holding that the CSA's prohibition on the distribution, manufacture, or possession of marijuana and other controlled substances "is constitutional under the Commerce Clause."[130] The government referenced over a dozen cases in which the Ninth Circuit, as well as all the other federal circuit courts, had ruled on the question and had differentiated challenges to the CSA from those aimed at the statutes at issue in *Lopez* and *Morrison*; the Supreme Court, after all, had found that neither the Gun Free School Zones Act nor the Violence Against Women Act targeted activity that was intrastate commercial or economic activity, whereas the CSA certainly did. The government attorneys invoked a Tenth

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[127] Bob Egelko, "Report: U.S. Attorney Ryan's Firing Justified," *SFGate*, September 30, 2008. http://www.sfgate.com/bayarea/article/Report-U-S-attorney-Ryan-s-firing-justified-3192327.php (accessed March 12, 2012).

[128] Associated Press, "High Court's Ruling Having Little Effect," *Lubbock Avalanche Journal*, June 14, 2001.

[129] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, C 02-4872 MMJ, U.S. District Court for the Northern District of California. http://www.robertraich.com/docs/DistCourtNorthDist/DefendantsOpp.pdf (accessed March 14, 2014).

[130] 103 F.3d 1475, 1479 (9th Circuit, 1996).

Circuit ruling from 2001, which held "[w]e think any party would be hard-pressed to prove that trafficking in controlled substances is not an economic activity and not an issue of national concern."[131]

It then followed, counsel for the government argued, that, if the Controlled Substances Act was, indeed, a constitutional assertion of the commerce power, the Tenth Amendment challenge plaintiffs put forth could only fail. In *New York v. United States,* the government pointed out, the Supreme Court had ruled, "if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states."[132]

Finally, the government lawyers addressed the medical necessity argument. They maintained that the Ninth Circuit, in *Carnohan v. United States,* had previously found there was no fundamental right to receive medical treatments not shown to be effective. In that decision, the court ruled that the use of laetrile, unapproved by the Food and Drug Administration, could not be used as an alternative cancer treatment even with the claim of medical necessity. According to the Ninth Circuit, referring to the mandates of the California Health and Safety Code, "[c]onstitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of the government police power."[133] Additionally, emphasized counsel for the government, the Supreme Court had found in *Oakland Cannabis Buyers' Cooperative* that "there is no medical necessity exception to the prohibitions at issue [in the

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[131] *United States v. Pompey*, 264 F.3d 1176, 1180 (10th Circuit, 2001), *cert. denied*, 122 S. Ct. 929 (2002).

[132] 505 U.S. 144, 156, and 192.

[133] 616 F.2d 1120 (9th Circuit, 1980); California Health & Safety Code § 1707.1, § 26670. Laetrile, patented in 1961, is a simpler semisynthetic version of amygdalin, an alternative drug for the treatment of cancer. William J. Curran, "Laetrile for the Terminally Ill: Supreme Court Stops the Nonsense," *New England Journal of Medicine*, Vol. 302, no. 11 (1980): 619–621.

CSA], even when the patient is "seriously ill" and lacks alternative avenues for relief."[134] It thus appeared that the government had strong precedents on its side.

Deciding the case was District Court Judge Martin J. Jenkins. A moderate Democrat, Jenkins had previously served as a prosecutor for Alameda County and Department of Justice trial attorney, specializing in racial violence and police misconduct cases. Republican Governor George Deukmejian appointed him to the Oakland Municipal Court in 1989, and fellow Republican Governor Pete Wilson elevated Jenkins to the Alameda Superior Court in 1992. Jenkins went on to become the presiding judge of the Juvenile Division in 1995; after his appointment to the federal bench by President Bill Clinton, he had served as a judge for the Northern District of California since November 1997.[135]

Judge Jenkins agreed with the government's arguments, while ruling that the precedents relied on by plaintiffs would not likely support their challenge to the CSA. Consequently, he denied the preliminary injunction. Relying on well-established precedents, Jenkins declared that, for a preliminary injunction to issue, a three-point test must be met, showing "(1) a strong likelihood of success on the merits; (2) that the balance of irreparable harm favors the case; and (3) that the public interest favors granting the injunction." Alternatively, plaintiffs were required to show that a decreasing probability of success combined with a sufficiently increasing severity of irreparable harm could tip the balance in favor of an injunction.[136] Jenkins noted that he was

[134] 532 U.S. 494 n.7 (2001).
[135] "Martin J. Jenkins," California Courts, The Judicial Branch of California. http://www.courts.ca.gov/7661.htm?print=1 (accessed March 3, 2014).
[136] *Angel McClary Raich, Diane Monson, John Doe No. One, John Doe No. 2 v. John Ashcroft, et. al.*, 248 F. Supp. 2d 921 (Northern District of California, 2003).

unable to disregard the relevant Ninth Circuit decisions without an intervening Supreme Court ruling; the precedents in these decisions were "closely on point."[137]

Each of the arguments advanced by the Justice Department attorneys was accepted in its entirety by the judge. Congress had gathered evidence and made findings during its deliberations over the Controlled Substances Act, which were declared in the initial section of the CSA, that marijuana production and consumption had a substantial relation to interstate commerce. According to Judge Jenkins, these findings were not the result of the type of "attenuated analysis" found problematic in *Morrison*.[138] Enforcement of the CSA against the plaintiffs would not contravene the Tenth Amendment; only when the federal government attempted to compel states to act was the Tenth Amendment violated. Since the federal government was not attempting to force California authorities to enforce the CSA, Tenth Amendment rights remained unviolated.[139] The Ninth Amendment was not at issue either. Since Congress had found that marijuana had no medicinal value, it followed that denying it to Raich or Monson would not, at least in a strict legal sense, be denying them treatment. "[A]s the Supreme Court was not in a position to overturn the legislative determination that placed marijuana in Schedule I, and thus, made it unavailable for prescription to seriously ill people, much less so is this Court."[140] Thus, the plaintiffs were left to appeal their case to the next higher federal court.

Undeterred by their failure in the district court, Raich, Monson, and the Does filed a timely notice of appeal on March 12, 2003, to the Ninth Circuit Court of Appeals. The case was then argued on October 7th and decided on December 16th. Robert Raich and Randy Barnett again

[137] Ibid., 925.
[138] Ibid., 922.
[139] Ibid., 927.
[140] Ibid., 929.

argued for the plaintiffs, while Mark T. Quinlivan represented the U.S. government. Raich and Barnett were backed with amicus support from Alameda and Butte counties as well as the City of Oakland and the State of California. The California Medical Association, the California Nurses Association, and the Marijuana Policy Project provided support as well.[141] The Justice Department, evidently more confident at the appellate level, did not apply the same resources to the case as it had previously.

Deciding the appeal in the circuit court was a three-judge panel, including Judges Richard A. Paez, Harry Pregerson, and C. Arlen Beam, rather than the full Ninth Circuit Court of Appeals.[142] After reviewing the arguments presented in the district court, two of the circuit court judges came to a different conclusion from that reached by Judge Jenkins. Judges Paez and Pregerson agreed with Raich, Monson, and the other appellants that the Controlled Substances Act, as applied to them, was an unconstitutional use of the Commerce Clause, while Judge Beam dissented and agreed with the district court ruling. Judge Pregerson, appointed to the Ninth Circuit Court of Appeals in 1979 by President Jimmy Carter, wrote its opinion, which accepted at least some of appellants' constitutional arguments:

> We find that the appellants have demonstrated a strong likelihood of success on their claims that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority. We decline to reach the appellants' other arguments, which are based on the principles of federalism embodied in the Tenth Amendment, the appellants' alleged fundamental rights under the Fifth and Ninth Amendments, and the doctrine of medical necessity.[143]

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[141] *Raich v. Ashcroft,* 352 F.3d 1222 (Ninth Circuit, 2003).
[142] Dean E. Murphy, "Court Allows Medical Use of Marijuana," *The New York Times*, Late Edition, February 27, 2004, A6; Joyce Howard Price, "Appeals Court OKs Medicinal Pot; Prosecuting Sick Unconstitutional," *The Washington Times*, December 18, 2003, A04.
[143] *Raich v. Ashcroft,* 1227.

How did the circuit court three-judge panel find for the appellants when faced with the same precedents considered by the district court? The panel reasoned that, although it had, indeed, ruled upon the constitutionality of the Controlled Substances Act in the past, this case was different. Prior decisions had enforced the CSA against drug *trafficking.* "The appellants' conduct," they explained, "constitutes a *separate and distinct class of activities*: the noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law."[144] The panel invoked one of its own decisions, *United States v. McCoy*, in which defendant Rhonda McCoy had been charged for violations of federal child pornography statutes. A trial court acquitted her because the criminal activity for which she was indicted, possessing a photograph of herself and her ten-year-old daughter while unclothed in the privacy of their own residence, was within a separate and distinct class of activity than that targeted by the statute.[145] McCoy had no intention of entering the photograph into interstate or foreign commerce; it was intended for her family's own private use.

The three-judge panel also evaluated the case in terms of key Commerce Clause holdings set out in *Lopez*, and reiterated in *Morrison*, regarding regulation of intrastate economic activity and criminal statutes. The judges formulated these holdings as a four-factor test: "(1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any 'express jurisdictional element that might limit its reach to a discrete set' of cases; (3) whether the statute or its legislative history contains 'express congressional findings' regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between

[144] Ibid., 1228.

[145] *United States v. McCoy,* 323 F.3d 114 (9th Circuit, 2003). [Emphasis in the original]

the regulated activity and a substantial effect on interstate commerce is 'attenuated'" – referring here, it seems, to the "costs of crime" and "national productivity" arguments thoroughly discounted in *Lopez.*[146]

The circuit court panel concluded that, "as applied to the limited class of activities presented by this case," the first *Lopez-Morrison* factor did not weigh in favor of the constitutionality of the CSA. Without systematically distinguishing cultivation from consumption or possession, the circuit court concluded that "[t]he cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." In contrast to the growing of corn for home consumption under review in *Wickard v. Filburn,* there was no commercial character whatsoever in the gifting of marijuana by the Does to Raich. By difficult-to-ascertain reasoning, the circuit court distinguished also the growing of corn for home consumption and the fact that Monson grew her marijuana plants purely for her own use, not as part of a commercial crop.[147]

According to the circuit court panel in its discussion of the second *Lopez-Morrison* factor and, thus, dealing with the CSA as a criminal statute, the act contained no express jurisdictional element that might limit its reach to a discrete set of cases that substantially affected interstate commerce. The act was, consequently, without the bounds of commerce power and unconstitutional as applied to the intrastate activities of the appellants. As shown above, however, the opening section of the CSA, that is, § 801, clearly announced the finding and declaration of Congress that "a major portion of the traffic in controlled substances flows

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[146] *Raich v. Ashcroft*, para. 34; *United States v. Lopez*, 514 U.S. 549, 563-567 (1995); *United States v. Morrison*, 529 U.S. 598, 611-612 (2000).

[147] Controlled Substances Act of 1970, § 101 (1) - (6) 84 Stat. 1242, codified at 21 U.S.C. ch. 13, § 801 (1) - (6).

through interstate and foreign commerce" and that "[i]ncidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce . . . . " It appears that the three-judge panel, simply, ignored this part of the CSA and considered only the text of that section of the act setting out the drugs to be included in Schedule I and those sections that defined offenses and penalties.[148]

The assessment by the circuit court panel of the CSA under the third *Lopez-Morrison* factor also militated against upholding the act under the commerce clause for the purposes of enforcement against the appellants. Now, while taking cognizance of the expressed congressional finding and declaration set out in § 801 of the CSA, the judges found the statute lacking. Although Congress had gathered evidence and determined that "control of the intrastate incidents in the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic," the judges concluded that Congress had not gathered evidence regarding the *class* of activities in question in the case at hand – meaning the possession, use, or cultivation of medical marijuana. To undergird this determination, the court emphasized a key holding in *Lopez*, set out verbatim in *Morrison*:

> "[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation . . . . Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[149]

[148] Section 202 [Schedules of Controlled Substances] and Sections 401-411 [Offenses and Penalties], Controlled Substances Act, 84 Stat. 1247-1249, codified at 21 U.S.C., §§ 811-812, § 841, et seq.

[149] *Raich v. Ashcroft,* 1232, quoting *Lopez,* 514 U.S. at 557.

Notwithstanding that the circuit court panel held possessing, cultivating or using medical marijuana not to be economic or commercial activity, it assessed the constitutionality of the CSA as applied to the appellants under the fourth factor it drew from *Lopez* and *Morrison*. According to the judges, the activity under consideration was too attenuated, even in the aggregate, to substantially effect interstate commerce. Considering the intended use of the marijuana in this case, the judges ruled that the crop was non-fungible and had no likelihood of ever entering a market. As well, the amount of cannabis that either Raich or Monson might buy, were they to do so only to meet their medical needs, would be so limited as to have virtually no effect upon the street price of the substance. Considering all four *Lopez-Morrison* factors, the circuit court three-judge panel declared that the "CSA, as applied to the appellants, is likely unconstitutional."[150]

Judge C. Arlen Beam dissented in *Raich v. Ashcroft*, arguing that there was no significant difference between the facts and statute law giving rise to the decision in *Wickard* and the present case. "Except for why the marijuana at issue in this case is consumed, i.e., for the medicinal rather than nutritional purposes, plaintiffs' conduct is entirely indistinguishable from that of Mr. Filburn's."[151] Further, the attenuation argument posed by the majority was addressed and dispensed with in *Wickard*. Just as Filburn would have to purchase wheat in the market, and thereby help sustain high wheat prices, so would the plaintiffs have to purchase marijuana "or possibly, a (federally) legally prescribed and dispensed drug such as Marinol – both of which are articles of interstate commerce."[152] Judge Beam added, "I don't believe that the commodity involved in *Wickard* was composed of any parts that had ever moved in interstate commerce. Yet the grain was still deemed by the Supreme Court to be the proper subject of congressional

[150] Ibid., 1230-1231.
[151] Ibid., 1238.
[152] Ibid., 1240.

regulation through the commerce power."[153] It seems clear that Judge Beam saw this case as one that should have been easily decided in keeping with the 1942 precedent. And it seemed just as obvious to many observers that the Justice Department would not allow the three-judge panel of the Ninth Circuit Court ruling to stand without another fight.

The issue of medical marijuana went beyond the borders of California, and the appeal by the Department of Justice drew widespread attention. Nine states, including California and several others in the West, had passed statutes easing or eliminating penalties for medical use of marijuana. In February, the appeal by the Justice Department to the full Ninth Circuit was refused. The Ninth Circuit Court stood by the ruling of its three-judge panel.[154] In response, the government applied to the Supreme Court for a writ of *certiorari* on April 28, 2004, and the Court agreed to a late November hearing. Newspapers around the country heralded the upcoming event. Jurists, partisans, marijuana activists, and many ordinary citizens were eager to see if the New Federalism advocated by the Court's most conservative justices would hold in the face of something as controversial as the use of medical marijuana, which more than a few Americans viewed as a clever ruse to open the door to legalized recreational cannabis.[155] The case also brought together some unlikely alliances. Authorities in Alabama, Louisiana, and Mississippi, typically states dominated by social conservatives, filed amicus briefs supporting the marijuana users with the aim of underscoring states' rights. Likewise, liberal groups, such as the Community Rights Council, an environmentalist organization, joined hands with the Justice

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[153] Ibid., 1243.

[154] Dean E. Murphy, "Court Allows Use of Marijuana," *The New York Times*, February 27, 2004, A06.

[155] John Ritter, "Supreme Court Will Take on Medical-marijuana Lawsuit," *USA Today*, June 29, 2004, 11A; Richard Willing, "Medical-pot Fight goes to Justices, *US Today*, November 26, 2004, 3A.

Department to ensure that federal statutes upon which their various causes depended would remain secure.

Oral arguments in what would be styled *Gonzales v. Raich* were presented before a crowded United States Supreme Court on November 29, 2004. Representing the government was Acting Solicitor General Paul D. Clement. He had a long record of presenting cases under Attorney General John Ashcroft and, so, was no stranger to appearing before the Supreme Court.[156] Representing Raich and her co-respondents was Randy Barnett, making his first appearance before the Court. Presiding over the Court was the eighty-five-year-old Associate Justice John Paul Stevens, in lieu of Chief Justice William Rehnquist, who had been under treatment for thyroid cancer since mid-October and continued to work from home; Justice Stevens announced that Rehnquist would participate in the case by reading the briefs and the argument transcripts.[157]

The arguments that Acting Solicitor General Clement put forth were based primarily on *Wickard v. Filburn.* He argued that, whether or not any commodity was being bought or sold, "the whole point of the Wickard case was to extend rationales that applied previously to commerce to activity that the Court described as economic but not commercial."[158] It was clear, he reasoned, that if medicinal consumers of marijuana grew their own product, they would not have to buy cannabis in the black market, which included the interstate market. And prices in those markets would, consequently, decrease, if only infinitesimally, thus creating an economic impact, and a negative one at that, considering federal law enforcement efforts to enforce the

[156] Dana Milbank, "Soaring Mightily into Retirement; At Justice Department Farewell, a Salute to the Lighter Side of Ashcroft," *The Washington Post,* January 25, 2005.
[157] Linda Greenhouse, "States' Rights Defense Falters in Medical Marijuana Case," *The New York Times*, November 30, 2004, Late Edition, A1.
[158] *Gonzales v. Raich*, Oral Argument, November 29, 2004. http://www.oyez.org/cases/2000-2009/2004/2004_03_1454/ (accessed March 26, 2014).

