Winter March, 2012

THE MARSHALL DOCTRINE, THE TANEY DOCTRINE AND CALHOUNIAN FEDERALISM

Arthur Lang

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ARTHUR LANG**

The unity of authority vested in Congress over interstate commerce created a single continental economy. While the states of Europe endured centuries of conflict, this centralization of authority contributed to peace and prosperity in the American states. Congress has appropriated its interstate power to confront issues diverse as economic and racial discrimination, and regulatory and criminal law, expanding the rule of the federal government at the expense of the states. This paper will compare the power of the Court to invalidate state law found inconsistent with federal legislative policy under the commerce clause with the power of the Court to invalidate state law found inconsistent with federal judicial policy under the due process clauses.

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** Arthur Lang is a juris doctor candidate at Rutgers, Newark, May, 2012. He grew up in Houston, graduated from the University of Texas, and was accepted to its law school in 1983. Mr. Lang did not attend law school until 25 years later. He spent most of the intervening years learning in yeshivas. He studied school administration and currently is a teacher of history and mathematics. He lives with his wife and children in New Jersey.
I. INTRODUCTION

We begin by distinguishing two judicial principles of commerce. The first principle, the Marshall doctrine, is an expansive expression of federal power, encompassing activities otherwise under state control. The second principle, the Taney doctrine, expresses powers reserved to the states. While Americans might envision these principles in opposition, this is usually only in the absence of affirmative national legislation. The Taney doctrine does not restrict the action of the national legislature; moreover, while the Marshall doctrine clearly limits the power of the states, the Taney doctrine limits the federal judiciary, rather than the legislature. To be sure, Congress at times overreaches its interstate powers and intrudes into those reserved to the states. This occurs when Congress acts like an executive power to enforce activities that it did not sweep under its own regulatory scheme. Thus, properly understood, Congress defines the scope of its own legislative powers.

The deference given to Congress in defining the bounds of its own reach is appropriate. In Article III, Section 2, the Supreme Court was affirmatively granted jurisdiction in particular cases. The first Congress extended the original jurisdiction of the Court in Section 13 of the Judiciary Act of 1789, giving it jurisdiction to issue writs of mandamus upon federal officers. Seventeen members of that first Congress attended the Constitutional Convention, as did President Washington who signed the law. Mr. Chief Justice Marshall, who was not at the convention, struck down the law in Marbury v. Madison (1803). This set the precedent that a court could strike down an act of a national legislature, a peculiarly American invention.

The weight of opinion in the early days of the republic, however, was not “to examine with scrupulous exactness the validity of a law.” A duly elected legislature was presumed to act consistent with the constitution unless “all men of sense and reflection in the community may perceive the repugnancy.” The legislative branch was supreme. Courts were restrained from limiting their power except for “a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication,” which was “so manifest as to leave no room for reasonable

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1 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
3 Id.
4 Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800), quoted in Thayer, supra note 2, at 141.
doubt"⁵ and "as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole."⁶ Laws "might be dangerous and destructive, and yet not so ‘unconstitutional as to justify the judges in refusing to give them effect.’"⁷

The national legislature and executive made their own responsibility to remain within the bounds of federal power. Typical of early presidents who vetoed bills out of constitutional concerns (rather than political), James Monroe opposed federal construction of a national transportation infrastructure on constitutional grounds. Furthermore, Congress obliged upon itself a limitation of the regulation of slavery to the territories, over which it had plenary power, rather than extending the reach of its interstate commerce power into the states. These limits were not imposed by the Court, but rather, assumed by the Congress to be the extent of federal power.

II. REDEFINING COMMERCIAL POWER BETWEEN FEDERAL AND STATE GOVERNMENTS

A. The Dormant Commerce Clause

In fact, the only commerce limitation that the Court was willing to hear was not on the power of Congress but on that of the states. The Article I, Section 8, interstate power of Congress “to regulate . . . excludes, necessarily, the action of all others that would perform the same operation on the same thing.”⁸ This limitation upon the states – recognizing the broad authority of Congress, together with the decision in Dartmouth College v. Woodward (1819)⁹ that gave rise to the modern corporation free from state interference – cannot be overstated as the impetus that paved the way for that which we today call the “American economy.” Like the Marbury rule of judicial review, the dormant commerce doctrine – the recognition of a zone over which Congress has exclusive jurisdiction – is a judicially imposed limitation over the power of a legislative body. However, unlike the doctrine promulgated in Marbury, this principle does not limit the power of the national legislature, but that of the states. On the contrary, the national legislature is free to define the boundaries of its commerce power.

