The Constitution Remains in Exile: The Supreme Court’s Shift to the Right has not Signaled a Revival of its Pre-New Deal Commerce Clause Jurisprudence

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“At least through the Rehnquist Court- no Supreme Court justice seriously questioned the national government’s power to pursue the New Deal’s goals. Except, of course, Justice Thomas.”¹ During his 1991 Supreme Court confirmation hearings, Justice Clarence Thomas expressed his adherence to a radically different judicial philosophy than the other members of the Court. The philosophy to which Thomas subscribes has been termed by Cass Sunstein and Jeffrey Rosen as the “Constitution in Exile movement.”² The phrase “Constitution in Exile” was derived from a book review written in 1995 by Douglas Ginsburg.³ Ginsburg used the phrase “Constitution in Exile” to condemn the Court’s post-New Deal movement away from the fundamental legal doctrines that had imposed firm constraints on state and federal power prior to that time.⁴ One of the key proponents of this school of thought is Professor Richard Epstein. Epstein believes that the Court’s legitimate understanding of the Constitution disappeared sometime between 1937 and 1941, when the Court began to uphold the federal regulatory programs of President Roosevelt’s New Deal.⁵ Proponents of the Constitution in Exile

¹ Mark Tushnet, A Court Divided 328 (W.W. Norton & Co. 2006).


³ Douglas Ginsburg, Delegation Running Riot, in The Cato Rev. of Bus & Gov’t (1995). Ginsberg is a judge on the U.S. Court of Appeals for the D.C. Circuit and one of President Reagan’s Supreme Court nominees.

⁴ See id.

movement believe that many aspects of the modern regulatory state are unconstitutional and assert that Congress exceeded its enumerated constitutional powers by enacting paternalistic legislation and creating independent regulatory agencies.\textsuperscript{6}

Supporters of this theory point to the Court’s undoing of two crucial constraints on the government’s constitutional power to enact economic legislation as sending the Constitution into exile. In the realm of state police power, adherents identify the decline of economic substantive due process as the catalyst of constitutional decline.\textsuperscript{7} Under this doctrine, the Court invalidated both maximum hour laws and minimum wage laws, in the cases of \textit{Lochner v. New York} and \textit{Adkins v. Children’s Hospital} respectively, on the grounds that they violated the liberty of employers and employees to contract free from government interference.\textsuperscript{8} In the sphere of federal authority, proponents of the movement point to the decline of the original understanding of the Commerce Clause as undermining the Framer’s calculated decision to create a federal government of limited and specifically enumerated powers.\textsuperscript{9} Thomas and Epstein abhor the Court’s modern approach whereby Congress is given essentially unrestrained authority to regulate any activity that affects interstate commerce, even if only tangentially and

\textsuperscript{6} See Rosen at 11 (discussing that Epstein wants to disband a number of federal regulatory apparatuses, such as the Environmental Protection Agency).

\textsuperscript{7} See RICHARD A. EPSTEIN, PROPERTY RIGHTS AND THE RULE OF LAW: CLASSICAL LIBERALISM CONFRONTS THE MODERN ADMINISTRATIVE STATE Ch. II 7 (2010) (Stating that the modern administrative state intrudes into “matters where it would be well advised to stay its hand, such as regulating the wages and hours in ordinary labor contracts").

\textsuperscript{8} \textit{Adkins v. Children’s Hospital}, 261 U.S. 525 (1923); \textit{Lochner v. New York}, 198 U.S. 45 (1905).

\textsuperscript{9} See Epstein, \textit{supra} note 5, at 1443 (“The New Deal cases systematically removed each of the previous limitations on the scope of the commerce clause.”).
The primary goal of the Constitution in Exile movement is thus to return to the era prior to the New Deal when the power of the state and federal governments to regulate economic and commercial activity was significantly constrained. Unlike traditional conservatives such as Justice Scalia who value states’ rights and judicial restraint, adherents of this libertarian philosophy actively encourage judges to strike down laws that they personally believe are contrary to the letter and spirit of the Constitution.\footnote{See William M. Wiecek, Justice David J. Brewer and “the Constitution in Exile.” 33 J. SUP. CT. HIST. 170, 171 (2008).}