CSA. Further, he argued, neither the State of California nor the federal government could differentiate recreational marijuana from medical marijuana. According to Clement, such inability to differentiate would "frustrate Congress' goal in promoting health," although he did not address here the fact that the promotion of health was traditionally a responsibility assumed by the states.[159] Clement also argued that medical marijuana was something of an oxymoron since Congress and the Food and Drug Administration had determined that marijuana had no medicinal value, at least in its unprocessed form. Pointing out that there were over 400 different chemical components in crude marijuana, Clement argued that Marinol, an oral medication derived from the beneficial components of marijuana and available as a Schedule III drug, was a better alternative than smoking the plant in its unrefined form, even if ingesting Marinol took longer than smoking cannabis to bring the therapeutic compounds in cannabis into the bloodstream. Clement seemed to find a reasonably receptive audience among the justices, needing only to parry rather mild questioning. Only Justice Sandra Day O'Connor pressed Clement. She asked him to explain how this case differed from those presented in *Lopez* and *Morrison*. Justice O'Connor differentiated the present case from *Wickard* by noting that part of farmer Filburn's corn crop was intended to enter the marketplace, while, in this case, the product was intended for personal consumption only. Clement countered by stating that, "I think it might be a bit optimistic to think that none of the marijuana that's produced consistent with California law would be diverted into the national market for marijuana . . . . I don't think that there's any reason to assume that California is going to have some sort of almost unnatural ability to keep

[159] Ibid.

one part of a fungible national drug market separate."[160] Having defended the position of the government, Clement, yielded the floor to Barnett.

Randy Barnett, on behalf of the respondents, endeavored to make two main points. First, "the class of activities involved in this case are non-economic and wholly intrastate" and second, "the federal prohibition of this class of activities . . . is not an essential part of a larger regulatory scheme that would be undercut unless the intrastate activity were regulated." Perhaps seeking to appeal most to the five justices who had constituted the majorities in *Lopez* and *Morrison,* Barnett also warned that, "If you accept the government's contrary contentions on either of these two points, *Ashcroft v. Raich* will replace *Wickard v. Filburn* as the most far-reaching example of Commerce Clause authority over intrastate activity."[161]

But Barnett faced some trenchant questioning. In response to his opening, justices David Souter and Stephen Breyer peppered him with queries about how to differentiate a valuable street drug like marijuana from that grown for personal medicinal use. Likewise, Justice Antonin Scalia was critical of Barnett's attempt to carve out a narrow category of cannabis users to be exempt from the constraints of the Controlled Substances Act. "What basis is there to draw it that narrowly? I mean, I guess if we . . . we could say people whose last name begins with a Z. You know, that would narrow the category too." Referencing the Court's key 1942 precedent, Justice Scalia observed that medical marijuana grown for personal use "sounds like Wickard to me . . . . always used to laugh at Wickard, but that's . . . that what Wickard said."[162]

To cast the intrastate activities of his clients outside the scope of the substantial effects test articulated in *Lopez*, Barnett continued to argue that his clients were not engaged in economic

[160] Ibid.
[161] Ibid.
[162] Ibid.

activity and that their activity was different from the economic activity of drug traffickers. It should be observed here that drug trafficking for profit was, under standard definitions, at least, economic activity and commerce, while cultivating or consuming marijuana were economic activities but not commerce – and merely possessing marijuana was neither economic activity nor commerce. But Barnett tried to make his case by eliding some of these distinctions, which, because of the judicial precedents in play, took on critical legal importance. For example, he asked the Court to consider the difference between marital sex, a non-economic activity, and prostitution, an economic activity. Omitting to point out the additional commercial nature of the latter activity, Barnett declared, "We could be talking about virtually the same act."[163] Unconvinced, Justice Breyer moved on to suggest that, perhaps, rather than attempting to find the Controlled Substances Act unconstitutional, Barnett and his clients might wish to pursue action with the FDA to have medical marijuana taken off Schedule I or perhaps sue them if they refused for "an abuse of discretion." Breyer added, "And while the FDA can make mistakes, I guess medicine by regulation is better than medicine by referendum."[164]

In the aftermath of oral arguments, it seemed apparent to knowledgeable jurists and policy experts that the Supreme Court would not declare the Controlled Substances Act unconstitutional as applied to medical marijuana cultivators and consumers because the *Wickard* precedent was too foundational for myriad federal regulations and the legalization of medical marijuana too

[163] Scholars have characterized patriarchal marriage in numerous cultures as a coercive arrangement by which husbands control the sexuality of their wives and, at the same time, obtain sexual services from them. In this view, perhaps, the marital sex act might be viewed as economic activity. Sexual intimacy between a couple ensconced in a more egalitarian and reciprocal marriage, however, might be viewed as both an economic activity and commerce – the mutual provisioning of sexual services as a mode of exchange. Nancy Folbre, *Who Pays for the Kids? Gender and the Structures of Constraint* (New York: Routledge, 1994), 29-37.
[164] *Gonzales v. Raich*, Oral Argument, ibid.

controversial. The headlines were indicative: "States' Rights Defense Falters in Medical Marijuana Case"; "High Court Not Receptive to Marijuana Case -- Medical Use Seen as Subject to Regulations"; and "Court Skeptical on Medical Marijuana – Five Justices Seemed Disinclined to Rule for Patients suing to Prevent Federal Confiscation of their Drugs."[165] In February 2005, President George W. Bush appointed his former white house counsel Alberto R. Gonzales United States Attorney General, who aggressively set about prosecuting the war on terror – while, in lieu of John Ashcroft, also becoming a party to the litigation involving Raich and Monson. These two women, in the meantime, continued medical marijuana therapy undeterred by the likely negative ruling to come.

Justice John Paul Stevens announced the decision of the Court in *Gonzales v. Raich* on June 6, 2005. He made it clear with his oral presentation that the case had been "extremely troublesome" for the justices because "respondents have made such a strong showing that they will suffer irreparable harm if denied the use of marijuana to treat their serious medical illness." But be that as it may, he conveyed without equivocation that the federal government would continue to regulate and police marijuana as a Schedule I controlled substance:

> [T]he question before us is not whether marijuana does in fact have valid therapeutic purposes, nor whether it is a good policy for the Federal Government to enforce the Controlled Substance Act in these circumstances. Rather, the only question before us is whether Congress has the power to prohibit respondents' activities. . . . Our case law

[165] Linda Greenhouse, "States' Rights Defense Falters in Medical Marijuana Case," *New York Times*, November 30, 2004; Charles Lane, "High Court Not Receptive to Marijuana Case; Medical Use Seen as Subject to Regulations," *The Washington Post*, November 30, 2004, Final Edition, A03. www.lexisnexis.com/hottopics/lnacademic (accessed March 25, 2014); Stephen Henderson, "Court Skeptical on Medical Marijuana," *The Philadelphia Enquirer*, November 30, 2004, A03.

> firmly establishes that Congress has the power to regulate purely local activities when necessary to implement a comprehensive national regulatory program.[166]

As indicated, the majority came to its decision by relying on the substantial effects and ancillary comprehensive regulatory scheme rationales set out in *Lopez* and reiterated in *Morrison*. According to Justice Stevens, "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce."[167] Justice Stevens relied heavily upon *Wickard v. Filburn*, concluding that "[t]he similarities between this case and Wickard are striking."[168] First, he stressed that, as in *Wickard,* Congress had a rational basis for including the cultivation, possession, and use of marijuana for medical purposes in the larger regulatory scheme set out by the Controlled Substances Act – and that, similarly to the situation in *Wickard*, "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[169] More important, and in keeping with his oral presentation, Justice Stevens concluded that the regulation of the purely intrastate cultivation, use, and possession of marijuana, even if only for personal medicinal purposes, was essential for the attainment of the ends declared for the Controlled Substances Act:

> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic . . . . We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA;

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[166] *Gonzales v. Raich* Opinion Announcement June 6, 2005. http://www.oyez.org/cases/2000-2009/2004/2004_03_1454/ (accessed March 27, 2014).
[167] *Gonzales v. Raich*, 545 U.S. 17, Opinion of Justice Stevens, Part III.
[168] Ibid.
[169] Ibid., Opinion of Justice Stevens, 15-16, referencing *Wickard v. Filburn,* 317 U.S. at 127-128.

> rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme.[170]

With substantially less authority, it seems, Justice Stevens invoked *Perez v. United States* (1971) and *Maryland v. Wirtz* (1968) to declare that when a federal court determined that Congress had a rational basis to establish a comprehensive scheme regulating a broad class of economic or commercial activities, it was *powerless* to excise any sub-class of intrastate activities from this larger class.[171]

Justice Scalia, in his words, offered a "more nuanced" opinion to agree with the decision of the majority. He, too, took the view that the case at hand bore no resemblance to *Lopez* or *Morrison*, since neither of them dealt with a comprehensive regulatory scheme such as the Controlled Substances Act. He also agreed with the holding of the majority that the CSA may be validly applied to the intrastate "cultivation, distribution, and possession of marijuana for personal medicinal use" – and that such regulation was essential to the operation of the comprehensive regulatory scheme. His principle beef was with the way the majority seemed to suggest, in imperative terms, that the Commerce Power alone authorized Congress, for the purposes of upholding the scheme, to regulate these intrastate activities with the substantial effects rationale. Scalia emphasized that the power of Congress to regulate intrastate activities

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[170] Ibid., 24. For a discussion of how *Raich* did not overturn any of the key holdings in *Lopez* and *Morrison*, see Christopher DiPompeo, "Federal Hate Crime Laws and *United States v. Lopez*: On a Collision Course to Clarify Jurisdictional-Element Analysis," *University of Pennsylvania Law Review*, Vol. 157, no. 2 (December 2008): 617-672.

[171] "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." Opinion of Justice Stevens, *Gonzales v. Raich*, Part IV, quoting *Perez v. United States*, 402 U.S. 146, 154 (1971), quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968). [Emphasis added]

that were "not themselves part of interstate commerce" derived from the Necessary and Proper Clause set out in Article I, Section 8. While the power provided thereby to make comprehensive regulation effective "commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce . . . the two are distinct." Included within the reach of the ancillary authority provided by the Necessary and Proper Clause, at its outer limits, were non-economic and non-commercial intrastate activities that did not affect interstate commerce. And Justice Scalia hastened to point out that the Court had articulated the parameters of this rule in *Lopez*:

> As we implicitly acknowledged in *Lopez* . . . Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated 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.' This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power."[172]

Justice Scalia does not appear to have taken too seriously the declaration made by Justice Stevens that federal courts were powerless to excise a sub-class of activities from a larger class of activities comprehensively regulated by Congress under its commerce power. His discussion of the relevant seminal New Deal-era decisions, including *Wrightwood Dairy* and *Darby*, indicated that the federal courts were fully authorized, if not duty bound, to exclude from a valid

[172] Ibid., Scalia concurrence, Part I, quoting *Lopez*, 514 U. S. at 561. In support of the point, Justice Scalia cited and discussed *United States v. Wrightwood Diary Co.*, 315 U.S at 119 (1942); *United States v. Darby*, 312 U.S. 100, 118-119 (1941); *Houston E. & W. Tex. Ry. Co. v. United States*, a.k.a. *Shreveport Rate Cases*, 234 U.S. at 353 (1914), while also citing *Jones & Laughlin Steel Corp*, 301 at 38 (1937).

comprehensive regulatory scheme a marginal sub-class of intrastate activities not "necessary" or "essential" or "appropriate" for giving effect to the larger scheme. Neither the Commerce Clause nor that provision in tandem with the Necessary and Proper Clause could support such a use of the commerce power, and, the Court, not Congress, had been the final arbiter of constitutional questions since *Marbury v. Madison*.[173]

As well, Justice Scalia maintained, *Lopez* and *Morrison* had "rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences." To permit the commerce power to reach noneconomic intrastate activity with such an attenuated nexus with interstate commerce would "obliterate what is national and what is local."[174] While conceding that the power of Congress to reach intrastate activity with the substantial effects rationale was broad, "it does not permit the Court to 'pile inference upon inference' . . . to establish that noneconomic activity has a substantial effect on interstate commerce."[175]

Justice O'Connor based her dissenting opinion on federalism principles and a strenuous objection to the majority's position on the scope of commerce power under its substantial effects rationale. First, she condemned the decision of the Court for helping to undercut "[o]ne of federalism's chief virtues," that is, the capacity of the states, under their "core police powers," to serve, in a changing world, as laboratories for experimenting with new laws and institutions to

[173] Ibid., Scalia concurrence, Part I, referencing and discussing *United States v. Wrightwood Dairy Co*., 315 U.S. 110, 119 (1942); *United States v. Darby*, 312 U.S. 100, 118-119 (1941); *Houston E. & W. Tex. Ry. Co. v. United States*, a.k.a. *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914), and citing also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38 (1937).
[174] Ibid., Part II referencing *Lopez* at 565–567 and *Morrison* at 617–618. [Original emphasis]
[175] Ibid., Part I, quoting *Lopez* at 567.

"protect the health, safety, and welfare of their citizens."[176] To bolster this point, Justice O'Connor quoted from James Madison's *Federalist*, No. 45: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State."[177] Next, O'Connor decried the majority's definition of "economic activity" that the commerce power might reach under its substantial effects test:

> The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities . . . . [The] Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.[178]

In this connection, Justice O'Connor appears to have been persuaded by the arguments made by counsel for respondents Randy Barnett that almost all activities have commercial and non-commercial versions. "Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket." In O'Connor's view, if the Court wished to proceed along its current path, then virtually all forms of human activity would have the potential to be legally considered economic activity.[179]

If the dissenting opinion of Justice O'Connor relied less on Court precedents than the ruling of the majority, the dissent penned by Justice Thomas was even less so constrained. He quoted from works by the Founders, especially James Madison and Alexander Hamilton to remind his colleagues of the original purpose of the Commerce Clause as well as its definition at the time

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[176] Ibid., O'Connor dissent, Paragraph 1.
[177] Ibid., Part III.
[178] Ibid., Part II(B).
[179] Ibid.

the states ratified the Constitution. "In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana."[180] And yet, Thomas lamented, Congress now regulates activities that are wholly intrastate in nature, including the use of products that do not even move in commerce. "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything – and the Federal Government is no longer one of limited and enumerated powers."[181] He noted that, unlike the Gun-Free School Zone Act and the Violence Against Women Act, the Controlled Substances Act cast so broad a net that, rather than simply regulate illegal drugs that crossed state lines for sale, it reached purely intrastate activity with no commercial nexus. With its passage of the CSA, "Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."[182] Further, he complained, if California had established a regulatory scheme that set the conduct of the respondents apart from other marijuana producers and consumers with state-mandated medical identification cards, then why should the federal government not respect that? "We normally presume that States enforce their own laws," he pointed out. [183] Additionally, he stressed, other high-risk drugs regulated by the Controlled Substances Act, such as morphine and amphetamines, were available by prescription. Why not marijuana? "No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions."[184]

[180] Ibid., Thomas dissent, Part I(A).
[181] Ibid., Paragraph 1.
[182] Ibid., Part I(B)(2).
[183] Ibid., Part I(B)(1).
[184] Ibid.

Justice Thomas homed in on the "substantial effects" test used by the Court for Commerce Clause jurisprudence and, again, deplored how far some of the justices had drifted from the text of the Constitution. Calling the substantial effects test "rootless and malleable," he complained that the Court no longer even bothered to ask whether a statute regulated outside the bounds of interstate commerce, which he understood to be the buying and selling of goods and services across state lines. Instead, the question, all too often, had become whether a statute properly extended to intrastate economic activities that substantially affected interstate commerce. [185] Further, he bemoaned, similarly to Justice O'Connor, that the Court had defined "economic activity" in the broadest possible terms, that is, "the production, distribution, and consumption of commodities."[186] Frustrated with the abuse of the rubric and how it had come to be interpreted, he lashed out at his colleagues, stating, "If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States."[187]

Last, Thomas rejected the majority declaration that, while the Controlled Substances Act was a reasonable assertion of commerce power to regulate comprehensively a class of activities, it was not judicially possible to excise from the CSA a sub-class of intrastate activities such as the personal cultivation, use, and possession of medical marijuana. Whether the excision of this sub-class of activities would undercut the entire regulatory scheme of the statute, ultimately, remained a decision of the Court. According to Justice Thomas, and echoing a similar complaint made by Justice O'Connor, "it is implausible that this Court could set aside entire portions of the United States Code as outside Congress' power in *Lopez* and *Morrison*, but it cannot engage in

[185] Ibid., Part II(A).
[186] Ibid.
[187] Ibid.

the more restrained practice of invalidating particular applications of the CSA that are beyond Congress' power."[188] All the views of the stalwart conservative justice were undoubtedly music to the ears of constitutional conservatives. But they had not changed the outcome in *Gonzales v. Raich*.