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⁵ Commonwealth ex rel. O’Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811), quoted in Thayer, supra note 2, at 140.
⁶ Grimball v. Ross, Charlton, 175 (Ga. 1808), quoted in Thayer, supra note 2, at 141.
⁷ Wilson at Constitutional Convention, quoted in Thayer, supra note 2, at 141. Can be found at: http://www.fjc.gov/history/home.nsf/page/talking_co_hd.html.
The Taney Court put brakes on the judicially imposed dormant commerce power, which, in the words of Mr. Justice Frankfurter, “if logically pursued, might well have profoundly altered the relations between the states and the central government.” The Taney doctrine covers the zone over which a state is free to act when Congress has not spoken. The conflict over the extent of the limitation on the states culminated in *Cooley v. Board of Wardens* (1852).

It must be noted that the Taney doctrine does not limit how far Congress can reach through affirmative legislation; rather, it is a protection of state power when Congress does not act. Under the Taney limitation, no regulation of Congress is called into question. The Taney Doctrine does not affect the plenary power of Congress. Moreover, the early Court certainly does not find a source of limitation on affirmative Congressional power in the Tenth Amendment. Its confirmation of powers reserved to the states is redundant. Mr. Justice Story commented on the redundancy of this amendment: “that what is not conferred, is withheld, and belongs to the state authorities.”

But Article I Section 8 grants interstate power to Congress. Does that not imply a limitation? Some power must be expected to remain with the states. This indeed is the Taney doctrine. If the constitutional grant of interstate power is so exclusive that a state cannot act even in the absence of affirmative national legislation, there must be some area over which Congress is not expected to exercise direct authority given the backdrop of interstate regulation, an area of intrastate activity that is reserved to the states to regulate.

The juridical question of limitation implied in Article One Section Eight is not about whether Congress has actively stepped into some residue of activity that belongs to the states, for that, Mr. Chief Justice Marshall states, “is vested in Congress as absolutely as it would be in a single government . . . .” On the contrary, the role of the Court is to delineate the zone over which the states may act when Congress has not acted. There is no formality dividing two kinds of commerce – one interstate and one intrastate. All commerce can become interstate through a federal scheme of uniform policy. It is rather in the default, interstate commerce pure and

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11 *Cooley v. Board of Wardens*, 53 U.S. 299 (1851). “[U]ntil Congress should find it necessary to exert its power, it should be left to the legislation of the States[. . . .] best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities. . . .” *Id.* at 319.
13 See Ogden, *supra* note 8, at 197.
natural; that is, divided into parts— one part necessary to remain dormant under the exclusive authority of Congress given the need for the free flow of goods and its regulatory regime, and another part left to the states to regulate.

B. The Calhoun Doctrine

In contrast to the Marshall Doctrine through which Congress defines its own interstate power, the Marbury rule—that the Court will define other powers of Congress by dissecting the Constitution even after Congress has made a reasonable interpretation of that document—paves the way for the second court imposed limitation upon the sovereignty of our national legislature, *Dred Scott v. Sanford*.  

*Dred Scott* twists the venerable principle of government of law embodied in the due process clause of the Fifth Amendment, providing all persons equal justice under the law, in order to overturn a law that applies to all persons equally. Due process, as its name indicates, means that a process is due to all persons before the executive can deprive the person of life, liberty or property. *Dred Scott* therefore adopts a new idea, substantive due process, a doctrine invented by Calhoun to restrict the power of the legislature to regulate life, liberty or property—in this case, ownership of a slave in federal territory.  

The Court overturns the Missouri Compromise, and all other compromises dividing United States territories over slavery, stripping Congress of the power to preserve itself and the nation, turning our moderate, election-oriented two-party system into a factional, sectional, issue-oriented multi-party system. Ironically, after the adoption of the due process clause of Fourteenth Amendment, the “Calhoun Doctrine,” substantive due process, becomes the great court-imposed restriction over state sovereignty, rivaling the commerce power of Congress.