While advocates of the Constitution in Exile movement subscribe to the belief that dozens of constitutional provisions have been sent into exile since the Court’s 1937 jurisprudential revolution, this Paper will confine its analysis to the Commerce Clause. This Paper seeks to describe and evaluate the success of this libertarian movement in attempting to convince the Court to return to the original understanding of the Commerce Clause. In Part I, this Paper lays out the philosophical underpinnings of the movement, followed by a comprehensive analysis of the legal foundations in Part II. Then in Part III, this Paper argues in opposition to much of the scholarly literature that while the Court has on a few occasions struck down federal regulatory laws enacted within the last 20 years, this does not mean that the Court is beginning to accept the theoretical underpinnings of the Constitution in Exile movement. In other words, the Court has not yet manifested its willingness to cut back on the post-New Deal understanding of the Commerce Clause. In these few cases the Court has simply made decisions using theories and precedents unrelated to the movement’s libertarian approach, which the movement’s proponents happen to agree with. Finally, this Paper concludes by briefly considering the

\footnote{See Rosen at 2.}
suitability of the current Supreme Court’s expansive Commerce Clause jurisprudence from the perspective of ensuring that Congress does not exceed the permissible scope of its enumerated powers.

Part I: The Philosophical Underpinnings of the Movement’s Commerce Clause Framework

The Constitution in Exile movement’s Commerce Clause framework is derived in part from a classical liberal conception of natural law theory. This school of thought can be traced all the way back to the writings of Samuel Pufendorf, Wilhelm von Humboldt, and John Locke in the 17th and 18th Centuries. In *On the Duty of Man and Citizen*, Pufendorf posited the existence of fundamental natural rules promulgated by God himself that have the force of law. These natural laws possess three essential characteristics: they (1) predate the existence of government and do not depend on government approval for their legitimacy, (2) do not vary over time, and (3) do not vary across cultures. Taking Pufendorf’s theory one step further, von Humboldt argued that the full development of human potential presupposes the existence of freedom.

Therefore, government intervention should be sharply curtailed to ensure that it does not crush

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12 Samuel Pufendorf, *On Natural Law, in ON THE DUTY OF MAN AND CITIZEN*, Book 1 Ch. III (1682). While Pufendorf did not speak directly on the subject of the balance of the commerce power between the nation and individual states, his writings indicate his belief that matters of purely local concern should be left to the individual states. See Samuel Pufendorf, *On the Law of Nature and Nations* 1046, 1048 (1688) (“[C]ommercial treaties, taxes which are required for the needs of the individual states, the appointment of magistrates, laws, the right over citizens of life and death, matters of religion, and the like, can without difficulty be left in the province of the individual states.”). This statement provides strong support for the proposition that Pufendorf preferred the conception of the commerce power adopted by the Articles of Confederation to the more expansive grant of power contained in the Constitution.

13 See id. See also Marcus Tullius Cicero, *True Law, in THE COMMONWEALTH* 270 (54 B.C.) (describing natural law theory as one eternal unchangeable law).

14 See Wilhelm von Humboldt, *The Purpose of the State, in THE SPHERE OF DUTIES OF GOV'T* 3-4 (1792).
individuality and stifle innovation.\textsuperscript{15} According to von Humboldt, government intervention is only justifiable for the explicit purpose of promoting security; the government crosses the fine line delineating the permissible scope of its legitimate power when it engages in paternalistic endeavors.\textsuperscript{16} John Locke expressed a similar view in his \textit{Second Treatise of Government}, where Locke proclaimed that all persons possess certain inalienable rights that were not created by government and therefore cannot be usurped by any governmental entity.\textsuperscript{17} While Locke acknowledged that an individual’s absolute freedom to exercise these rights in the “state of nature” was necessarily restricted by the formation of governments, Locke adamantly emphasized that the narrow purpose of government was to secure these rights from unreasonable interference.\textsuperscript{18}

Applying natural law theory to the context of commerce, it can be implied that this theory would support a categorical prohibition on government regulation of activities that are purely local in nature, such as manufacturing. Such activities have a negligible, if any effect at all on the national economy, and so placing restrictions on these activities would in the words of von Humboldt, “superinduce national uniformity, and a constrained and unnatural manner of

\textsuperscript{15} See id.

\textsuperscript{16} See id.

\textsuperscript{17} John Locke, \textit{Of the State of Nature, in Second Treatise of Government}, Section 6 (1690) (“The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker.”).