Although the impact of the decision in *Gonzales v. Raich* was a blow to the nine states whose medical marijuana statutes had been preempted, more important for many others was what the ruling meant for the future of federalism. The judgments of the four liberal justices were not especially surprising, nor were those of Chief Justice Rehnquist, and Justices O'Connor and Thomas. That Justice Kennedy joined with the four more liberal justices was not wholly unexpected. But that choice was certainly unwelcomed by originalists, who believed that, as one of the Court's swing voters, his allegiance to New Federalism Commerce Clause jurisprudence was critical for its success. The big surprise to many was the decision of Justice Scalia to side with the majority, if only with his concurring opinion. Those hoping to limit further the size and scope of the federal government were deflated by Scalia's apparent fickleness, which seemed to suggest that his social conservatism had trumped his originalist principles. Linda Greenhouse of *The New York Times* captured the conservative letdown in the immediate aftermath of the decision. In a piece she published in the paper on June 12, 2005, she reported that Roger Pilon of the libertarian Cato Institute had concluded that Justice Scalia was a "fair-weather federalist." Michael S. Greve of the conservative American Enterprise Institute surmised that "[t]he federalism boomlet has fizzled . . . . [t]he court was never clear about what it wanted to

[188] Ibid., Part II(B); O'Connor dissent, Part II(A).

accomplish or how the revolution would play itself out when the first modest steps bumped up against entrenched political structures."[189]

According to Greenhouse, then Georgetown University Law Center Professor Mark Tushnet, a well-known proponent of critical legal studies and a confirmed left-of-center liberal, revealed that he believed the Court's earlier decisions had "brought the justices to a threshold that was far away when Rehnquist joined the court . . . . [but] they have yet to decide whether to stay where they are, or continue on, or retreat." Indicative of his liberal-left orientation, Tushnet referred to *Gonzales v. Raich* as an "easy case . . . at the heart of national regulatory authority" and cautioned that the ruling did not necessarily mean a retreat.[190]

Certainly, the decision of the Supreme Court in a related Commerce Clause case ripe for review at about the same time it decided *Gonzales v. Raich* indicated that a majority of its justices might continue to affirm comprehensive regulatory schemes. In the same month as the Court issued its decision in *Raich,* it opted *not* to review the Fifth Circuit Court of Appeal decision *GDF Realty Investments v. Norton.* That case involved a Commerce Clause challenge to the enforcement of provisions set out in the Endangered Species Act (ESA). GDF Realty applied for a permit to build on its 200-acre rural tract in Travis County, Texas, which featured a rocky topography with water percolating through limestone rock that created sinkholes and caves. The U.S. Fish and Wildlife Service denied the permit, basing its decision on a finding that some of the caves were populated by six endangered species of tiny arachnids and insects.[191] By

[189] Linda Greenhouse, "The Nation; The Rehnquist Court and Its Imperiled States' Rights Legacy," *New York Times,* June 12, 2005.
[190] Ibid.
[191] The endangered species at issue included the Bee Creek Cave Harvestman, the Bone Creek Harvestman, and the Tooth Cave Pseudoscorpion, which are subterranean, eyeless arachnids; the Tooth Cave Spider, a subterranean arachnid with eyes; and the Tooth Cave Ground Beetle and

declining to review the decision, the Supreme Court permitted the ruling of the Fifth Circuit Court in favor of the ESA to stand, with effects adverse to the economic interests of land owners in that part of the country and elsewhere. More than a few ordinary Texans considered the decision of the Court to be a fit measure of its willingness to allow Congress and administrative agencies to employ federal regulatory authority, in the name of the commerce power, to undercut further property rights, suppress productive employment of private resources, and jeopardize the fortunes of those who made a living with such enterprise.[192]

Richard A. Epstein concludes that *Gonzales v. Raich* reversed the "*Lopez* synthesis." Notwithstanding that Monson and Raich had "structured their transactions so as to eliminate all possible interstate economic transactions," the substantial effects aggregation rule set out in *Wickard v. Filburn* and the comprehensive regulatory scheme rationale articulated in *Perez v. United States* constituted a "one-two punch" sufficient to render the New Federalism Commerce Clause decisions defunct.[193] Other knowledgeable commentators see *Raich* as a return to pre-*Lopez* rational basis review of Commerce Clause cases, that is, a policy of deference by the Court to reasonable legislation passed by Congress under its commerce power to achieve a legitimate end, the lowest level of constitutional scrutiny. In this connection, Jonathan H. Adler and Mollie Lee maintain that *Raich* constituted a repudiation of or significant retreat from *Lopez*. Michael C. Blumm and George A. Kimbrell conclude that, under the circumstances, *Lopez* and

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Kretschmarr Cave Mold Beetle, which are subterranean insects. 326 F.3d 622 (5th Circuit, 2003).

[192] Through 2011, at least, the Court would turn down six applications for review challenging the Endangered Species Act. Greg Stohr, "Endangered Species Act Survives Challenge at U.S. High Court," *Bloomberg News*, October 31, 2011. http://www.bloomberg.com/news/2011-10-31/endangered-species-act-survives-challenge-at-u-s-high-court.html (accessed March 27, 2014).

[193] Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge: Harvard University Press, 2014), 184-185.

Morrison had been aberrations in the Commerce Clause jurisprudence of the Court rather than a substantial break from that which the Court had established with the New Deal.[194]

But Lawrence B. Solum suggests there is an alternative way to interpret *Gonzales v. Raich* – one that situates the decision coherently within the Rehnquist Court Commerce Clause line of decisions and larger New Federalism jurisprudence. Jurists who fervently embraced originalist understandings undoubtedly were disappointed with *Raich*.[195] But, given it was always "radically implausible" for the Rehnquist Court to issue rulings that would overturn a substantial amount of New Deal and Great Society legislation, its conservative majorities opted for a second-best alternative. And this was to "somehow accept the legal rules generated by the New Deal Settlement, as those rules currently exist" – but refrain from endorsing "a dynamic understanding of the content of the settlement." In plain terms, the Rehnquist Court decisions construed New Deal Commerce Clause holdings strictly and avoided establishing precedents that further expanded commerce power at the expense of the states – but without overturning seminal New Deal decisions. According to Solum, New Federalism decisions can be summarized with a

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[194] Jonathan H. Adler, "Is *Morrison* Dead? Assessing a Supreme Drug (Law) Overdose," *Lewis & Clark Law Review*, Vol. 9 (2005): 751-778; Mollie Lee, "Environmental Economics: A Market Failure Approach to the Commerce Clause," *Yale Law Journal*, Vol. 116 (2006): 456-492, 468; Michael C. Blumm and George A. Kimbrell, "*Gonzales v. Raich*, the 'Comprehensive Scheme' Principle, and the Constitutionality of the Endangered Species Act," *Environmental Law Review*, Vol. 35 (2005): 491-498, 497. But Robert J. Pushaw, Jr., concluded that it was not possible to discern whether the opinions rendered in *Raich* applied the new standards set out in *Lopez* and reiterated in *Morrison*. Pushaw, "The Medical Marijuana Case: A Commerce Clause Counter- Revolution?" *Lewis & Clark Law Review*, Vol. 9 (2005): 879-914, 884.

[195] Lawrence B. Solum, "How *NFIB v. Sebelius* Affects the Constitutional Gestalt," *Washington University Law Review*, Vol. 91 (2013): 1-58, 49-54, referencing, inter alia, Charles H. Clarke, "Supreme Court Assault on the Constitutional Settlement of the New Deal: *Garcia* and *National League of Cities*," *Northern Illinois University Law Review*, Vol. 6 (1986): 39-79; Randy E. Barnett, "The Original Meaning of the Commerce Clause," *University of Chicago Law Review*, Vol. 68 (2001): 101-147.

slogan he borrows from a piece authored by Randy Barnett reflecting on Rehnquist Court Commerce Clause jurisprudence: "this far, and no further." Solum, thus, casts the New Federalism decisions, through *Raich*, as "The Frozen New Deal Settlement."[196]

The federal statute that gave rise to *Gonzales v. Raich* was the product of gradual changes in American law, dating to the nineteenth century, which permitted a total ban on beverage alcohol and, thereby, retooled constitutional understanding to permit the absolute proscription of other mind-altering intoxicants. Federal government experimentation with nominal tax policies that, in fact, regulated and suppressed cannabis also constituted an important precursor of the 1970 Controlled Substances Act – which distinguished itself as the first anti-illicit drug measure to be based on the Commerce Clause. This comprehensive regulatory regime, however, also derived from growing public trepidation after 1900 with a narcotic associated originally with black jazz musicians, underground criminality, the rapid immigration of Mexican peasants whose customary use of marijuana seemed to portend "reefer madness," and a threatening drug culture rooted in the 1960s counterculture insurgency that made cannabis a powerful emblem of culture wars conflict through the early twenty-first century. Political contention over the problem of increasing drug abuse and addiction, along with a concerted campaign by marijuana advocates to legalize cannabis and then free medical marijuana from federal and state controls, produced the California Compassionate Use Act of 1996 and, in turn, the challenge to the CSA ban on cannabis that became *Gonzales v. Raich*.

[196] Solum, "How *NFIB v. Sebelius* Affects the Constitutional Gestalt," 50-54; Randy Barnett, "'This Far and No Farther': Baselines and the Individual Insurance Mandate, *Volokh Conspiracy*, January 22, 2012. http://www.volokh.com/2012/01/22/this-far-and-no-farther-baselines-and-the-individual-insurance-mandate (accessed November 2, 2017).

The decision in *Raich* certainly did not meet the approval of conservatives who had hoped to see New Federalism principles, as in *Lopez* and *Morrison*, further circumscribe the commerce power. On the other hand, intense culture wars disputation seems to have distorted somewhat the expectations and perception of the decision for conservatives and liberals alike. After all, *Raich* affirmed the 1970 Controlled Substances Act, which had constituted an expansive deployment of commerce power in keeping with a cause that conservatives, at the opening of the culture wars, had held near and dear – the vigorous suppression of illegal drug trafficking and drug abuse. For thirty-five years, the CSA had categorically proscribed the possession, distribution, and use of cannabis. And yet the decision of the more liberal members of the Court in *Raich* not to recognize an exception to the proscription fueled the ire of conservative partisans. Even Justice Scalia could not escape their censure – an example of how culture wars imperatives could rearrange partisan priorities. Liberal jurists undoubtedly could chuckle at the way the liberal majority in *Raich* relied on New Federalism Commerce Clause jurisprudence to sustain the congressional deployment of commerce power fully to the new limits identified in *Lopez* – albeit with a result that flouted well-established liberal positions on drug policy, criminal law enforcement, and racial justice. But liberal partisans who demanded that federal authorities exclude medical marijuana from the CSA proscription, if only for humanitarian reasons, were no more satisfied with the decision in *Raich* than civil libertarians who, simply, preferred that recreational marijuana be made legal in all states and permitted by federal law.

Gonzales v. Raich, in fact, reiterated holdings set out in *Lopez* and reinforced by *Morrison*, making it clear, once again, that the Supreme Court intended to enforce the outer limits of the commerce power rather than, as before *Lopez*, allow the Commerce Clause to serve as an open-ended grant of general legislative authority. The decision in *Gonzales v. Raich* did not

contradict or undercut any of the major holdings in those two decisions. In fact, the majority in *Raich* affirmed the articulation of the substantial effects test set out in *Lopez* and reiterated in *Morrison*, holding again that commerce power alone could not extend so far as to reach intrastate non-economic activity, even if such activity substantially affected interstate commerce. As in *Lopez* and *Morrison*, the majority agreed that the Constitution permitted Congress to regulate intrastate non-economic and non-commercial activity – but only if such was essential to sustain the effectiveness of a comprehensive regulatory regime well-grounded in the commerce power. *Raich* did not draw into question holdings in *Morrison* declaring that Congress could not circumvent the limited grant of power set out in the Commerce Clause by issuing a legislative finding and declaration that demonstrated only an "attenuated" connection between a non-economic or non-commercial intrastate activity and interstate commerce. The decision in *Raich* did not suggest that the Court would abandon its commitment to viewing with skepticism congressional regulatory measures that encroached upon the sovereign authority of the states. As discussed, for thirty-five years before the decision, Congress had readily exercised the power to regulate controlled substances. Upholding the CSA ban on medical marijuana, notwithstanding the strenuous complaints of justices O'Connor and Thomas, did not constitute any kind of new threat to well-established areas of state government authority. Notwithstanding the superheated partisan conflict over the legalization of medical marijuana, the decision in *Gonzales v. Raich* comported entirely with other seminal Rehnquist Court Commerce Clause decisions. These decisions, including *Raic*h, held the line against the further expansion of commerce power that had commenced during the New Deal – locking in place the articulation of New Federalism Commerce Clause doctrines set out by Chief Justice Rehnquist in *Lopez*.

Chapter Eight

A Bridge Too Far: Obamacare, the Individual Mandate, and *N.F.I.B. v. Sebelius* (2012)

No single piece of congressional legislation based on the Commerce Clause since the New Deal raised the hackles of conservative Americans more than the signature legislative accomplishment of President Barack H. Obama: The Patient Protection and Affordable Care Act (ACA). Passed in March 2010, by a margin of 60-39 in the Senate and 219-212 in the House, and without a single Republican vote in support of it, the Affordable Care Act was highly controversial because of its individual mandate, to be enforced with a civil penalty, requiring most Americans to carry some form of health insurance by 2014. To conservatives the ACA bastardized the Commerce Clause into something wholly unintended by the Founders – and in a way sure to devastate personal liberty. The ACA, after all, commanded commercial activity rather than simply regulating commerce that already existed. Now presided over by Chief Justice John Roberts, the Supreme Court responded to an avalanche of Commerce Clause-based challenges to the ACA – ultimately upholding the individual mandate with an unlikely resort to the power of Congress to tax, while refusing to accept that the commerce power could justify it.[1] The ACA and the fragmented decision of the Supreme Court in *NFIB v. Sebelius* both arose from and exacerbated the culture wars polarization that had been developing over the previous five decades. To liberal progressives, the ACA and the decision in *Sebelius* constituted a giant leap

[1] Pub. L. 111-148 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

forward in providing health care to millions who had been unable to afford it before, while further advancing the cause of economic equality for all. Notwithstanding that the Supreme Court had forestalled yet another attempt to expand radically the scope of commerce power – some conservatives and libertarians were apoplectic because, in important respects, *Sebelius* extended federal power into the lives of ordinary Americans to an unprecedented degree.

By the time Americans elected Barack Obama to the presidency in fall 2008, the adoption of a single-payer health care system had been a fundamental goal of the liberal-progressive wing of the Democrat Party for decades. The actions taken by President Bill Clinton and First Lady Hillary Rodham Clinton beginning in September 1993 to advance a health care overhaul, which included several steps toward nationalization of health care services, in fact, helps explain the strident objections to the Affordable Care Act in 2009 and 2010. The merits of "socialized medicine" are not the subject of enquiry here – only the extent to which culture wars contention over health care reform constituted the critical context driving the unusually rapid and controversial passage of the Affordable Health Care Act in 2010, the extraordinarily energetic response by conservatives to the initiative – and the response of one majority of justices in *Sebelius* that many conservatives might have appreciated more than they did.

Early in his first term, President Obama called for Congress to pass legislation reforming health care in the United States with the aim of improving health insurance availability; in this way, he set about making good on a major campaign promise. His proposal was to spend $900 billion over ten years and include a government insurance plan, which he dubbed the "public option." Government subsidized health insurance would compete with policies offered by private health insurance companies. According to the president, this competition would lower costs and improve the quality of health care services. Fundamental to his goal was to terminate

the longstanding practice by which health insurance providers refused to insure individuals with pre-existing medical problems. Critical for this project was to enlarge insurance pools across the country to increase insurance company revenues to cover the increased costs of health care services to be provided for such high-risk clients.

In mid-June 2009, House Democrats presented a massive 1,017-page plan for remaking the health care system in the United States, indeed, one that was as voluminous and complex as that which the Clintons had advanced in 1993. On September 9, 2010, President Obama delivered a rousing speech to a joint session of Congress to announce the importance of the reform and his strenuous support for it. The ACA proved to be a highly controversial bill while debated in Congress. With a major national financial crisis having ensued in late 2007 and continuing in 2009 and 2010, the number of Americans covered adequately by health insurance declined steadily in these years. From the perspective of conservatives and entitlement-conscious Republicans, the Democratic-controlled Congress seemed bent on passing a health care law, with its distinctive individual mandate, that seemed to threaten individual liberty and the established relationship between the United States government and its citizens. Undaunted, President Obama signed the bill into law on March 23, 2010, concluding an extraordinary legislative process that featured Democrat majorities in both houses of Congress asserting themselves audaciously in the face of strenuous Republic opposition.

The Affordable Care Act was one of the most ambitious comprehensive regulatory schemes reliant on commerce power ever to be adopted. It effectively granted the federal government the authority to reconfigure major sectors of the national domestic economy, not only health care insurance, but also health care services, the federal-state program of Medicaid, and, to some extent, Medicare. Many ordinary Americans worried about the difficult-to-anticipate social and

economic consequences that might result from implementation of the ACA, with especially intense concerns focused on the possible disruption of patient-physician relations.[2]

Intense disputes over the costs, practicality, mandates, and government subsidies imposed by the ACA obscured the ambitiousness and full extent of the scheme. Spread out over ten titles, were innovations dedicated to revamping the role of public health care programs; improving the quality and efficiency of health care services; preventing chronic disease, training and regimenting "the healthcare workforce," providing transparency and program integrity for the keeping and institutional sharing of personal and aggregated health care information, and improving access to innovative medical therapies.[3]

The individual mandate penalty set out in the Affordable Care Act applied variously, depending on the income of those required to obtain health insurance. The ACA exempted persons with an annual income below a specified level – in which case they would qualify for Medicaid subsidies to cover the costs. According to White House and Congressional Budget Office figures, the maximum share of income that enrollees would have to pay would vary depending on their incomes relative to the federal poverty level. Particularly, the ACA included the expansion of Medicaid eligibility for individuals earning annually up to 133% of the federal poverty level. Health and Human Services defined the poverty level in 2010 to be an annual income of $10,830 or less for an individual, increased by $3,740 for each household dependent. The ACA subsidized insurance premiums for individuals earning up to 400% of the federal poverty level.