C. Three Zones of Commerce

The Marshall doctrine through which Congress defines the extent of its power, the Taney doctrine by which states are free to act concurrent to that power, and an area between the two, delineates three zones of interstate action. They are: 1) The area over which Congress has explicitly expressed its authority with a scheme of affirmative legislation; 2) the area over which the judiciary has determined that state activity interferes with a

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15 *Id.* at 450. “[A]n Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void.”
regulatory scheme set up by Congress, or by its nature imposes an undue interference with interstate commerce even in the absence of affirmative legislation; and 3) all other activity that affects interstate commerce that we might refer to as the powers reserved to the states.

The first two zones are consequent of the Marshall doctrine, while the third represents the Taney doctrine. The third zone, the powers reserved to the states, are not truly reserved, as Congress can establish an interstate scheme of legislation pre-empting those powers. If it is “interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” United States v. Women’s Sportswear Mfrs Assn. (1949).16

The second area, the expression of the dormant commerce power of Congress, reached its modern height in Philadelphia v. New Jersey (1978)17, where New Jersey tried to conserve its landfill capacity allowing garbage only from within the state into its landfills. However, the law was overturned, since the state did not require garbage from within the state to be disposed locally for health or safety reasons, and provided “no basis to distinguish out-of-state waste from domestic waste.”18 The Court notably explained, “states are not separable economic units . . . in a position of economic isolation.”19 The Marshall doctrine indeed created a single economy.

The third area of interstate commerce is “reserved” for state legislation. Statutes in this zone are those that do not discriminate or unduly interfere with the movement of goods. Given the breadth of interstate commerce with its potential to encompass all activity, the third area over which the state may legislate (the Taney Doctrine) is the broadest. It covers the area over which Congress has not affirmatively legislated and the Court has not taken away (the Marshall Doctrine). The necessary delineation of the Court between the third zone and the second, while leaving the first to the discretion of Congress, had to be what Mr. Justice Holmes had in mind when he said, “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.”20

Alas, not even the first zone – the power of Congress to affirmatively assert its authority over interstate commerce – so obvious to Marshall and Holmes, was safe from judicial intervention during the era of

18 Id. at 629.
19 Id. at 623.
20 Oliver Wendell Holmes, Collected Legal Papers, 295-6 (1920).
the Laissez-Faire Court. Federal laws regulating trusts were ruled unconstitutional in United States v. E.C. Knight (1895)\(^{21}\), as were child labor laws in Hammer v. Dagenhart (1918)\(^{22}\), even though reasonable people could disagree over whether the act was “repugnant to the Constitution.”

As such, the great return to the Marshall Doctrine began in 1937 and culminated in Wickard v. Filburn, (1942)\(^{23}\), a case in which a farmer was prohibited from growing wheat for his own use in excess of his quota under the Agricultural Adjustment Act because of the aggregate effect of home-grown wheat on its interstate price. This essentially affirms the plenary power of Congress over the national economy.

**D. Dual Federalism**

The Laissez-Faire Court of 1895-1937 repudiated the Marshall doctrine, in part, by breathing meaning into the Tenth Amendment, long understood to be a redundant statement having no positive meaning.\(^{24}\) The Court upheld the national power in some cases, such as a law against gambling, Champion v. Ames (1903)\(^{25}\), the Pure Food and Drug Act in Hipolite Egg Co. v United States (1911),\(^{26}\) an act to Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes in Hoke v. United States, (1913)\(^{27}\); but it struck down laws regulating businesses in interstate commerce when they enter into trusts or use child labor. In his article “John Marshall and the Sugar Trust: A Reply to Professor Gillman,” Professor Mendelson points out that E.C. Knight in 1895 was “the first time the Court gutted an act of Congress on the ground that reserved state power (to regulate manufacturing) trumps federal power (to regulate interstate commerce).”