[2] Title I, Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, approved March 23, 2010.
[3] Titles I-X, ibid.

As well, the ACA provided tax incentives for employers to provide health care benefits to their workers. Businesses that employed fifty or more full-time workers were to offer such employees prescribed health insurance coverage or face a penalty, known as the "employer mandate," to take effect in 2015 or 2016, depending on the number of workers employed by a company. Companies with 100 or more full-time employees were to offer coverage to at least seventy percent of eligible workers in 2015, and that percentage would increase to ninety-five percent in 2016. Companies that employed from fifty to ninety-nine full-time workers were not required to comply until 2016.[4]

As discussed, the ACA prohibited health insurance companies from denying coverage because of the pre-existing health condition of an applicant. The act established state government and federal government-operated insurance "exchanges" that would broker health insurance policies from government-approved health insurance companies. The ACA prohibited annual health insurance coverage maximum payments, or "caps," and also provided financial incentives to private health care providers for health care research.

According to the ACA, the costs of health insurance premiums would be offset by federal taxes, fees, and "cost saving measures." These measures, which came mostly at the expense of certain categories of taxpayers, included new Medicare taxes for recipients deemed to be in high-income brackets; new taxes on those who used indoor tanning services; and sizeable cuts to the existing Medicare Advantage program, which provided benefits for the elderly. As well, cost-savings would accrue with the imposition of new fees on medical devices and pharmaceutical companies.[5] The Congressional Budget Office buoyantly estimated in March 2010 that the

[4] Sections 1511-1511, Part II, Title I, ibid.
[5] Title I, ibid.

overall effect of the ACA would be to reduce the federal deficit by $143 billion in the first decade of full-scale ACA operation. This appeared, by early 2016, to have been a somewhat inaccurate prediction. By March 2016, the CBO had revised its estimates: now, the program would cost the federal government $1.34 trillion over the ensuing decade, an increase of $136 billion from the predictions made by the CBO in 2015. The CBO estimated that the ACA and its programs would cost a total of $110 billion for 2016 alone.[6]

Set out among the many titles and subtitles were numerous progressive measures to improve social relations, albeit presented as also being beneficial to the improvement of health. For example, under the title "Creating Healthier Communities" was included a revision to the Fair Labor Standards Act, which required all employers to provide "a reasonable break time for an employee to express breast milk for her nursing child" in "a place other than a bathroom," indeed, an area that was to be "shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." This section did, however, allow that a company employing less than fifty workers was "not to be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."[7]

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[6] Statement of Douglas W. Elmendorf, Director, Congressional Budget Office, "CBO's Analysis of the Major Health Care Legislation Enacted in March 2010," before the Subcommittee on Health Committee, Committee on Energy and Commerce, United States House of Representative, March 30, 2011 (Washington, D.C.: Congressional Budget Office, 2011); Kerry Close, "Here's How Many Billions Obamacare Will Cost in 2016," *Money*, March 24, 2016. http://time.com/money/4271224/obamacare-cost-taxpayers-2016/ (accessed October 3, 2017).

[7] Section 4207, Subtitle C, Title IV, Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119.

Certainly, the drafters of the Affordable Care Act relied primarily on the commerce power as a foundation for the comprehensive regulatory scheme and, particularly its individual mandate. Language in the opening title of the ACA declared that "Congress makes the following findings. . . as a formal finding by Congress that . . . "[t]he individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce. . . ." The effects of the requirement on interstate commerce were set out at length, which included the finding that the requirement regulated activity that was commercial and economic in nature, that is, "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." The requirement and other provisions of the ACA would add millions of new consumers to the health insurance market, thereby increasing the supply of, and demand for, such services; improve the financial security of families and reduce bankruptcies; and increase the size of insurance pools and reduce administrative costs. The lengthiest justification of the requirement explained the fundamental difficulty the ACA reorganization would have without the mandate:

> If there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.[8]

While Congress relied almost exclusively on its commerce power to justify the ACA and the individual mandate penalty, other language in Section 1501, simply, described how the penalty for non-compliance was to be collected from the non-compliant individual – as a

[8] (a)(2) (H), Subtitle F, Part I, Section 1501, ibid.

payment to be included with her or his annual income tax return. According to Section 1501, the penalty "was to be determined in an amount equal to one-twelfth of the determined amount due for premiums in any calendar year. "Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return . . . for the taxable year which includes such month."[9]

After passage of the ACA in March 2010, it became clear to conservatives, libertarians, and others that they had little choice but to organize and become energetically involved in the political process. Such partisans perceived that the federal government, more than ever, was becoming too expansive, too expensive and, especially in the view of libertarians, too intrusive. One group of conservatives and libertarians organized as the Tea Party movement, which invoked Revolutionary Era rhetoric targeting tyrannical taxation, although liberal-left partisans satirized them as ignorant, half-crazed "tea baggers." The November elections of that year, however, produced a landslide victory for Republican candidates at all levels of government. In the House of Representatives, sixty-three seats changed from Democrat to Republican. In the United States Senate, the Republican Party increased its number of seats by six, leaving Democrats in control with a slim 51-47 majority. The Republicans picked up 680 seats in state legislatures, giving the GOP control of both bodies in twenty-five states, while only sixteen remained in Democratic Party control. Governorships also changed hands; in the end, twenty-nine of fifty governors were affiliated with the Republican Party.[10]

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[9] (a)(2) (A-H), Subtitle F, Part I, Section 1501, ibid.

[10] Chris Good, "In Redistricting Year, GOP Gains Edge," *The Atlantic*, November 4, 2010. http://www.theatlantic.com/politics/archive/2010/11/in-redistricting-year-gop-gains-a-big-edge/66128/ (accessed March 17, 2016); Tim Store, "GOP Makes Historic State Legislature Gains in 2010," *Rasmussen Reports*, December 10, 2010http://www.rasmussenreports.com/public_content/political_commentary/

The fall 2010 national elections seemed to suggest that those who preferred more limited federal power might well become rapidly a pivotal force in American politics. However, conservatives and libertarians had to face the hard, cold truth – the fact that the Democrat party continued to control the Senate and neither that body nor President Barack Obama had any intention of acceding to the wishes of the Republican party-controlled House of Representatives. Understanding well that Democratic Party control of the federal government and a liberal-leaning print and electronic media boded ill for reversing the ACA overreach, conservatives and libertarians turned to their state governments as the only authority powerful enough to act in their behalf. Several states adopted statutes to prevent their agencies from setting up ACA health care insurance "exchanges" in the aftermath of the ACA's passage.[11]

Across the United States, state governments and other interested parties soon challenged the Affordable Care Act on constitutional grounds in the federal courts.[12] The ACA challenge that would eventually reach the United States Supreme Court originated in Florida.[13] The state of Florida, along with the attorneys general or governors, or both, of twenty-six states, two individual plaintiffs, and the National Federation of Independent Businesses (NFIB), sued the United States Department of Health and Human Services in the northern district of Florida.

Federal Judge Roger Vinson, appointed by President Reagan, faced two significant questions regarding the individual mandate and its civil penalty. First, did Congress have the power to

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commentary_by_tim_storey/gop_makes_historic_state_legislative_gains_in_2010 (accessed March 17, 2016).

[11] Missouri Healthcare Freedom, Proposition C (August 2010).

[12] *Liberty Univ., Inc. v. Geithner,* 753 F. Supp. 2d 611, 2010 (W.D. Va. Nov. 30, 2010); *Thomas More Law Center v. Obama,* 720 F. Supp. 2d 882 (E.D.Mich.2010), *Virginia v. Sebelius,* 728 F. Supp. 2d 768 (E.D.Va.2010).

[13] *Florida Ex. Rel. Bondi v. U.S. Dept. of Health and Human Services,* 780 F. Supp. 2d 1256 (2011).

coerce Americans to purchase private health insurance? Second, if the individual mandate was unconstitutional, could the remainder of the Affordable Care Act survive separately? In his final analysis of these questions, Judge Vinson made it clear that he did not think it was within the realm of possibility that the Founders had understood the Commerce Clause to be sufficient authorization for Congress to coerce the individual to engage in commercial activity:

> It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place.[14]

Judge Vinson concluded that only a Supreme Court ruling that would expand the scope of commerce power or a Constitutional amendment to that effect could justify the individual mandate. Accord to him, "[b]ecause the individual mandate is unconstitutional and not severable, the entire Act must be declared void."[15] The Department of Health and Human Services immediately appealed the result to the Eleventh Circuit Court of Appeals.

The three-judge panel of the Eleventh Circuit in Atlanta that reviewed the decision of the district court was composed of judges Joel Dubina, who had been appointed by President George H. W. Bush, and Frank Hull and Stanley Marcus, both of whom had been appointed by President Bill Clinton. Chief Judge Dubina and Associate Judge Hull wrote the majority opinion of the court, which, by a margin of 2-1, affirmed part of Judge Vinson's ruling, while reversing another part.[16] Dubina and Hull agreed that the individual mandate was unconstitutional. But they also took the view that the remainder of the ACA could stand. Such a result may have made sense;

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[14] Ibid., 1286.
[15] Ibid., 1306.
[16] *State of Florida et al v. United States Department of Health and Human Services et al*, 648 F. 3d 1235 (11th Cir. 2011).

there were hundreds of stand-alone provisions unrelated to the individual mandate. However, one of those provisions held that insurance companies must provide health care even to individuals with pre-existing conditions, and at an affordable price. Insurers had supported the ACA during its drafting; they had based this support on the assumption that premiums received from the larger pool of customers virtually guaranteed by the individual mandate would allow them to absorb the losses that providers were sure to incur by insuring all applicants regardless of their health condition and health care needs. The circuit court panel ruling, thus, caused a significant stir within the health insurance industry, as insurance company officers and stockholders pondered how they would survive if the opinion of the circuit court panel stood.[17] Adding to the confusion was that the ruling of the Eleventh Circuit three-judge panel conflicted with that arrived at by the 2-1 June decision of the Sixth Circuit Court of Appeals sitting in Cincinnati. The controversy was, thus, ripe to be heard by the Supreme Court. The legal challenge to the ACA in the Eleventh Circuit went forward as *National Federation of Independent Business v. Sebelius.*[18]

NFIB v. Sebelius featured not only questions about the individual mandate and its severability from the law but also the Medicaid expansion provisions of the ACA. The plaintiffs argued that 1) the Commerce Clause did not empower Congress to compel individuals to buy health insurance; 2) the ACA requirement that the states expand Medicaid coverage or,

[17] Brent Kendall, "Health Overhaul is Dealt Setback," *The Wall Street Journal*, August 13, 2013. http://www.wsj.com/articles/SB10001424053111904006104576504383685080762 (accessed March 17, 2016).
[18] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), 183 L. Ed. 2d 450, 132 S. Ct. 2566.

otherwise, forfeit all existing Medicaid funding, was unconstitutionally coercive; and 3) the ACA requirement that employers with fifty or more employees purchase health insurance for their employees impermissibly infringed on the sovereign jurisdiction of the states. But, from the perspective of most Americans who were unsettled by the ACA, the prime objection was the individual mandate, which will be the focus here.

The composition of the Supreme Court in June 2012 had changed significantly since it had rendered its 2005 decision in *Gonzales v. Reich*. Chief Justice Rehnquist had passed away in September 2005 shortly after that ruling. In his place sat Chief Justice John Roberts, whom President George W. Bush had appointed. President Bush had also appointed Justice Samuel Alito to replace the retired Justice O'Connor. President Obama had appointed Justice Sonia Sotomayor, who replaced Justice Souter, who retired in 2009. He also appointed Justice Elena Kagan to replace Justice Stevens, who retired in 2010. The ideological balance of the Court, in the view of most experts, was not significantly changed from that which had prevailed on the Court at the end of the tenure of Chief Justice Rehnquist. There were, as of 2012, four generally conservative justices, four generally liberal justices, and Justice Kennedy, who maintained the unpredictable middle ground. Based upon the various decisions of the circuit courts, how Justice Kennedy might vote on the challenges that had been raised to "Obamacare" was anyone's guess.[19]

On November 14, 2011, the Supreme Court granted certiorari to parts of three cross-appeals from the opinion of the Eleventh Circuit Court of Appeals. In December 2011, the Court

[19] Massimo Calabresi, "Why Obamacare May Stand: Reading Justice Kennedy, the Supreme Court's Swing Vote," Time, March 30, 2012 at http://swampland.time.com/2012/03/30/why-obamacare-may-stand-reading-justice-kennedy-the-supreme-courts-swing-vote/ (accessed March 17, 2016).

announced that it would hear six hours of oral argumentation over a three-day period in late March 2012. To argue for the government was United States Solicitor General Donald B. Verrilli, appointed by President Obama in January 2011. Representing the Florida respondents was Paul D. Clement, who had taught briefly at the Georgetown University Law Center in 2008 and shortly thereafter represented the National Rifle Association in the Supreme Court in 2010 and, in 2011, the National Basketball Association players during labor negotiations during a 2011 lockout. Michael A. Garvin, who represented the National Federation of Independent Business and other respondents, had argued before the Florida Supreme Court on behalf of George W. Bush in the 2000 presidential election Florida recount controversy.

On June 28, 2012, the Supreme Court issued its long-awaited ruling in *National Federation of Independent Business v. Sebelius*. With Chief Justice John Roberts authoring the majority opinion, the Court affirmed the Eleventh Circuit in part and reversed it in part. Justice Anthony Kennedy, contrary to the expectations of some, did not cast the swing vote in the 5-4 ruling. Far more surprising to most was the majority opinion authored by Chief Justice Roberts. To the astonishment of jurists from all ideological points of view, Chief Justice Roberts held that the taxing power of Congress, not its commerce power, supported the controversial individual mandate. Joining the chief justice in this holding were justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

In a joint dissent, the more conservative justices, Antonin Scalia, Clarence Thomas, and Samuel Alito, as well as Justice Kennedy, supported the conclusion of Chief Justice Roberts, set out in Part III-A of his opinion, that neither the Commerce Clause alone or in tandem with the Necessary and Proper Clause could support the individual mandate – but with notably different reasoning. Although the four dissenters did not formally join with the chief justice in this part of

his opinion, their support of its conclusion effectively constituted a joint concurrence. As well, Justice Thomas authored a separate opinion expressing his distinctive view on why the Commerce Clause did not provide Congress with the authority to institute the individual mandate.

Also winning the support of a majority was the conclusion of Part IV of the chief justice's opinion, which held unconstitutional the coercive features of the ACA Medicaid expansion, which authorized the government to withdraw all existing Medicaid funds from states that refused to adopt the expanded coverage provisions of the ACA. In this regard, the chief justice was joined by justices Breyer and Kagan, while the dissenting justices, Scalia, Thomas, Kennedy, and Alito, effectively concurred. Justice Ginsburg wrote a separate opinion, dissenting in part and concurring in part, in which Justice Sotomayor joined, and which justices Breyer and Kagan joined in four of five parts. Among other things, this opinion maintained that the Commerce Clause and Necessary and Proper Clause did, in fact, in concert with the Commerce Clause support the individual mandate.[20]

The opinion of Chief Justice Roberts, which sided in part with the more liberal justices and in part with the more conservative justices, opened with a notable paean to the principle that the Constitution, especially Article I, Section 8, had created a general government vested with only enumerated and limited powers. Language included in Part I of his opinion conveyed a

[20] Strictly speaking, Chief Justice John Roberts announced the judgment of the Court and delivered the opinion of the Court in Parts I, II, and III–C of his opinion. In parts I, II, and III-C, the Chief Justice was joined by justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Effectively concurring with the chief justice in Part III-A of his opinion were the four joint dissenters, justices Scalia, Thomas, Kennedy, and Samuel Alito. Part IV of the opinion authored by the chief justice was joined by justices Breyer and Kagan, while the four dissenting justices effectively concurred with it. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), 183 L. Ed. 2d 450, 132 S. Ct. 2566.

deep, abiding respect for conservative understandings of federalism, state sovereignty, and limited federal power:

> Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution . . . The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions . . . Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. . . And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.[21]

The prefatory language also suggested that the Chief Justice, at least, preferred not to declare his view on whether the ACA was prudent or even sound policy. He emphasized that the Court was not in the business of making policy judgments, which were properly left to the people through their elected leaders.[22]

Having paid his respects to the principles of judicial restraint that helped to define the proper role of the Court, Chief Justice Roberts duly recognized its established Commerce Clause rules of interpretation: "Our precedents can be read to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'"[23] And, while acknowledging that the

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[21] *NFIB v. Sebelius*, Opinion of Justice Roberts, Part I, Slip Opinion, 3.
[22] Ibid. See Randy E. Barnett, "Who Won the Obamacare Case?" pp. 17-27 in Nathaniel Persily, ed., *The Health Care Case: The Supreme Court's Decision and Its Implications* (New York: Oxford University Press, 2013).
[23] *NFIB v. Sebelius*, Opinion of Justice Roberts, Part III-A, referencing *United States v. Morrison* at 529 U.S. 609.

substantial effects rationale provided Congress a relatively broad power, Chief Justice Roberts declared that the individual mandate of the ACA could not, under its parameters, stand as a legitimate exercise of the commerce power. According him, "[t]he Constitution grants Congress the power to '*regulate* Commerce' . . . The power to *regulate* commerce presupposes the existence of commercial activity to be regulated . . . As expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity.'"[24] The Chief Justice belabored the point that the "[t]he individual mandate . . . does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." In the view of the chief justice, "[c]onstruing the Commerce Clause to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. The Chief Justice was adamant:

> The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress's power to "regulate Commerce."[25]

Chief Justice Roberts appears to have readily gauged the sentiment of libertarians who bristled at the idea that government could command the individual to enter into a contract for health insurance. In the closing part of his opinion, he reiterated the objection: "The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it."[26]

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[24] ***NFIB v. Sebelius***, Opinion of Chief Justice Roberts, Part III-A, referencing *United States v. Lopez* at 514 U.S. 549. [Original emphasis]

[25] ***NFIB v. Sebelius***, Opinion of Justice Roberts, Part III-A.

[26] ***NFIB v. Sebelius***, Opinion of Justice Roberts, Part IV-B, Slip Opinion, 58.

In a separate part of his opinion, the Chief Justice addressed the argument of the government that Congress had the power under the Necessary and Proper Clause to impose the individual mandate to give effect to the ACA, which was, if anything, a comprehensive regulatory scheme. The power to 'make all Laws which shall be necessary and proper for carrying into Execution' the powers enumerated in the Constitution . . . vests Congress with authority to enact provisions 'incidental to the [enumerated] power, and conducive to its beneficial exercise . . .'"[27] But the chief justice was not predisposed to allow the Congress to employ this ancillary authority. According to him, "Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective." Even the Necessary and Proper Clause could not bring inactivity within the commerce power. Just as the individual mandate could not be sustained as a law regulating the substantial effects of the failure to purchase health insurance on interstate commerce, neither could it be upheld as a "necessary and proper" component of the ACA.[28]

Chief Justice Roberts certainly expressed strong commitments to federalism principles and expressed what seems to have been a sincere commitment to the preservation of state sovereignty in the introduction of his opinion. His holding that struck down features of the Medicaid Expansion that sought to coerce states into participation with this program demonstrated rather plain this regard. But in Part III-A of his opinion, he seemed to articulate an understanding of the substantial effects test that drew on some of the most partisan language ever employed by its New Deal innovators. Most notably, Chief Justice Roberts quoted a well-worn snippet of *obiter dictum* from the 1937 majority of opinion of Chief Justice Charles Evans Hughes in *NLRB v.*

[27] Ibid., referencing *McCulloch v. Maryland*,17 U.S. (4 Wheat.) 418.
[28] *NFIB v. Sebelius*, Opinion of Chief Justice Roberts, Part III-A.

Jones & Laughlin Steel Corp declaring that the plenary power of Congress under the Commerce Clause could reach all intrastate "activity." This incantation, at least when not tied to the comprehensive regulatory scheme at issue in that decision, was certainly at odds with the holdings of the Court in *Lopez*, *Morrison*, and *Raich* declaring that, under the substantial effects rationale, the commerce power could reach, at its farthest extent, only intrastate economic activity.

Under the circumstances, it was remarkable that Chief Justice Roberts held that the individual mandate penalty could be upheld as a tax, and not as an exercise of the commerce power, in conjunction or not with the Necessary and Proper Clause. According to the chief justice, the individual mandate could constitutionally impose a monetary penalty on those who did not purchase insurance as required by the ACA. This penalty, which was to be submitted to the IRS could reasonably be "construed" as a tax. The penalty was not referred to as a tax in the statute, it was referred to as a "penalty" – a payment based upon a failure to comply with the ACA mandate. Yet the Chief Justice, joined by the four liberal justices on the Court, declared it a tax.[29] According to Chief Justice Rehnquist, the federal government was well within its power to levy the exaction for the omission to purchase health insurance:

> [I]t is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes.[30]

[29] Ibid., Part III-C.

[30] *NFIB v. Sebelius*, Opinion of Justice Roberts, Slip Opinion, 41.

The four most liberal justices, that is, David H. Souter, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, agreed with the Chief Justice that the mandate penalty could be constitutionally levied as a tax. But they were not prepared to agree with him that the individual mandate could not also be upheld as an exercise of the commerce power. Justice Ginsburg argued that many citizens did not have health insurance but that would not prevent them from being active in the health care market:

> Everyone will, at some point, consume health-care products and services . . . Thus, if THE CHIEF JUSTICE is correct that an insurance purchase requirement can be applied only to those who "actively" consume health care, the minimum coverage provision fits the bill.[31]

In the view of Justice Ginsberg, the Commerce Clause was a valid source of authority for the individual mandate since even "inactive" persons were actually "active" in the interstate health care market.

A separate opinion regarding the constitutionality of the individual mandate under the Commerce Clause was set out in the joint dissent. But the dissenters did not formally join Part III-A, or any other part, of the chief justice's opinion – a step that appeared to be somewhat inexplicable in the view of some analysts. In response to the opinion of the four more liberal justices that the commerce power was sufficient to sustain the individual mandate penalty, justices Anton Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, to say the least, registered their dissatisfaction. The joint dissenters were appalled that the reach of the commerce power under the substantial effects rationale, stretched beyond recognition as it had been since the New Deal, could now be stretched, even farther to include inactivity.

[31] *NFIB v. Sebelius*, Opinion of Justice Ginsburg, Slip Opinion, 18.

> The striking case of *Wickard v. Filburn*, 317 U.S. 111 (1942), which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.[32]

Further, as to the decision of the majority to construe the ACA mandate penalty as a tax, the four dissenting justices were not persuaded. They argued that it simply was not possible for a civil penalty to double as a tax; referencing previous opinions, the dissenters maintained that "'a tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'"[33] The dissent also pointed out that it was not within the power of the judicial branch to rewrite legislation – that was the job of Congress according to Article I. That being the case, the decision of the majority to change the meaning of the statutory individual mandate penalty amounted to rewriting the ACA, an obvious violation of the Constitution, at least in the view of the joint dissenters.

Justice Thomas was not ready to quit with his joint dissent and wrote his own brief but piercing individual dissent as well. Notwithstanding the extent to which the decisions in *Lopez*, *Morrison*, and *Raich* had significantly delimited the reach of commerce power under the substantial effects test, Justice Thomas remained an inveterate foe of the rule. He seized on the occasion to reiterate arguments against it set out in earlier opinions he had authored. In his words, "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent

[32] Ibid., Joint Dissent, Slip Opinion, 2-3 (joint dissent of Scalia, Kennedy, Thomas, and Alito).
[33] *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996) (quoting *United States v. La Franca*, 282 U. S. 568, 572 (1931)) at *Ibid*., 18

with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." And further, he added, "the Court's continued use of that test 'has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.'" In conclusion, Justice Thomas declared that "[t]he Government's unprecedented claim in this suit that it may regulate not only economic activity but also inactivity that substantially affects interstate commerce is a case in point." [34]

While President Obama and former House speaker Nancy Pelosi praised the outcome in *Sebelius*, conservatives and libertarians, as well as Republican congressional leaders, such as Speaker of the House John Boehner and Senate Minority leader Mitch McConnell, expressed deep-seated dismay – and vowed to repeal the Affordable Care Act. In the coming months and years, numerous jurists and public policy experts weighed in on the decision. Marcia Coyle, for example, concluded that *Sebelius* had unmasked the great ideological divides within the Court.[35] Jack M. Balkin, perhaps the most well-known champion of the "living Constitution" at the time the Supreme Court rendered its decision in *Sebelius*, insisted that the ruling had reaffirmed the nation's social contract. In fact, he likened the decision to early New Deal decisions that had facilitated the expansion of the regulatory state.[36] Legal ethicist J.B. Coleman, however,

[34] *NFIB v. Sebelius*, Dissent of Justice Thomas, Slip Opinion, 1-2, Justice Thomas quoting from his concurrence in *United States v. Morrison*, 529 U.S. 598, 627 (2000).
[35] Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* (New York: Simon & Schuster, 2013). See also Ronald K.L. Collins, "Foreword, Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism." *Albany Law Review*, Vol. 76, no. 1 (2013): 409-66; Stephen E. Gottlieb, *Unfit for Democracy: The Roberts Court and the Breakdown of American Politics* (New York University Press, 2016).
[36] Nathaniel Persily, ed., *The Health Care Case: The Supreme Court's Decision and Its Implications* (New York: Oxford University Press, 2013), 5.

surmised that the majority that upheld the individual mandate appeared to have placed commitments to society over individual liberty[37]

One of the most notable consequences of *NFIB v. Sebelius* was the utter shock of many jurists, lawmakers, and politicians when concluding that the post-New Deal settlement, supposed to grant the federal government unlimited power under the Commerce Clause to regulate the economy and society of the United States, was not so unlimited and could still be challenged on constitutional grounds with viable arguments and Supreme Court precedents. Never had so many liberal observers seen so many "frivolous" and "off the wall" arguments taken so seriously. In the estimations of these observers, the Commerce Clause conclusions of Justice Roberts were, on numerous grounds, incorrect.[38]

Conservative jurist and writer Richard A. Epstein, well-versed on Commerce Clause jurisprudence, flogged the chief justice for that part of his opinion upholding the individual mandate penalty as a tax. In his words, this holding was "jurisprudential mishmash." The chief justice had, clearly, "struggled" to recast the penalty as a tax. In his estimation, the federal

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[37] J. B. Coleman, "Autonomy and the Affordable Care Act Individual Mandate," pp. 135-148 in Fritz Allhoff and Mark Hall, eds., *The Affordable Care Act Decision: Philosophical and Legal Implications* (Routledge, 2014; Hoboken: Taylor and Francis, 2014).

[38] Marcus Schulzke and Amanda Cortney Carroll, **"**The Health of the Commerce Clause: The Sebelius Decision and the Future of Federal Power, pp. 272-282 in Fritz Allhoff and Mark Hall, eds., *The Affordable Care Act Decision: Philosophical and Legal Implications* (Routledge, 2014; Hoboken: Taylor and Francis, 2014): Nathan Stout, "Activity, Inactivity, and Production: Roberts's Commerce Clause Argument," ibid., pp. 117-130; Neil S. Siegel, "More Law Than Politics: The Chief, the "Mandate, and Statesmanship," pp. 192-214 in Nathaniel Persily, ed., *The Health Care Case: The Supreme Court's Decision and Its Implications* (New York: Oxford University Press, 2013), 6, 192; Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (New York: Henry Holt and Company, 2014), 52-87; Andrew Koppelman, "'Necessary,' 'Proper,' and Health Care Reform," pp. 105-124, in Nathaniel Persily, ed., *The Health Care Case: The Supreme Court's Decision and Its Implications* (New York: Oxford University Press, 2013), 6.

government had never levied a tax on the omission to engage in a transaction. One reason for this, he pointed out, is that "every person at any given time is not engaged in thousands of activities that could expose him to taxes from all sides." Because the chief justice had insisted that Congress could not "regulate such inactivity under the Commerce Clause, it is ludicrous to conclude in the next breath that it can do an end run around that limitation by resorting to the taxing power.[39]

The assessment of originalist Randy Barnett was no more encouraging. He emphasized that under the ACA, even after paying the penalty, one continued to violate the law if one did not purchase health insurance. The chief justice had, by declaring the individual mandate penalty a tax, essentially, rewritten the statute – a mistake that had rendered this jurisprudential incoherence. Now, the Court had, moreover, passed a law the political process could not have produced. Perhaps equally egregious, the chief justice and his four supporters had allowed that the Congress might impose a tax on inactivity.[40]

While seeming to please no constituency entirely, the decision in *NFIB v. Sebelius* left the question of affordable health care a fit battle ground for continuing culture wars conflict. At least it should be observed that the decision in *Sebelius* quickly produced a surge of publications debating the merits of *Sebelius* and, particularly, the difficulties produced by its holding that Congress could not coerce a state government into participating in the Medicaid Expansion with

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[39] Richard A. Epstein, "A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA," pp. 28-50, 39, in Nathaniel Persily, ed., *The Health Care Case: The Supreme Court's Decision and Its Implications* (New York: Oxford University Press, 2013), 5. See also Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge: Harvard University Press, 2014), 183-193.

[40] Randy E. Barnett, "Who Won the Obamacare Case?" pp. 17-27, 20-23, in Nathaniel Persily, ed., *The Health Care Case: The Supreme Court's Decision and Its Implications* (New York: Oxford University Press, 2013).

a threat to withdraw existing Medicaid funding if it chose not to do so. Steven Brill concluded that, in the aftermath of *Sebelius*, the Affordable Care Act was, simply, emblematic of a healthcare industry fraught with abuse, corruption, and incompetence.[41] Writing in 2015, James S. House surmised that health care reforms such as the ACA could not resolve an ongoing crisis in a health care system that had already demonstrated its incapacity to provide adequate healthcare services in the wealthiest country in the world.[42]According to Daniel E. Dawes, *Sebelius* only highlighted that, in a "polarized political environment," health care reform had been caught in the cross fire of partisan struggle.[43]

The passage by Congress and President Barack Obama in March 2010 of the Patient Care and Affordable Care Act, similarly to the Gun-Free School Zones Act of 1990 and the Violence Against Women Act of 1994, was the consequence of an unprecedented surge in culture wars political polarization. The ACA constituted an extraordinary congressional overreach – driven by

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[41] Steven Brill, *America's Bitter Pill: Money, Politics, Backroom Deals, and the Fight to Fix Our Broken Healthcare System* (New York: Random House, 2015).

[42] James S. House, *Beyond Obamacare: Life, Death, and Social Policy* (New York: Russell Sage Foundation, 2015); See also Daniel Béland, Philip Rocco, and Alex Waddan, *Obamacare Wars: Federalism, State Politics, and the Affordable Care Act* (Lawrence: University Press of Kansas, 2015); Josh Blackman, *Unraveled: Obamacare, Religious Liberty, and Executive Power* (New York: Cambridge University Press, 2016); Ezekial J. Emanual, *Reinventing American Health Care: How the Affordable Care Act Will Improve our Terribly Complex, Blatantly Unjust, Outrageously Expensive, Grossly Inefficient, Error Prone System* (New York: Public Affairs, 2014); Grace-Marie Turner, *Why ObamaCare is Wrong for America: How the New Health Care Law Drives Up Costs, Puts Government in Charge of Your Decisions, and Threatens Your Constitutional Rights* (New York: Harper Collins, 2011); Stephen Davidson, *A New Era in U.S. Health Care: Critical Next Steps Under the Affordable Care Act* (Stanford: Stanford University Press, 2013).

[43] Daniel E. Dawes, *150 Years of ObamaCare* (Baltimore: Johns Hopkins University Press, 2016).

well-intended progressive commitments to providing universal health care. The unprecedented tactics employed in Congress by the Democrat Party to pass the ACA strictly along party lines, however, were an integral feature of partisan conflict and related cultural polarization dating back decades.[44] Conservatives and libertarians, far more than liberal-left supporters of the ACA, saw its Commerce Clause-based individual mandate as nothing less than an effort by Congress, in effect, to establish an unbounded authority for it to legislate on all subjects.

That Chief Justice Roberts in *NFIB v. Sebelius* was joined by the four most liberal members of the Court to uphold the ACA individual mandate penalty under the taxing power of Congress constituted a notable departure from the originalist and textualist principles of interpretation that had commonly provided the foundations for the decisions of the Rehnquist Court – and from the commitments to judicial restraint among the conservatives of that Court. That a majority of the Court in *Sebelius* may have rendered this holding in deference to Congress, under the circumstances, only highlights the extent to which powerful partisan bitterness had come to figure prominently in both the processes of federal lawmaking and adjudication. More problematically, the virtual rewriting of the ACA mandate and penalty by the Chief Justice to cast the penalty as a tax also constituted a species of judicial activism that blatantly disregarded the principles of popular sovereignty enshrined in the Constitution, which most Americans, even in 2012, supposed to have made the will of the people, expressed through their representatives in Congress, the legitimate source of lawmaking authority.

On the other hand, the holding of a different 5-4 majority, also led by Chief Justice Roberts, constituted a firm rejection of the unprecedented congressional overreach that fundamentally

[44] H. R.3600, Health Security Act, 103rd Congress (1993-1994), introduced on November 20, 1993 by Democrat Representative Rep. Richard A. Gephardt of Missouri.

distinguished the ACA – its reliance on the commerce power to support the individual mandate. Strongly indicating the persistence of Rehnquist Court New Federalism principles was that part of the opinion authored by the chief justice holding that the commerce power, under the Court's substantial effects rationale, could not reach inactivity – even in tandem with the ancillary power of the Necessary and Proper Clause. Neither the substantial effects or comprehensive regulatory scheme rationales were sufficient to uphold the individual mandate penalty. Not so surprising was that Justice Anthony Kennedy, widely deemed to be the "swing vote," supported these holdings by siding with the three more conservative justices in a joint dissent. The four dissenters did not formally join the Chief Justice in this part of his opinion. But they were certainly sufficiently in accord with him to constitute a bona fide holding.