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\(^{21}\) Coffin v. United States, 156 U.S. 1 (1895).
\(^{22}\) Hammer v. Dagenhart, 247 U.S. 251 (1918).
\(^{24}\) See Story, supra note 12, at 844. “The attempts, then, which have been made from time to time, to force upon this language an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into the text the word ‘expressly;’ to qualify, what is general, and obscure, what is clear, and defined.” The Roosevelt Court understood that the Tenth amendment “states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that . . . its purpose was other than to allay fears that the new national government might seek to exercise powers not granted...” United States v. Darby, 312 U.S. 100, 124 (1941).
\(^{26}\) Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).
\(^{27}\) Hoke v. United States, 227 U.S. 308 (1913).
commerce).” The Court created a doctrine of “dual federalism,” meaning that the reach of Congress did not extend into intrastate activity. The Laissez-Faire Court, despite its dual federalism, was not a friend of the states. To be sure, dual federalism stripped the federal government of the power to regulate respectable business, but the Court did not reserve that power to the states. On the contrary, the Court applied the doctrine of substantive due process through the Fourteenth Amendment to prevent states from regulating business in a line of cases beginning with Lochner v. New York (1905).

This occurred while the Court denied the true meaning of the Civil War amendment in Plessy v. Ferguson (1896). The due process clause, the guarantee for government of law, was to provide for the government of men, the men on the Supreme Court.

E. Fundamental Rights

Mr. Justice Holmes vigorously dissented against the use of the words “due process of the law” to protect the un-enumerated substantive rights of property or liberty, holding that, “it is too late to deny that they have been given a much more extended and artificial signification... with no guide but the Court's own discretion....” With this reluctance, he set his famous standard for a substantive violation of due process, that “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”

As for the enumerated federal rights, Mr. Chief Justice Marshall in Barron v. Baltimore (1833) did not apply them to the states, nor did The Fourteenth Amendment Court incorporate them under due process. Mr. Justice Holmes admitted that the First Amendment right of “free speech... must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used...” He also

30 Plessy v. Ferguson, 163 U.S. 537 (1896).
32 See Lochner, supra note 29 (Holmes, J. dissenting).
34 The conviction of a black man in Twitchel v. Pennsylvania, 74 U.S. 321 (1868), was upheld even though his indictment did not comply with the Sixth Amendment, while the conviction of another black man was overturned in Strauder v. West Virginia, 100 U.S. 303 (1880), because African-Americans were excluded from juries.
35 Gitlow v. New York (1925, Holmes, J. dissenting). Note again, the reluctance of Mr. Justice Holmes toward using any kind of substantive due process.
assented to the majority that freedom of religion is a fundamental right in *Pierce v. Society of Sisters* (1925).\(^{36}\)

Mr. Justice Cardozo also limited incorporation under due process to those federal rights that are fundamental, those “found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.”\(^{37}\) The right of a fair trial certainly is one of those rights.\(^{38}\) Mr. Justice Frankfurter included the “security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the ‘concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause.”\(^{39}\)

Most of the provisions of the Bill of Rights are not fundamental to ordered liberty. Lord Coke’s rule in *Heydon’s Case* (1587),\(^{40}\) that when the meaning of a law is in doubt, to look at the historic circumstances motivating its enactment, shows that they were specifically directed against the national government consequent to events that precipitated the Revolution.

What about fundamental principles that are not enumerated? The intent of Fourteenth Amendment, with its broad sweeping terms such as due process, privileges and immunities, and equal protection of the law, was plain and simple: to end racial discrimination by the states and their courts. This was the opinion of the Fourteenth Amendment Court, which rejected Calhoun’s substantive due process in *The Slaughter-House Cases* (1872).\(^{41}\) As for the fundamental principles, no doubt, these are the same as the “privileges and immunities which are, in their nature, fundamental; which belong, of right, [1] to the citizens of all free governments; and [2]...


\(^{37}\) *Polks v. Connecticut*, 302 U.S. 319, 324 (1937, citations omitted). It is “unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress; or the like freedom of the press, or the free exercise of religion; or the right of peaceable assembly, without which speech would be unduly trammeled, or the...[additional] right of one accused of crime to the benefit of counsel.” *Id.* at 324 (citations omitted).


\(^{40}\) *Heydon’s Case*, 78 ER 637, (1587).

\(^{41}\) *The Slaughter-House Cases*, 83 U.S. 36 (1872). The Court overturned Dred Scott and the substantive interpretation to the due process clause. A property “restraint imposed by the State...[cannot] be held to be a deprivation of property within the meaning of that provision.”; *Id.* at 82.
which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.  

Note well that Justice Washington in Corfield described the unenumerated privileges and immunities as having two necessary elements. If either is missing, whether 1) a free government can reasonably prohibit the activity or 2) if any state in our Union has reasonably prohibited the activity, then it is not a fundamental right.