NFIB v. Sebelius, thus, held that the Commerce Clause did not authorize Congress to command the individual to engage in commercial activity because such an omission in the aggregate might affect, in any relevant market, the future price of goods or services in that market – or because the individual might later become active in that market. The individual mandate of the Affordable Care Act, at least as presented by the Justice Department in *Sebelius*, presupposed, in a classic utilitarian way, that the provision would provide the most benefit for the most people. This aggregate utility rational, however, appears to have ignored long-established Commerce Clause jurisprudence holding that statutes based on the commerce power could only regulate the actual activities of an individual – not what a person might do in the future. Indeed, the proposition that government could only bring its power to bear on the individual for her or his actions, rather than his or her probable future actions, was a fundamental proposition of due process dating back centuries in the Anglo-American constitutional tradition.

In several respects, Chief Justice Roberts exhibited an ambivalent stance toward the New Federalism principles established by the Rehnquist Court. In addition to holding that the Commerce Clause, along with the Necessary and Proper Clause, could not support the individual mandate, the Court held that the federal government could not coerce the state governments into accepting the ACA Medicaid expansion with the threat to deny existing Medicaid arrangements if they did not do so. In addition, the four joint dissenters in *Sebelius* refused to join that part of the opinion authored by the chief justice declaring that, under the Court's substantial effects rationale, intrastate activity of any kind having a substantial effect on interstate commerce was within the commerce power of Congress. This wholly unsupported part of the opinion resurrected well-worn obiter dictum from the New Deal-era that declared an unbounded, plenary commerce power.

Taken together, the three seminal Rehnquist Court Commerce Clause decisions and *Sebelius* defined a coherent set of categorical limits to the range of commerce power under the Supreme Court's substantial effects test. Under the substantial effects rationale articulated in *Lopez* and reaffirmed in *Morrison* and *Raich*, commerce power could, at its furthest extent, reach only intrastate economic activity that substantially affected interstate commerce. Chief Justice Roberts and the four joint dissenters in *Sebelius* effectively established a second outer limit to that power – inactivity. Intrastate non-economic activity and inactivity, consequently, remained beyond the scope of commerce power under its substantial effects rationale. Commerce power could reach intrastate activity of any kind only if necessary to give effect to a bona fide comprehensive regulatory scheme, while inactivity remained out of bounds even for that purpose.

Conclusions

The changing scope, meanings, and significance of commerce power from 1964 through 2012 were fundamentally enmeshed in the culture wars conflict that engulfed the United States in that period. At the same time, commerce power shaped and reflected highly contested processes of congressional legislation and Supreme Court adjudication, as well as the energetic engagements of increasingly polarized partisans determined to seize cultural and political supremacy from their opponents. Commerce Clause-based lawmaking and adjudication on the eve of the culture wars was, however, grounded in a complex development of commerce power that had commenced with the ratification of the United States Constitution.

From ratification in 1789 through 1936, congressional legislation and Supreme Court interpretation produced a steady increase in commerce power to meet the needs of national expansion and development. Congress and the Supreme Court, over many decades, produced a legislative application and jurisprudence of commerce power that extended beyond the regulation of simple exchange – becoming, instead, a federal authority that encompassed the channels and instrumentalities of interstate commerce and the flow of people and products in interstate commerce. By the late nineteenth century, commerce power most notably restrained monopoly corporate power and prohibited interstate trade in products deemed unhealthy, immoral, or unsafe.

Commerce power took a quantum leap during the New Deal of President Franklin D. Roosevelt, which established a long-term trend toward centralization of law-making and judicial

power in the national government and a declining role for the states as primary centers of policy making. From 1933 to 1945, lawmakers, judges, and administrators emerged as a college-educated elite caste of social engineers who believed that government had both a responsibility and a right to spur progress according to their own understandings of the concept. Legal liberalism brought the demise of the traditional liberal ideals of laissez-faire and individualism. Its proponents placed a premium on "social justice," which included prominently the redistribution of income for the benefit of ordinary people.

The idea of "liberalism" came to denote a level of concentrated government power and regimentation largely inconsistent with its eighteenth and early nineteenth century meanings and almost completely at odds with understandings of individual liberty that had once inspired Americans to fight for independence. President Roosevelt, the Democrat party-controlled Congress, and the redirected Supreme Court after 1936 succeeded in casting New Deal policy as a breakthrough for freedom. That they succeeded so well in this project suggests rather strongly the extent to which many Americans came to place a greater value on the economic security offered by New Deal programs than a personal autonomy all too frequently besieged by modern economic uncertainties.

In response to the Great Depression, New Deal enactments and Supreme Court rulings turned the commerce power into a powerful tool for implementing a liberal-progressive vision of a fully integrated industrialized and urban nation. Decisions such as *NLRB v. Jones & Laughlin Steel*, *United States v. Darby*, and *Wickard v. Filburn* laid the foundations for the radically-enhanced commerce power that would now prevail. Armed with decisions such as this, the federal courts refrained from imposing any meaningful restraints on Congress's commerce power for the next half a century.

Fundamentally revising constitutional understanding of the Commerce Clause that had evolved for 150 years after the ratification of the Constitution was the New Deal Supreme Court "revolution of 1937." From an Article I, Section 8 power demonstrably intended and understood at the time of ratification only to facilitate trade across state boundaries, the Court held that the commerce power was to extend, not only to the instrumentalities and channels of commerce and the flow of persons and goods within interstate commerce, but also to intrastate activities substantially affecting interstate commerce – and, with the aid of the Necessary and Proper Clause, to regulate or suppress altogether intrastate activities that undercut a federal regulatory scheme.

In a few short years, the Supreme Court established the power of Congress to bolster the status and rights of organized labor, regulate employer-employee relations, and control the production and prices of agricultural and manufactured products. As a result of the development of more extensive regulatory power was the creation by Congress of a vast bureaucracy of administrators, knowledgeable experts largely insulated from the judgments of democratic politics and, thus, electoral accountability, much like the federal judges who generally defended the new agencies against constitutional challenges.

From 1946 through 1963, commerce power more than any other constitutional authority, spurred the emergence of a centralized regulatory state far more encompassing and complex than the federal apparatus that had existed before World War II. Americans viewed the rise of federal agencies and comprehensive regulatory schemes, variously, as praiseworthy, necessary, or wrong-headed, depending on individual socioeconomic, cultural, and political affiliations. Novel interventions in the period 1946-1963 included new wage and hour regulations for non-unionized labor; antitrust measures aimed at corporate combinations; criminal statutes that targeted corrupt

labor unions and their subversion by international communism; and other kinds of organized crime increasingly connected with multistate gambling, drug trafficking, and racketeering. But entrepreneurs and the managers of corporate capital had pressing financial reasons to be discontented with a federal regulatory apparatus that steadily increased their costs of doing business and their income tax obligations. By 1963, new commerce power interventions on behalf of environmental protection and equal pay for women, in fact, foreshadowed a sea change in American society and culture.

More than any other constitutional authority in the period 1964-1998, the commerce power served the purpose of rapidly reordering socioeconomic and political relations in the United States. Its deployment was central to intensifying political and cultural conflict. In the period 1964-1998, Congress wielded its commerce authority as a virtual general police power, largely with the accommodation of the Supreme Court, to substantially remake the socioeconomic, cultural, and political fabric of the United States – by rearranging the relations of race, class, and sex; the relations between increasingly aggressive law enforcement personnel and newly-invented classes of criminals; and the relations between human beings, a steadily growing array of protected flora and fauna, and natural resources, climate, and even the weather.

Certain that theirs was the correct and most moral vision of America, partisan political operatives sought to realize their visions with the most effective tool available – central government power. Congressional legislation and Supreme Court rulings made many controversial issues national ones and the stakes at election times, consequently, became a "winner takes all" proposition. With the capacity of central power to spur change clearly established, victory seemed imperative for partisan combatants. Because of the enormous implications of most policy questions central to culture wars conflict, the vitriol between

conservatives and liberals grew so intense as to produce the perception that very little common ground remained.

Commencing with the instrumental use of Commerce Clause authority to ameliorate the racial injustice that African Americans had suffered for centuries, well-intended federal lawmakers resorted increasingly to this potent instrument of change. Supported vigorously by a predominantly liberal academy and mass print and electronic media – new congressional legislation and administrative agencies deployed Commerce Clause power to raise wages and limit the hours of workers, ensure equity in hiring and promotion for women and minority members with affirmative action directives, and end the sex- and gender-based harassment of women and members of the LGBT community in the work place. The rapid extension of federal authority on behalf of liberal conceptions of progress entailed the imposition of new regulatory regimes that took aim at environmental hazards and threats to endangered species. The increasing reliance on commerce power to limit the availability of post-viability abortion, arrest and prosecute "super predators," restrain drug-cartel trafficking, and restrict gun ownership exponentially intensified partisan conflict. Many business owners and consumers, however, resented deeply the rising costs of regulation, while others simply wanted to be free of federal government regimentation they deemed both unnecessary and in violation of fundamental freedoms.

As indicated, the period 1964-1998 saw the rapid proliferation of comprehensive regulatory schemes based on the commerce power. More explicitly than ever before, the Warren and Burger courts held that Congress could regulate or entirely suppress an intrastate activity if Congress had reasonably concluded that such regulation was necessary to uphold such a scheme. This was so even if an activity, taken in the aggregate, did not have a substantial effect on interstate

commerce. In the case of a comprehensive regulatory regime, Congress could employ the commerce power to regulate intrastate activities – and even ban intrastate activities if necessary to uphold such a regime. As well, Congress could pass criminal statutes based on commerce power if the language of such statutes contained a jurisdictional element identifying a nexus of the offense, in each case, to interstate commerce. Such a linkage permitted a federal court to decide, on a case-by-case basis, if the statute met Commerce Clause muster for the purposes of enforcement.

Until Richard M. Nixon was elected president in fall 1968, the American public generally had accepted the steady expansion of federal power that had relied fundamentally on New Deal Supreme Court Commerce Clause doctrines. Together with commitments to securing "law and order" in the tumultuous late 1960s, Nixon sought to rein in federal authority by reinvigorating principles of state sovereignty. This was a political impulse that brought to life the New Federalism and, among conservative jurists, the constitutional theory of "originalism." This theory was fully intended to counterbalance that of a "living Constitution," which had emerged as a set of ideas to justify increasingly inventive interpretations of the constitution's language and increasingly expansive interventions of federal power, including those grounded in the Commerce Clause. Just as it had taken presidents with liberal orientation decades to make appointments sufficiently numerous to generate New Deal and Great Society jurisprudence in the United States Supreme Court, it took over two decades for appointments to the Court to bring about a balance between progressives and conservatives. Remarkably, from 1968 until 1992, presidents affiliated with the Democrat party did not add a single member to the Court. The consequences of this development for Commerce Clause jurisprudence became apparent in the 1990s.

The growing number of conservative justices appointed to the Supreme Court increasingly generated decisions that refrained from enlarging the scope of the substantial effects test and in other ways calibrated Commerce Clause-based measures to contain them within the limits of the New Federalism, which gathered something of a critical mass during the tenure of Chief Justice William Rehnquist. In this connection, the Rehnquist Court produced Commerce Clause decisions that assertively staked out the sovereign prerogative of the states to refuse to be "commandeered" into federal regulatory schemes.

Congress and the Supreme Court engaged one another to generate Commerce Clause-based law that steadily re-arranged the balance of power between states and the federal government. Some of the more controversial measures regulated or criminally penalized activities that bore no clear relationship to interstate commerce and seemed to invade the customary and, indeed, constitutionally reserved criminal jurisdiction of the states. These developments spurred anxiety among many in what would one day be called "flyover country" that federal authority knew no bounds and that the capacity of state and local governments to manage their affairs in keeping with the preferences of their constituents was rapidly disappearing.

The Rehnquist Court began to recalibrate substantially the Commerce Clause jurisprudence developed in the New Deal era with its 1995 decision *United States v. Lopez.* At the least, this decision demonstrated that Congress, with its passage of the Gun Free School Zones Act of 1990, could not bring an activity always assumed to be entirely within the jurisdiction of local and statute authorities into federal criminal jurisdiction. The decision in *Lopez*, which overturned the GFSZA, surely disturbed some liberal members of the legal community who favored centralization of power and no little jubilation among conservative legal thinkers. More

important, the decision worked a major doctrinal breakthrough for the New Federalism. Before the decision in *Lopez*, the Supreme Court and numerous lower federal courts had, off and on for half a century, invoked the seemingly open-ended power of Congress under the substantial effects test, first set out in *Jones & Laughlin Steel Corp*, as a bona fide foundation for an ever-expanding, virtual federal police power. The decision of the Rehnquist Court in *Lopez* identified and rectified this error.

In *Lopez*, Chief Justice Rehnquist clarified existing Commerce Clause doctrine without declaring to or, in fact, needing to overturn any important precedents. Rehnquist and the majority held that, under the substantial effects rationale, commerce power could reach intrastate activity only if it was commercial activity or, at a minimum, *economic* activity. In this case, non-commercial activity and non-economic activity were out of bounds. As well, the Court allowed that Congress might rely on the Necessary and Proper Clause to bring any intrastate activity within the commerce power, but only if necessary to uphold a comprehensive regulatory scheme. Last, the Court declared that it would uphold criminal statutes based on commerce power if the language of such statutes contained a jurisdictional element identifying a nexus of the offense to interstate commerce – but reserved to the federal courts the right to decide, on a case-by-case basis, if prosecuted activity was, in fact, within the commerce power. The finding of the Supreme Court in *Lopez* that it had never, under its substantial effects rationale, upheld a Commerce Clause-based piece of legislation that reached non-economic intrastate activity suggested powerfully that, in future, there would be few instances in which the Court would, in fact, uphold such measures. The decision in *Lopez* re-animated a longstanding tradition of judicial minimalism protective of state sovereignty. In doing so, the decision effectively articulated discernible limits to an expanding commerce power – which helped to supercharge

partisan culture war struggles for at least a decade. In the year following *Lopez*, the Supreme Court would again decide the purview of commerce power—this time in favor of the Eleventh Amendment.

In *Seminole Tribe v. Florida* (1996), five of the nine justices of the Supreme Court reaffirmed the sovereign authority of the states in the face of increasingly extensive employments by Congress of its powers under Article I, Section 8. Dealing with that part of the Commerce Clause known as the "Indian Commerce Clause" and the Indian Gaming Regulatory Act of 1988, the decision marked a major advance for the "New Federalism." As in *Lopez*, the decision in *Seminole Tribe* involved some of the most contentious issues fueling the culture wars of the 1990s – including the rising casino gambling industry, federal government environmental protection regulations, and the balance of power between the state governments and the federal government.

Seminole Tribe of Florida constituted a twin victory from the perspective of the Supreme Court justices interested in advancing Commerce Clause New Federalism. The decision made it clear that the Eleventh Amendment prohibited Congress from making the State of Florida, or any other state, susceptible of being sued by a private party in federal court for non-compliance with the tribal demands authorized by the Indian Gaming Regulatory Act. In coming to this result, the Court also reversed a decision it rendered in 1969 to hold that commerce power did not authorize Congress to allow companies required to pay for hazardous waste site cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to sue states for their role in creating such environmental hazards. Once again, Eleventh Amendment sovereign immunity protections forbade this.

Seminole Tribe of Florida and the New Federalism sovereign immunity decisions it produced were also symbolic of the determination of the Rehnquist Court to resist efforts by the Congress to undercut further state sovereignty with an unrestrained employment of commerce power and to "commandeer" the states. While *Seminole Tribe* effectively held that Congress had no authority to authorize private law suits to compel states to enter tribal-state compacts, the decision also insulated state governments from the remedial strictures that Congress had set out in CERCLA. Eleventh Amendment sovereign immunity decisions resulting from *Seminole Tribe* that dealt with private lawsuits under the Age Discrimination Act and the Americans with Disabilities Act, moreover, effectively declared that Congress had no authority to establish private causes of action against state governments to coerce them into following Commerce-Clause-based employee wage and hour, hiring, and promotion policies imposed unilaterally by Congress.

Culture wars political mobilization against gender-based violence produced the Violence Against Women Act of 1994, while the highly-publicized action brought under the VAWA by Christy Brzonkala against Antonio Morrison and James Crawford fanned the flames of controversy over the statute in the ensuing six-year period. From the perspective of those who strongly supported the civil remedy set out in § 13981 of the VAWA, federalization of judicial authority over domestic violence properly marked gender-based violence against women as a serious national problem. Such violence was, indeed, a widespread source of misery and a crying injustice that congressional leaders amply verified. However, the empathy, compassion, and moral certitude that spurred strong support of the VAWA civil remedy caused many such well-intended partisans to discount or ignore altogether the larger implications for limited government, federalism, and personal liberty of a judicially-authorized Commerce Clause-based

police power that would know no bounds. The urgent felt need among activists for a fast and powerful solution to gender-based violence, essentially, drove such considerations beyond the constitutional horizon and out of view. The ruling of the Supreme Court in *United States v. Morrison* constituted a great setback for those who had expended much time and effort to supply federal courts with the remedial tools activists deemed necessary to suppress gender-based violence against women. Vigorous feminist critiques utterly condemned the decision in *Morrison* for being, simply, symbolic of a federal judiciary little concerned with improving women's rights and insensitive to the plight of women targeted by gender-motivated violence.

As had been the case in *Lopez*, the Supreme Court in *Morrison* was called upon to decide a question of great importance, indeed, one that went beyond solving the national problem of gender-motivated violence: Would the Court allow Congress to rely on the Commerce Clause to establish an unlimited federal police power. In *Morrison*, the Court upheld and reiterated the substantial effects rationale clarified in *Lopez* – but, this time, in a controversy that drew widespread public attention to this holding and its New Federalism foundations. The Court declared once again that none of its decisions had ever extended commerce power, under the substantial effects test, to non-economic intrastate activity. Even when a given non-economic intrastate activity, aggregated with all other instances of it, had a substantial impact on interstate commerce, such activity was beyond the commerce power. Congress could regulate intrastate activities that were commercial or, in and of themselves "economic in nature" – but not non-economic intrastate activity, such as gender-motivated violence or gun possession in a school zone or any number of other non-economic intrastate activities exclusively within the purview of state civil and criminal law. Lastly, *Morrison* reaffirmed that part of the clarified substantial effects test set out in *Lopez* holding that, for the commerce power to justify a criminal statute, it

was required to include a jurisdictional element tying the offense to interstate commerce under an "in commerce or affecting commerce" rationale, which would permit a court to make the required case-by-case determination if the offense at issue, indeed, fell within the commerce power.

In the fourth case, it has been shown that the federal statute that gave rise to *Gonzales v. Raich* was the product of gradual changes in American law, dating to the nineteenth century, which permitted a total ban on beverage alcohol and, thereby, retooled constitutional understanding to permit the absolute prohibition of other mind-altering intoxicants. Federal government experimentation with nominal tax policies that, in fact, regulated and suppressed cannabis also constituted an important precursor of the 1970 Controlled Substances Act – which distinguished itself as the first anti-illicit drug measure to be based on the Commerce Clause. This comprehensive regulatory regime, however, also derived from growing public concern after 1900 with a narcotic associated originally with black jazz musicians, underground criminality, the rapid immigration of Mexican peasants whose customary use of marijuana seemed to foreshadow "reefer madness," and a threatening drug culture rooted in the 1960s counterculture insurgency that made cannabis a powerful symbol of culture wars conflict through the early twenty-first century. Political contention over the problem of increasing drug abuse and addiction, along with a concerted campaign by marijuana advocates to legalize cannabis and then free medical marijuana from federal and state controls, produced the California Compassionate Use Act of 1996 and, in turn, the challenge to the CSA ban on cannabis that became *Gonzales v. Raich*.

The decision in *Raich* certainly did not meet the approval of conservatives who had hoped to see New Federalism principles, as in *Lopez* and *Morrison*, further circumscribe the commerce

power. On the other hand, intense culture wars disputation seems to have distorted somewhat the expectations for and perceptions of the decision for conservatives and liberals alike. After all, *Raich* affirmed the 1970 Controlled Substances Act, which had constituted an expansive deployment of commerce power in keeping with a cause that conservatives, at the opening of the culture wars, had held near and dear – the vigorous suppression of illegal drug trafficking and drug abuse. For thirty-five years, the CSA had categorically forbidden the possession, distribution, and use of cannabis, and yet the decision of the more liberal members of the Court in *Raich* to not to recognize an exception to the proscription fueled the ire of conservative partisans. Even Justice Scalia could not escape their censure – an example of how culture wars imperatives could rearrange partisan priorities. Liberal jurists undoubtedly could chuckle at the way the liberal majority in *Raich* relied on New Federalism Commerce Clause jurisprudence to sustain the congressional deployment of commerce power fully to the new limits identified in *Lopez* – albeit with a result that flouted well-established liberal positions on drug policy, criminal law enforcement, and racial justice. But liberal partisans who demanded that federal authorities exclude medical marijuana from the CSA proscription, if only for humanitarian reasons, were no more satisfied with the decision in *Raich* than civil libertarians who, simply, preferred that recreational marijuana be made legal in all states and permitted by federal law.

The four Rehnquist Court Commerce Clause decisions closely examined in this study indicate that five members of that Court, in each case, sought to see Commerce Clause legislation limited in some way; that much is clear. One answer to the question of whether Rehnquist Court Commerce Clause decisions amounted to a "constitutional revolution" similar to that which the New Deal Court instituted in 1937 might be provided by examining the short-

term consequences of each decision, especially the responses of Congress to three of them. Given the outcome in *Raich,* the prohibition of medical marijuana under the Controlled Substances Act remained in place, at least through 2017. The CSA, a comprehensive regulatory scheme, was certainly a constitutional use of the commerce power, even though the Supreme Court upheld the Schedule I ban on cannabis because it deemed such to be necessary to give effect to the legislation. However, it appears that the doctrinal limitations articulated in *Lopez, Seminole Tribe, Morrison,* and *Raich* did little to impede the legislative objectives of Congress in the case of each statute at issue. In all three, the Supreme Court ruled unconstitutional all or part of a statute. Congress, however, had the prerogative to revise the statute, in each case, to make it conform to New Federalism jurisprudence – even if Congress did not choose to do so in every case. A brief review of the response of Congress in each case is in order.

Congress was able to pass legislation achieving its original goal with a revision to the Gun Free School Zones Act. The majority in *Lopez* did not overturn any precedents; instead, it identified and articulated barriers. In response, President Bill Clinton led Congress in revising the legislation by including the required jurisdictional element such that the statute reached only firearms brought within 1000 feet of a school that had "moved in or that otherwise affects interstate commerce."[1] Since most firearms were produced in states other than the ones in which they were purchased, the statute remained, at least in the abstract, almost all-encompassing. Under pre-existing precedent, a federal court was to verify, on a case-by-case basis, that prosecuted activity, in fact, came within the commerce power. Even so, the statute remained in effect, albeit not sustained by the substantial effects rationale, with only negligible limitations.[2]

[1] "Clinton Seeks to Reinstate Ban on Guns," *New York Times*, May 7, 1995, A23.
[2] Law Center to Prevent Gun Violence, "Federal Law on Guns in Schools," May 21, 2012. http://smartgunlaws.org/federal-law-on-guns-in-schools/ (accessed Feb 22, 2016).

In *Seminole Tribe*, another limit was set out to the employment of the "Indian Commerce Clause" – that is, the Supreme Court reaffirmed the sovereign authority of the states to forestall legal action by Native American Tribes under the Indian Gaming Regulatory Act of 1988. Notwithstanding the decision, however, the Indian Gaming Regulatory Act continued to facilitate the opening of Indian casinos. Congress, immediately after the ruling of the Supreme Court, initiated amendments to the statute that reflected the holdings of the Court. In the two years following the ruling, nineteen gaming-related stand-alone bills and amendments to the IGRA were introduced. But none provided the tribes with the negotiating power of the IGRA before the *Seminole* decision. Amendments that authorized the Secretary of the Interior to dictate state-tribal compact terms and similar amendments were introduced but could find no traction.[3] In the case of Indian casinos, Congress might have sidestepped the ruling in Seminole Tribe with new legislation if there had been the political will to do so.

After the decision of the Supreme Court in *United States v. Morrison*, Congress re-authorized the Violence Against Women Act, albeit without the controversial civil remedy struck down in that decision. The remainder of the VAWA remained intact. After the 2000 decision, Congress and President George W. Bush reauthorized the statute in 2005. The act expired in 2011 but Congress and President Barack Obama reauthorized it again in 2013.[4] The civil-remedy title of the original act was never revived. Shortly after the Court decided *Morrison*, Representative John Conyers (D-MI) attempted to amend the act by including language setting

[3] Paul Moorhead, "IGRA at 25, With So Much More to Do," *Indian Country Today Media Network*., http://indiancountrytodaymedianetwork.com/2013/10/25/25-years-indian-gaming-regulatory-act (accessed February 22, 2016).

[4] President Signs H.R. 3402, the "Violence Against Women and Department of Justice Reauthorization Act of 2005." http://georgewbush-whitehouse.archives.gov/news/releases/2006/01/20060105-3.html (accessed February 2, 2017)

out a jurisdictional nexus of gender-motivate violence and interstate commerce with a bill entitled the Violence Against Women Civil Rights Restoration Act (VAWCRRA). Creating the jurisdictional nexus was, it seems, difficult. Adding language that stipulated that the crime of gender-motivated violence was actionable only when the defendant or victim "travels in interstate or foreign commerce," or when the defendant "uses a facility or instrumentality of interstate or foreign commerce," did not seem to be sufficiently encompassing.[5] Legislators easily saw that the revised act would not reach all gender-motivated violence and refrained from supporting the amendment. *Morrison* was the one decision, of the three considered here, that posed a difficult legislative barrier to Congress, one that remained as of 2017.

The contention here is that the four decisions, and particularly *Lopez*, *Morrison*, and *Raich*, did not amount to a constitutional revolution.[6] In none of these decisions did the Rehnquist Court overturn a major New Deal Era or Great Society Era Commerce Clause holding. Likewise, not one of these decisions disrupted the basic rules for identifying the scope of the Commerce Clause: regulation of the channels and instrumentalities of interstate commerce, the flow of people and goods in interstate commerce, and, per the New Deal "revolution of 1937," the substantial effects and comprehensive regulatory regime rationales. *Lopez*, *Seminole Tribe*, and *Morrison*, as discussed, caused only minor setbacks to Congress in the pursuit of its legislative goals in each case, indicating the substantial prerogative of Congress to forestall Commerce Clause strictures by seeking alternative legislative strategies, such as the inclusion in a statute of

[5] John Dinan, "Congressional Responses to the Rehnquist Court's Federalism Decisions," *Publius* (Summer 2002): 6.
[6] Glenn H. Reynolds & Brannon P. Denning, "Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?" *Wisconsin Law Review* (2000): 369, 371, 378-91.

a jurisdictional element, textually at least, linking the activity to be regulated with interstate commerce. Consider the wisdom of Senator Fred Thompson (R-TN) indicating the nimbleness of Congress in this regard in an October 11, 2000 speech on the Senate floor:

> We, from time to time, try to get around the commerce clause. We want to federalize things, such as guns in schools. Every state in the Union has a tough law they deal with in their own way as to what to do about a terrible problem – guns in schools. We get no headlines out of that, so we had a federal law to which the Supreme Court said: No, that does not affect interstate commerce. Then we just try to basically directly force States to enforce Federal laws and regulations that we make – background checks for guns, when judges should retire, Federal regulations. Finally, the Supreme Court said: No, we cannot do that. The 10th Amendment prohibits us from doing that. So we have a steady array of our attempting to figure out ways in and around the Constitution in order to impose our will because 'we know best.' The latest, of course, now is the use of the spending clause.[7]

It is apparent from the four Rehnquist Court decisions and their aftermath, in each case, that if the political winds were strong enough, Congress remained quite capable of finding ways to pass the legislation it preferred.

Another contention here, and perhaps one that is more important, *Lopez*, *Morrison*, and *Raich* constituted, in fact, a major accomplishment for the Rehnquist Court New Federalism – one that, beginning with *Lopez*, articulated discernible limits to commerce power by strictly construing the Commerce Clause decisions of the Supreme Court dating back to 1937. In *Lopez*, the Supreme Court declared that the Commerce Clause did not provide an open-ended grant of legislative power as liberal jurists had maintained since the New Deal. And, contrary to the view

[7] *Congressional Record*, V. 146, Pt. 15, October 6, 2000 to October 12, 2000, 22087.

of some jurists, one can, in fact, look to *Gonzales v. Raich* to appreciate the culmination of this breakthrough.

The decision in *Gonzales v. Raich* reiterated holdings set out in *Lopez* and affirmed in *Morrison* amply demonstrating that the Supreme Court intended to enforce the outer limits of the commerce power rather than, as before *Lopez,* allow the Commerce Clause to serve as an open-ended grant of general legislative authority. The decision in *Gonzales v. Raich* did not contradict or undercut any of the major holdings in those two decisions. In fact, the majority in *Raich* affirmed the articulation of the substantial effects test set out in *Lopez* and reiterated in *Morrison* The Court defined and effectively narrowed the range of economic activity that commerce power could reach under its parameters to include only "the production, distribution, and consumption of commodities." Commerce power alone could not extend so far as to reach intrastate non-economic activity, even if such activity substantially affected interstate commerce. As in *Lopez* and *Morrison,* the majority agreed that the Constitution permitted Congress to regulate intrastate non-economic and non-commercial activity – but only if such was essential to sustain the effectiveness of a comprehensive regulatory regime well-grounded in the commerce power. *Raich* did not draw into question holdings in *Morrison* declaring that Congress could not circumvent the limited grant of power set out in the Commerce Clause by issuing a legislative finding and declaration that demonstrated only an "attenuated" connection between a non-economic or non-commercial intrastate activity and interstate commerce. The decision in *Raich* did not suggest that the Court would abandon its commitment to viewing with skepticism congressional regulatory measures that encroached upon the sovereign authority of the states. As discussed, for thirty-five years before the decision, Congress had readily exercised the power to regulate controlled substances. Upholding the CSA ban on medical marijuana, notwithstanding

the strenuous complaints of justices O'Connor and Thomas, did not constitute any kind of new threat to well-established areas of state government authority. Notwithstanding the superheated partisan conflict over the legalization of medical marijuana, the decision in *Gonzales v. Raich* meshed entirely with other seminal Rehnquist Court Commerce Clause decisions. These decisions, including *Raic*h, held the line against the further expansion of commerce power that had commenced during the New Deal – locking in place the articulation of New Federalism Commerce Clause doctrines set out by Chief Justice Rehnquist in *Lopez*.

The decision of the Supreme Court in *NFIB v. Sebelius*, insofar as Commerce Clause jurisprudence was concerned, powerfully and vitally augmented the limits to commerce power articulated initially in *Lopez* and reaffirmed in *Morrison* and *Raich*. The passage by Congress and President Barack Obama in March 2010 of the Patient Care and Affordable Care Act, similarly to the Gun-Free School Zones Act of 1990 and the Violence Against Women Act of 1994, was the consequence of an unprecedented surge in culture wars strife. The ACA constituted an extraordinary congressional overreach – driven by well-intended progressive commitments to providing universal health care. The unprecedented tactics employed in Congress by the Democrat Party to pass the ACA strictly along party lines, however, were an integral feature of partisan conflict and related cultural polarization dating back decades.[8] Conservatives and libertarians, far more than liberal-left supporters of the ACA, saw its Commerce Clause-based individual mandate as nothing less than an effort by Congress, in effect, to establish an unbounded authority for it to legislate on all subjects.

[8] H. R.3600, Health Security Act, 103rd Congress (1993-1994), introduced on November 20, 1993 by Democrat Representative Rep. Richard A. Gephardt of Missouri.

That Chief Justice Roberts in *NFIB v. Sebelius* was joined by the four most liberal members of the Court to uphold the ACA individual mandate penalty under the taxing power of Congress constituted a notable departure from the originalist and textualist principles of interpretation that had commonly motivated the decisions of the Rehnquist Court – and from the commitments to judicial restraint among the conservatives of that Court. That a majority of the Court in *Sebelius* may have rendered this holding in deference to Congress, under the circumstances, only highlights the extent to which powerful partisan antagonisms had come to figure prominently in both the processes of federal lawmaking and adjudication. More problematically, the virtual rewriting of the ACA mandate and penalty by the Chief Justice to cast the penalty as a tax also constituted a species of judicial activism that blatantly disregarded the principles of popular sovereignty enshrined in the Constitution, which most Americans, even in 2012, supposed to have made the will of the people, expressed through their representatives in Congress, the legitimate source of lawmaking authority.

On the other hand, the holding of a different 5-4 majority, also led by Chief Justice Roberts, constituted a firm rejection of the unprecedented congressional overreach that fundamentally distinguished the ACA – its reliance on the commerce power to support the individual mandate. Strongly indicating the persistence of Rehnquist Court New Federalism principles was that part of the opinion authored by the chief justice holding that the commerce power, under the Court's substantial effects rationale, could not reach inactivity – even in tandem with the ancillary power of the Necessary and Proper Clause. Neither the substantial effects or comprehensive regulatory scheme rationales were sufficient to uphold the individual mandate penalty. Not so surprising was that Justice Anthony Kennedy, widely deemed to be the "swing vote," supported these holdings by siding with the three more conservative justices in a joint dissent. The four dissenters

did not formally join the Chief Justice in this part of his opinion. But they were certainly sufficiently in accord with him to constitute a bona fide holding.

NFIB v. Sebelius, thus, held that the Commerce Clause did not authorize Congress to command the individual to engage in commercial activity because such an omission in the aggregate might affect, in any relevant market, the future price of goods or services in that market – or because the individual might later become active in that market. The individual mandate of the Affordable Care Act, at least as presented by the government in *Sebelius*, assumed, in a classic utilitarian way, that the provision would provide the most benefit for the most people. This aggregate utility rational, however, appears to have ignored long-established Commerce Clause jurisprudence holding that statutes based on the commerce power could only regulate the actual activities of an individual – not what a person might do in the future. Indeed, the proposition that government could only bring its power to bear on the individual for her or his actions, rather than his or her probable future actions, was a fundamental proposition of due process dating back centuries in the Anglo-American constitutional tradition.