Hence, Professor Thayer, Mr. Justice Holmes, and Mr. Justice Washington hold the unconstitutionality of laws only in cases of the universal. In their respective views, a law can only be repugnant to the constitution if “all men of sense and reflection in the community may perceive the repugnancy” and “a rational and fair man necessarily would admit” and if it abrogates a “right, [belonging] to the citizens of all free governments.” The law has to be unreasonable to all free men.

III. EVOLVING INTERPRETATIONS OF CONGRESSIONAL PREROGATIVE IN INTERSTATE COMMERCE

A. The Great Dissents

The Court also settled upon fine lines to limit the power of Congress over interstate commerce – for example, between manufacturing or mining and shipping, or between the indirect and direct effect on interstate commerce. In Schechter v United States (1935) the Court invalidated the National Industrial Recovery Act, which set up a huge New Deal regulatory scheme designed to stabilize wages and prices, as it applied to goods after the flow of commerce. The Court invalidated the Bituminous Coal Act in Carter v. Carter Coal Co. (1936), because it applied to a labor standard before the flow of commerce. The Court restricted the power of Congress to regulate by taxing commerce before its flow, invalidating the Agricultural Adjustment Act in United States v. Butler (1936).

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42 Corfield v. Coryell, 6 F. Cas. 546, 551 (Cir. Crt, E.D. Pa. 1823). Mr. Justice Washington listed the “right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.”


44 United States v. Butler, 297 U.S. 1 (1936)
The dissents of Mr. Justice Holmes explained the fallacy of the distinctions in commerce before its flow and afterwards, or between its indirect effects and direct effects. When states “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.”

Mr. Justice Cardozo led the Court in *Stewart Machine v. Davis*[^46], in reversing *Butler* and 42 years of *laissez-faire* dual federalism. The Roosevelt Court (1937-1963) would also end substantive due process, and return to the real meaning of the Fourteenth Amendment in *Brown v. Board of Education of Topeka No. 1* (1954)[^47], and to the Marshall doctrine of federal regulatory power in *NLRB v. Jones & Laughlin Steel Corp.*[^48].

### B. The New Substantive Due Process

The retreat from the Calhoun doctrine of substantive due process did not last for long. In 1963, the Court proclaimed its rejection of the *Lochner* line, with its inquiry into the wisdom of legislation, and admitted its “abandonment of the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise.” *Ferguson v. Skrupa* (1963)[^49]. But just two years later, these same “vague contours” of due process took new form. Rather than a substantive right of privacy in economic relations, the Court created a substantive right of privacy in matters of intimate relations in *Griswold v. Connecticut* (1965)[^50], and its line of cases that followed, including *Roe v. Wade* (1973)[^51] and *Lawrence v Texas* (2003)[^52]. The test for fundamental rights was no longer whether the right is necessary in all free governments and has historically been secure in every American state.

The Court began to look to the majority of states to invalidate the majority within a state, to create new rights and to incorporate all of the

[^48]: *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The late Wallace Mendelson, this author’s professor of Constitutional Law at the University of Texas, referred to the Court during this period as the Roosevelt court. This appellation makes sense given that President Roosevelt appointed eight members of the Court after 1937 and the sharp doctrinal shift that occurred in 1963, the year after the retirement of Mr. Justice Frankfurter.
Bill of Rights. Is this the proper role of the Court? Legal opinion into the intent of a clause of the Constitution or any statute, if doubtful, is not decided by the meaning of words, which can be as subjective as a political opinion, but requires examination of the historic circumstances or context surrounding enactment.

C. The New Federalism

1. United States v. Lopez

The prerogative of Congress to determine for itself the extent of its reach into commerce lasted some 58 years. “In effect parliamentary supremacy prevailed. Then in Lopez (1995) the Rehnquist Court reinstated judicial supremacy and the spirit of Dagenhart.” The Court in United States v. Lopez (1995) invalidated the authority of Congress to ban guns from school zones. Five years later, in United States v. Morrison (2000), the Court invalidated a federal law protecting women from violent crimes. Like the Warren Court that denied its own departure from the Roosevelt Court’s rejection of substantive due process, the modern Court also claims that it continues in the tradition of the Roosevelt Court in affirming the power of Congress over commerce. Does it?