In several respects, Chief Justice Roberts exhibited an ambivalent stance toward the New Federalism principles established by the Rehnquist Court. In addition to holding that the Commerce Clause, even together with the Necessary and Proper Clause, could not support the individual mandate. The Court held that the federal government could not coerce the state governments into accepting the ACA Medicaid expansion with the threat to deny existing Medicaid arrangements if they did not do so. However, the four joint dissenters in *Sebelius* refused to join that part of the opinion authored by the chief justice declaring that, under the Court's substantial effects rationale, intrastate activity of any kind having a substantial effect on interstate commerce was within the commerce power of Congress. This wholly unsupported part

of the opinion harkened back to the New Deal-era that aimed toward an unbounded, plenary commerce power.

Taken together, the three seminal Rehnquist Court Commerce Clause decisions and *Sebelius* defined a coherent set of categorical limits to the range of commerce power under the Supreme Court's substantial effects test. Under the rationale articulated in *Lopez* and reaffirmed in *Morrison* and *Raich*, commerce power could, at its furthest extent, reach only intrastate economic activity that substantially affected interstate commerce. Chief Justice Roberts and the four joint dissenters in *Sebelius* effectively established a second outer limit to that power – inactivity. Intrastate non-economic activity and inactivity, consequently, remained beyond the scope of commerce power under its substantial effects rationale. Commerce power could reach intrastate activity of any kind only if necessary to give effect to a bona fide comprehensive regulatory scheme, while inactivity remained out of bounds even for that purpose.

The controversy over the ACA and the decision in *Sebelius* spelled out in high relief at least the value of persistent constitutional restraints on central power under the Commerce Clause. To an unprecedented extent, this episode of culture wars contention illuminated vividly the potential of Congress to legislate far more extensively than sober, thoughtful citizens had previously considered. Court watchers were amused on the second day of oral argument in *Sebelius* when Justice Antonin Scalia asked Solicitor General Donald Verrilli why Washington bureaucracies could not require citizens to buy vegetables:

> Could you define the market – everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli?[9]

Amusing or not, the query made more than a few Americans think. Any act or omission to act that could affect the ever-rising costs of health care, the environment, or any other public interest implicating the national economy suddenly seemed within range of federal economic planners. New Federalism restraints on commerce power set out in key Supreme Court decisions at least remained serviceable in a federated republic beset by partisans bent on extending regulatory power in directions previously unimagined to promote their various visions of progress.

Amid rising culture wars conflict in the period 1964-2012 conservative and liberal lawmakers in Washington, D.C. could not resist the opportunities afforded by an increasingly expansive federal government apparatus to promote rapidly the changes their constituencies, with increasing certainty, deemed vital to comfort, security, and happiness. Congress, much more than the federal courts, drove innovations in the deployment of commerce power that spurred culture wars contention. Regulatory and criminal statutes based on the commerce power in fact, aimed at remaking socioeconomic, race, and gender relations, protecting the environment and various species of endangered flora and fauna, and controlling urban violence and criminality, a task once exclusively within the jurisdiction of state governments and local courts. These changes in the employment of central power arose in a nation increasingly fragmented as to understandings of right and wrong and the relationship of the individual to government power.

[9] Byron Tau, "Scalia Wonders about a Broccoli Mandate," March 27, 2012. https://www.politico.com/blogs/politico44/2012/03/scalia-wonders-about-a-broccoli-mandate-118823 (accessed February 3, 2016).

Increasingly complex statutes and judicial decisions evolved beyond the understanding of ordinary persons further produced a growing sense that government was too large, too big, and too out of control. Culture wars conflict, in the final analysis, involved power and divergent understandings of power and who might succeed in seizing it.

Whether elite lawmakers, judges, and partisans had a superior vision of a perfected society, however, was not, ultimately, the question. The federalization of authority came too fast for too many people in the United States and too often at the expense of the sentiments and preferences of persons not sharing the ideals and goals of well-intended elite planners. Ultimately central power seemed to more than a few to impose itself far too often at the expense of consent and liberty.

The Commerce Clause decisions of the Rehnquist Court both fueled and responded to the culture wars conflict. Rather than attempt to overturn a substantial amount of New Deal and Great Society legislation, conservative majorities on the Rehnquist Court and, as well as Chief Justice Roberts and the four joint dissenters in *Sebelius*, opted to read strictly existing Commerce Clause jurisprudence and avoid establishing precedents that further expanded commerce power at the expense of the states. In keeping with conservative commitments to judicial restraint, they did so without overturning seminal New Deal decisions. This strategy, which Randy Barnett, denotes with the rubric "this far, and no further" was at the crux of Commerce Clause New Federalism.[10]

[10] Solum, "How *NFIB v. Sebelius* Affects the Constitutional Gestalt," 50-54; Randy Barnett, "'This Far and No Farther': Baselines and the Individual Insurance Mandate, *Volokh Conspiracy*, January 22, 2012. http://www.volokh.com/2012/01/22/this-far-and-no-farther-baselines-and-the-individual-insurance-mandate (accessed November 2, 2017).

Epilogue

Whereto the Commerce Power and Culture Wars after *Sebelius*?

After *Sebelius* the political climate in America grew even more contentious, as liberals, progressives, conservatives, and libertarians vied for control of the moral, cultural, and economic direction of the country. Additionally, as the reach of the federal government continued to expand, the concerns and activity of previously inactive citizens grew as well. Federal power could be a blessing or a curse, depending on who it affected as it grew. In response, many citizens began to demand more from their state governments to protect them from federal overreach. By early 2014, states had begun to show their willingness to simply ignore federal statutes and regulations that its citizens deemed to be too intrusive.[1] The use of medical marijuana, for instance, continued in various states, until it became, by late 2017, federally permissible. In 2015, "state legislators introduced close to 400 bills that rejected or simply ignored federal authority," according to a 2015 year-end report by the Tenth Amendment Center.[2]

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[1] Eric Fein, "State Nullification and the Tenther Movement: Fight the Fed," Wondergressive.com, Feb 13, 2014. http://wondergressive.com/state-nullification-tenther-movement/ (accessed March 17, 2016).

[2] Tenth Amendment Center, "2015 State of the Nullification Movement: Report on the Growth of State-Level Resistance to Federal Power, 16. https://s3.amazonaws.com/TAChandbooks/2015-state-of-the-nullification-movement-report.pdf (accessed March 18, 2016).

Other state initiatives to reign in federal power included a rediscovery of Article V as it pertains to state-level initiatives for amending the Constitution. According to that provision, "on the Application of the Legislatures of two thirds of the several States," Congress shall call a "Convention for proposing Amendments."[3] Once an amendment proposal was agreed upon, it had to be ratified by three quarters of the states' legislatures or by specially formed conventions to become a part of the Constitution. Popularized by Mark Levin in his book *The Liberty Amendments* and on his radio program, the idea was taken up even by those in government.[4] As of April 2015, there were twenty-seven active petitions to Congress to hold a convention to add a balanced budget amendment to the Constitution.[5] In regard to reining in the commerce power, in early 2016 Governor Mark Abbott of Texas proposed a series of amendments to be considered by the Texas legislature, including one aimed at prohibiting Congress from regulating activity that occurs wholly within one state.[6]

In the highly contentious 2016 presidential election, citizens with a wide array of political views showed a general dissatisfaction with the federal government on both sides of the political aisle, but for differing reasons, as evidenced by the four candidates who did best during the party primaries. Aside from Hillary Clinton of the Democratic Party, the other three candidates who drew the most votes came from outside of the mainstream of their parties. Senator Bernie

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[3] U.S. Const. Art. V

[4] Mark R. Levin, *The Liberty Amendments: Restoring the American Republic*, (New York: Threshold Editions) 2013.

[5] "Doing the Math for a New Constitutional Convention," National Constitution Center, April 6, 2015. http://blog.constitutioncenter.org/2015/04/doing-the-math-for-a-new-constitutional-convention/ (accessed March 18, 2016).

[6] Brandi Grissom, "Texas Gov. Greg Abbott Calls for Convention of States to Take Back States' Rights," *The Dallas Morning News Trail Blazers Blog*, January 8, 2016. http://trailblazersblog.dallasnews.com/2016/01/gov-greg-abbott-calls-for-constitutional-convention-to-take-back-states-rights.html/ (accessed March 18, 2016).

Sanders (I-VT, who caucuses with the Democratic Party), a self-proclaimed socialist, decried the excessive influence of corporate interests on the political system. On the Republican side, Senator Ted Cruz (R-TX) represented those who wished for a return to the Founding principles to an extent far greater than the leadership of his party. Finally, entrepreneur Donald Trump, who had never held political office, appealed to Americans across the political spectrum who wanted to see the United States protect its jobs, its traditional middle-class culture, and its economic preeminence in the world. Trump ultimately won the election, showing that, in 2016, citizens sought solutions not provided by the longstanding political parties.

President Trump's first year in office appeared to produce a new level of culture wars conflict. The legitimacy of his election was called into question; he and members of his team dealt with ongoing investigations into alleged illegal dealings with Russians prior to his stunning victory of November 8, 2016. Culture wars vitriol generated a constant flood of denigrating public disparagements characterizing him as a "racist," "xenophobe," "fascist" whose campaign motto "Make America Great Again" was only a code for returning America to a white male dominated society.[7]

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[7] David Leonhardt, Donald Trump's First 100 Days: The Worst on Record" *New York Times*, April 26, 2017. https://www.nytimes.com/2017/04/26/opinion/donald-trumps-first-100-days-the-worst-on-record.html (accessed July 30, 2017);
Conor Lynch, "Decoding Trump's Meaningless Mantra: Making America Great Again for the Sour, Mean and Delusional," *Salon.com*, January 21, 2017. http://www.salon.com/2017/01/21/decoding-trumps-meaningless-mantra-making-america-great-again-for-the-sour-mean-and-delusional/ (accessed July 30, 2017).
Jesse Berney, "Is Patriotism Possible in Trump's America?" *Rolling Stone*, July 3, 2017. http://www.rollingstone.com/politics/features/how-to-be-patriotic-in-trumps-america-w490449 (accessed July 30, 2017);
Robert Schlesinger, "Donald Trump Is What's Wrong With America," *U.S. News and World Report*, December 11, 2015. https://www.usnews.com/news/the-report/articles/2015/12/11/donald-trump-is-whats-wrong-with-america (accessed July 30, 2017)

While political commentators did not generally characterize Trump as a constitutional conservative or constitutional originalist, one of his campaign promises was to appoint conservative judges to the federal court system when he had the opportunity. He had that opportunity early in his presidency – responding thereto with an appointment to replace Justice Antonin Scalia, who passed away in February 2016. That appointment was rather quarrelsome from the start because the Senate, with a Republican majority, had refused to consider President Barack Obama's nominee, Washington D.C. Court of Appeals Judge Merrick Garland, for the position, instead allowing the incoming president to make the selection.[8] President Trump, as one his first acts as president, nominated Tenth Circuit Court of Appeals Judge Neil Gorsuch in January 2017.[9] The nomination process was filled with drama. Senate Democrats, still stinging from not having been given the opportunity to vote on Garland's nomination, likewise filibustered to prevent Gorsuch's nomination from proceeding. In response, Republican senators employed the so called "nuclear option," which changed long-held Senate rules to allow a simple majority to close debate on Supreme Court nominees and let a vote go forward. In the end, the Senate confirmed Gorsuch by a 54-45 vote along party lines, aside from three Democrat senators who voted to confirm him.[10]

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[8] Ariane de Vogue, "How McConnell won, and Obama lost, the Merrick Garland fight," *CNN*, November 9, 2016. http://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html (accessed July 30, 2017).

[9] By Julie Hirschfeld Davis and Mark Landler, "Trump Nominates Neil Gorsuch to the Supreme Court," *The New York Times*, January 31, 2017 (accessed July 30, 2017). https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html

[10] Adam Liptak and Matt Flegenheimer, "Neil Gorsuch Confirmed by Senate as Supreme Court Justice," *The New York Times*, April 7, 2017. https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html (accessed July 30, 2017).

As of this writing, it was too early to predict if Gorsuch would render decisions in the Supreme Court as he did at the Tenth Circuit, where, as the *New York Times* reported, he adjudicated as a "reliable conservative committed to following the original understanding of those who drafted and ratified the Constitution."[11] Indeed, several sources expected him to rule in the same originalist manner as Justice Scalia, but with less deference to administrative agencies. "He is also a textualist as Scalia was. He interprets legal provisions according to the meaning they had when adopted. He appears to shun balancing tests and legislative history," wrote Ryan Black and Ryan Owens in the *Washington Post*.[12] In fact, he and Justice Thomas appear to have been rather consistent in their voting patterns and formal alignments in decisions, resulting, for instance, in a 7-2 vote with only Thomas and Gorsuch dissenting, in *Perry v. Merit Systems Protection Board*. This decision dealt with a byzantine statute prescribing formal discipline of federal employees, but which failed to address adequately the dispute in the case at hand.[13] In Justice Gorsuch's dissent, he lectured the majority for trying to do the work Congress had failed to do.

> If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation. To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the difficulty of making new laws isn't some bug in the constitutional design: it's the point of the design, the better to preserve liberty.[14]

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[11] Ibid.

[12] Ryan Black and Ryan Owens, "Neil Gorsuch could be the most conservative justice on the Supreme Court," Washington Post, March 20, 2017. https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/neil-gorsuch-could-be-the-most-conservative-justice-on-the-supreme-court/?utm_term=.59a7748c9500 (accessed July 30, 2017).

[13] *Perry v. Merit Systems Protection Board*, 582 US ___ (2017).

[14] Ibid.

The replacement of Justice Scalia with Justice Gorsuch, was likely to help sustain the persistence of New Federalism principles in the Supreme Court, including Commerce Clause doctrines, since the appointment of Gorsuch appears to have helped to maintain the previous balance on the Court.[15] The fact that Justice Kennedy sided with the conservatives on the Court in *Sebelius*, all of whom agreed with Chief Justice Roberts that the individual mandate of the ACA was unsustainable under the Commerce Clause, strongly indicated the persistence of Rehnquist Court Commerce Clause jurisprudence favoring renewed recognition of state sovereignty.

If the successful elevation of a new Supreme Court Associate Justice was a success for President Trump, he did not, in his first year in office, fulfill his campaign promise to repeal and replace the Affordable Care Act. To that end, he based his efforts more on politics than constitutional principles. In January 2017, he stressed that he would replace the ACA with a plan to provide "insurance for everybody," but provided few details.[16] Through the spring and summer of 2017, the Republican majorities in both houses of Congress were unable to garner the votes necessary to pass a new version of the ACA or even to completely repeal it with a commitment to replace it with some other enactment within two years.[17] The Commerce Clause

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[15] Justice Scalia died on Feb 13, 2016 and was replaced by Justice Neil Gorsuch on April 9, 2017. For Gorsuch's conservative views on the Court see, Ariane de Vogue, "Justice Neil Gorsuch Delivering as Trump's Promised Conservative," CNN, June 27, 2017. http://www.cnn.com/2017/06/26/politics/justice-neil-gorsuch-president-trump-gets-his-man/index.html (accessed July 26, 2017).

[16] Tami Luhby, "Trump promises his Obamacare replacement plan will cover everybody, report says," *CNN*, January 17, 2017. http://www.cnn.com/2017/01/15/politics/trump-obamacare/index.html (accessed July 30, 2017).

[17] Leigh Ann Caldwell, "Obamacare Repeal Fails: Three GOP Senators Rebel in 49-51 Vote," NBC News, July 28, 2017. http://www.nbcnews.com/politics/congress/senate-gop-effort-repeal-obamacare-fails-n787311 (accessed July 30, 2016).

and the constitutionality of the ACA did not, it seems, figure into these discussions. Congress and the President were more concerned with producing a bill that could generate a majority and win passage to get the healthcare issue behind them. This permitted them to appear as though they had not abandoned Americans who could not afford healthcare without financial assistance. The final result of this congressional horse trading remained distant at the end of President Trump's first year in office, but he was then, it seems, quite likely to sign any bill that appeared on his desk to claim a legislative victory.

Regardless of the successes or failures President Trump earns, one eventuality remained certain – the persistence of extraordinarily vicious partisan conflict. By the end of 2017, culture wars conflict centered on the supposed flaws and misdeeds of the new president, but, in fact, continued to array partisans struggling for cultural and political power to advance their own visions of a better America. Some fought for the persistence of traditional middle-class understandings of morality and proper social organization and others sought to advance the cause of freedom, equality, and global harmony in wholly new directions. Vicious epithets broadcast with ever wider effect through social media and the internet, in lieu of civil debate and the exchange of ideas, promised to be the continuing order of the day, even as the issue of federal regulation of the internet portended yet another encroachment by federal authorities. We can only hope that the Article I, Section 8 provision intended initially to bring the states of the Union together in commerce and prosperity does not ultimately result in tearing the nation apart in high stakes cultural political conflicts.

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VITA

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Following his retirement in 2008, he began his doctoral studies in history at the University of Missouri-Columbia where he studied under the guidance of Mark M. Carroll. While at MU, he was the first recipient of the James W. Goodrich Graduate Research Assistantship in Missouri History at the State Historical Society of Missouri where he provided archival research for the book *"But I Forget That I Am A Painter and Not a Politician": The Letters of George Caleb Bingham.* He also authored three articles for the Society's "Famous Missourians" website. In 2012 he began his current teaching duties and resides in Bolivar with his wife Mary Kay and their children: Benjamin, Arianna, James, Isaac, Joseph, Abigail, and Levi.