Lopez technically did not depart from Wickard. That case had its jurisdictional hook, the price of wheat in the market. Indeed, Gonzales v. Raich, (2005), citing Wickard, affirmed the power of Congress to ban state sanctioned intrastate home-grown medical marijuana as part of the Controlled Substance Act. Lopez, on the other hand, was not “in conjunction with congressional regulation of an interstate market.”

Lopez had an easy fix, as Mr. Chief Justice Roberts made clear during his Senate confirmation hearings. The statute needed a jurisdictional fix, say, possession of a gun transported in interstate commerce. Was it just bad drafting of legislation, or did Lopez usher in a kind of “new federalism,” as if we were returning to the “dual federalism” that was repudiated by the Roosevelt Court?

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54 514 U.S. 549
55 529 U.S. 598, 613
56 Gonzales v. Raich, 545 U.S. 1 (2005).
57 Id. at 38.
58 C.J. Roberts’ responses to questions were found at: http://www.asksam.com/ebooks/releases.asp?file=JGRHearing.ask&dn=Day%203%20%2d%20F

\[\text{einstei}\%20%2d%20\text{Does%20Crime%20Influence%20Commerce%20(Commerce%20Clause)}\].
Indeed, we find that Mr. Justice Frankfurter dissented over the use of the federal tax power in penalizing intrastate gambling. It was unconstitutional, in his view, because it was “an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.”59 Was the eminent Frankfurter a “new federalist?”

2. Regulation of Contraband Items

United States v. Five Gambling Devices, etc. (1953)60 avoided the same question by constructing a federal requirement of reporting gambling devices to apply only to those who have actually purchased out-of-state gambling devices. The statute under question was a measure against interstate organized crime. Intrastate reporting was claimed by the government to be necessary to make interstate crime enforcement effective. If Wickard is good law, as it certainly was, what is problematic about Congress requiring the reporting of intrastate gambling devices or criminalizing the intrastate use of guns without requiring their actual shipment across state lines?

To answer, I claim that the regulated object has to be part of a legislative scheme over interstate commerce. For example, the prohibition of marijuana under Controlled Substance Act (CSC) regulates the drug industry, which is interstate by its nature. In a sense, Congress keeps the interstate price for illegal drugs, such as marijuana, high through regulation. The CSA is a “lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of ‘controlled substances.’”61

In Five Gambling Devices, etc., Congress did not require the reporting of gambling devices in states where gambling was legal. If Congress was concerned over a national market as in Wickard or Raich, the legality of the conduct in a particular state should not have made a difference. Rather than creating a national scheme to prohibit gambling

60 Five Gambling Devices, etc., 346 U.S. 441 (1953).
61 See Raich, supra note 56, at 24.; The regulation of a national enterprise also applies to an activity, such as the services of a doctor. Congress banned partial birth abortions, even without the jurisdiction hook of medicines or material crossing state lines. On the other hand, in Gonzales v. Oregon, 546 U.S. 243 (2006), the Court upheld the legalization of euthanasia in Oregon in face of the CSA, against an intrusion by the executive. When Congress regulates, “it does so by explicit language in the statute. In the face of the CSA’s silence on the practice of medicine generally and its recognition of state regulation of the medical profession it is difficult to defend the Attorney General’s declaration that the statute impliedly criminalizes physician-assisted suicide.”
devices or wagers in *Five Gambling Devices, etc.*, and *Kahriger* which might justify Congressional prohibition of purely intrastate devises and bets, Congress was merely trying to take over local law enforcement, as pointed out by Mr. Justice Frankfurter in his *Kahriger* dissent.

The *Lopez* Court might have recognized, as explained by the dissent, that the dissemination of guns is part of a clearly national industry whose regulation is within the powers of Congress. In fact, recognition of this plenary interstate commerce power to reach into the states gives meaning to the proscription against the federal government embodied in the Second Amendment. This argument, albeit using another provision of the original document rather than the later enacted Second Amendment, is made by Mr. Justice Story to prove that the commerce clause included regulation of navigation:

> The very exceptions found in the constitution demonstrate this; for it would be absurd, as well as useless, to except from a granted power that, which was not granted, or that, which the words did not comprehend. . . . Why should these be made, if the power itself was not understood to be granted?\(^{52}\)

How could the Second Amendment restrict the federal government from abridging the right to bear arms if not for expansive reach of Congress over the control of guns? Congress was regulating guns, an interstate industry, plain and simple, so that they are not possessed in certain places. Are not guns a controlled substance like the marijuana in *Raich*? What if Congress lifted the federal ban on possessing marijuana except in a school zone? How comprehensive do the regulations have to be in order to be valid under the commerce clause?\(^{53}\)

**D. Incorporation of the Second Amendment**

The Laissez-Faire Court denied the power of Congress to regulate manufacturing and mining under the commerce clause while restricting the regulatory power to the states using substantive due process. The modern

\(^{52}\) See Story, *supra* note 12, at 477 (§ 1059).

\(^{53}\) See *Raich*, *supra* note 56, at 39. Justice Scalia apparently requires the scheme to encompass more than the questionable activity. “*Lopez* and *Morrison* affirm that Congress may not regulate certain ‘purely local’ activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation.”
Court denied the power of Congress to regulate the possession of guns under the commerce clause while restricting the regulatory power of the states using substantive due process. *McDonald v. Chicago*, (2010)\(^64\), incorporated the Second Amendment using substantive due process. Not *all* reasonable people agree that Congress cannot regulate the possession of guns in a school zone, and still, the Court struck down the act of the national legislature. Not *all* reasonable people agree that a state cannot regulate the possession of guns in the home, yet the Court created the Fourteenth Amendment due process right to possess a gun.

What of Mr. Justices Washington, Holmes, Cardozo, and Frankfurter and their test of fundamental rights? Do “citizens of *all* free governments” have the right to bear arms in their homes *everywhere*? Has the right to bear arms in municipalities “been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign?”

*District of Columbia v. Heller* (2008)\(^65\) was a whole different matter. That case interpreted federal power under the Second Amendment rather than creating a new substantive right under the Fourteenth Amendment. *McDonald* is even more perplexing once we apply the *Rule in Heydon’s Case*. The purpose of the Second Amendment was to prevent the federal government from doing a “Lexington and Concord” by trying to seize the local armory. The right to possess a gun in the home, a derivative of the Second Amendment, upon the regulatory power of the states, seems to be another derivative upon a derivative.\(^66\) The Roberts Court, which followed Holmes, Brandeis, Cardozo and Frankfurter in defending the fundamental rights found in the First Amendment, issues the final victory to the grand advocate of wholesale incorporation, Mr. Justice Black!

E. Passive and Non-Economic Activity

1. Obamacare

Recently, perhaps emboldened by *Lopez*, a federal judge invalidated the Patient Protection and Affordable Care Act of 2010, the federal universal health care act: “Congress can[not] regulate inactivity under the Commerce Clause . . . to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting . . [it

\(^{64}\) *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).
\(^{65}\) 554 U.S. 570
\(^{66}\) Incorporation, a derivative of the Fourteenth Amendment, incorporating the derivative of the Second Amendment.
is] commercial and economic in nature. . . .”

This is puzzling. Cannot a state penalize passive activity? If so, then why should Congress not have this power in the area over which it has plenary power, given the huge scheme regulating health care that Congress set up.

The penalty of this passive activity is just as “necessary and proper” to enable Congress to carry out its huge scheme of regulating health care as the federal chartering of the Bank of the United States was necessary and proper for the government’s fiscal operations. The Constitution, “in its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”

2. United States v. Morrison

Morrison involved the question of commerce avoided in both Five Gambling Devices, etc. through statutory interpretation, and by the majority in Kahriger because “Congress ha[d] employed the taxing clause.”

Morrison drew a line over the “regulation of intrastate activity only where that activity is economic in nature.” The Court invalidated part of the Violence Against Women Act of 1994 prohibiting “crimes of violence motivated by gender.”

Congress may not “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” There is no industry or commodity to be regulated associated with gender related violence, as Lopez might have found in the case of guns. There is no jurisdictional hook, such as the crossing of state lines as there was when Mr. Justice Holmes said, “It does not matter whether the supposed evil precedes or follows the [interstate] transportation, it is enough that in the opinion of Congress the transportation encourages the evil. . . .”

The question in Morrison concerned whether Congressional findings regarding the effects on interstate commerce are sufficient “to sustain the constitutionality of Commerce Clause legislation.”

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67 Florida v. The Department of Health and Human Services, Case No.: 3:10-cv-91-RV/EMT, 42 (N.D. Fla. 2011).
68 McCulloch v. Maryland, 17 U.S. 316, 403 (1819).
70 See Morrison, 529 U.S. at 613.
72 See Morrison, 529 U.S. at 617.
73 See Hammer, 247 U.S. at 279-80 (Holmes, J., dissenting).
74 See Morrison, at 614.
from the Court that upheld the Civil Rights Act of 1964, which found the “overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.” *Heart of Atlanta Motel v. United States* (1964). 75

*Morrison* seems consistent with Mr. Justice Frankfurter who held that Congress “cannot constitutionally grapple directly with gambling in the States. . . .” 76 Is Mr. Justice Frankfurter dissent in *Kahriger* peremptory? One can point out that *Kahriger* involved “prosecution for such crimes under State law,” while *Morrison* involved a federal punishment to uniformly punish for effects on commerce. There were no exclusions in the Violence Against Women Act for states that did not criminalize all the acts under their law, such as the wagers in *Kahriger*.

*Morrison* was thus a retreat from the Marshall doctrine. Mr. Chief Justice Marshall flatly denied its kind of reasoning and line drawing in his famous dicta:

> 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 solely, in all representative governments. 77

To Marshall, the power of Congress over interstate commerce was under its own discretion. The *Morrison* Court rejected the “Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.” 78 There is no distinct line between intrastate activity and interstate commerce, as all activity affects each other.

Once decided, *Morrison* should stand. Congress will have to devise what Mr. Justice Scalia called “a more comprehensive scheme of regulation.” 79 A judicial reinterpretation at this point brings to mind Mr. Justice Jackson in *Five Gambling Devises*: “Judicial abstention is especially wholesome where we are considering a penal statute. Our policy in constitutional cases is reinforced by the long tradition and sound reasons

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76 See *Kahriger*, 345 U.S. at 40 (Frankfurter, J. dissenting).
77 See *Gibbons*, 22 U.S. at 194.
78 See *Morrison*, 529 U.S. at 647 (Souter, J. dissenting).
79 See *Raich*, 545 U.S. at 33 (emphasis added).
which admonish against enlargement of criminal statutes by interpretation.  

IV. CONCLUSION

This paper has advanced the view that the Court’s interpretation of the commerce clause has not evolved. Rather, it is Congress’ interpretation of its own power that has changed. From the beginning until 1995, with the exception of the Laissez-Faire era, the Court was content to allow Congress to define the extent of its power. Whereas in the past, Congress understood that it could not ban slavery within the States, or the production of alcohol for intrastate use, in a later era, it found that it could end discrimination within the states, or the production of marijuana for home use.

Proponents of judicial intrusion into the legislative process often quote Marshall’s famous dicta in Marbury, that it “is emphatically the province and duty of the judicial department to say what the law is.” Marbury is remarkable because reasonable people, many whom were the writers of the Constitution, could disagree, and indeed disagreed that the Constitution was not violated. The Marbury dicta never applied to interstate commerce. “Marshall indicated that in his view, congressional power to regulate commercial intercourse extended to all activity having any interstate impact--however indirect.” Lawrence Tribe, American Constitutional Law, Second Edition, Foundation Press, p.306 (1978).

The criticism of Court imposed limitation over commerce by no means implies that Congress should not exercise restraint. Over the last century, we have seen artificial structural changes in our nation, creating a single hegemony, one rule for the whole country. This has undermined freedom, our ability to govern ourselves in communities and our sense of empowerment, far beyond the effects of urbanization and mobility. The legislative branch used its spending power to restrict the states and their subdivisions in determining their own affairs, and its interstate commerce power, as a national solution is demanded on almost every important issue. It intruded into education, a power traditionally reserved to the States, and effectively replaced patriotism with global competition as the purpose of public schooling, holding teachers accountable for math, reading and science while ignoring American history and civics. The country as a whole is not more divided now than in the past, just less tolerant of diversity in practice. People in Texas always differed from people in New York, but those differences were reserved to the States, not fought out in Washington.

10 Five Gambling Devices, 346 U.S. at 449.