\textsuperscript{18} John Locke, \textit{Of the Beginning of Political Societies, in Second Treatise of Government}, Section 95 (1690) (“The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.”).
action.” It is important to note that this position was not confined to the natural law theorists. Indeed, even David Hume concurred with this viewpoint articulating in his essay *Of Commerce* that “commerce” does not encompass local activities such as manufacturing.20

The views espoused by these philosophers had a profound influence on the understanding of commerce adopted by the Framers of the Constitution. For example, in *Federalist No. 11*, Alexander Hamilton adopted Hume’s narrow definition of commerce, articulating that the word “commerce” was commonly understood to refer only to trade.21 According to Epstein, Hamilton believed that jurisdictional limits on Congress’ Article I enumerated powers, such as a narrow conception of “commerce,” served as a more effective guarantor of individual rights than the enumeration of a bill of rights itself, since only the former prevented the federal government from exercising plenary power over commercial activity.22 Furthermore, Randy Barnett asserts that the *Declaration of Independence* itself is a document based primarily on libertarian values.23 Not only does the Declaration enumerate individual rights in accordance with a classical liberal conception of natural rights,24 but it contains a detailed list of grievances against the British monarchy, evidencing that the United States government would be based on the principle of

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19 von Humboldt at 3.

20 See Epstein, *supra* note 6 (discussing that Hume placed the idea of commerce in opposition to manufacturing).

21 See ALEXANDER HAMILTON, THE FEDERALIST NO. 11 (1787); see also ALEXANDER HAMILTON, THE FEDERALIST NO. 36 (1788) (referring to agriculture, commerce, and manufacturing as three distinct activities).


24 DECLARATION OF INDEPENDENCE ¶ 2 (1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).
limited government in stark reaction to the tyranny of the British monarchy. It would be wholly inconsistent with this principle to provide the federal government with a boundless police power to restrict economic rights at its will.

The first generation of independent American citizens expressed well-founded skepticism about placing significant power into the hands of a federal legislature. Thus, when the thirteen states ratified the Articles of Confederation in 1781, this document established a “firm league of friendship” between the sovereign states. Under the Articles, the states were viewed as sovereign entities and their status as components of a much larger Union was assigned only secondary importance. It naturally followed from this arrangement that the Articles only assigned a few limited powers to the Confederation Congress, which did not include the power to tax or the power to regulate interstate or foreign commerce. Under the Articles, Congress had no authority whatsoever to regulate trade and commercial activity among the several states, and thus this power was reserved exclusively to the individual states. Echoing the Articles of Confederation, Thomas Jefferson cautioned against investing the newly-formed national government with expansive authority to provide for the well-being (as opposed to security) of its citizens, stating that “a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and

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25 See Barnett at 9-10.

26 ARTICLES OF CONFEDERATION art. II (1781) (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”).

improvement, and shall not take from the mouth of labor the bread it has earned.”

In language strikingly similar to von Humboldt, Jefferson wholeheartedly adopted the natural law framework of government, drawing a crucial distinction between the permissible state end of securing the rights that predated the existence of government and the forbidden objective of legislating from the perspective of a concerned parent attempting to ensure the welfare of its feeble child.

One final source of support for the position that the Framers were heavily influenced by the limited government mentality of classical liberal thinkers is the inclusion of the Tenth Amendment in the Bill of Rights. The Tenth Amendment’s reservation of “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states … to the States respectively, or to the people” makes crystal clear the Framers’ desire to reserve to the American people all powers except for those expressly delegated to the national government in Articles I, II, and III of the Constitution. Barnett considers the ratification of the Tenth Amendment as incontrovertible evidence that the Constitution embodies a libertarian outlook.

The upshot of this philosophical discussion is that there is very strong support for the contention that the Framers espoused the belief that “government has no legitimate power to act as Nanny to protect us from ourselves or from making stupid decisions in what we buy, use or ingest or how we choose to live our lives.” In other words, in the absence of fraud or coercion, there is no legitimate reason for the national government to thrust itself into the voluntary economic


29 U.S. CONST. amend. X.

30 See Barnett at 32 (Asserting that the Constitution, at least under its original understanding, “may be the most libertarian governing document ever actually enacted into law.”).

31 Bergland at 510.
dealings of localized individuals. Up until the time of the New Deal, this philosophy based on the twin libertarian values of limited government and rigorously protecting economic liberty in order to facilitate individual advancement prevailed in the Supreme Court’s Commerce Clause jurisprudence.

Part II: The Legal Foundations of the Movement’s Commerce Clause Framework

Just as economic substantive due process provides the basis for the movement’s jurisprudential approach in the realm of a state’s exercise of its police powers, the Court’s original understanding of the Commerce Clause serves as the foundation for the movement’s analytical framework adopted in the context of federal authority. The text of the Commerce Clause reads in relevant part, “[t]he Congress shall have Power … [t]o regulate Commerce … among the several States.” Prior to the New Deal, the Court construed the Commerce Clause narrowly, granting Congress the authority to regulate the channels and instrumentalities of

32 Note on the history and decline of economic substantive due process: From the turn of the century until 1937, the Court placed a special emphasis on the word “liberty” contained in the Fourteenth Amendment Due Process Clause in order to strike down economic legislation enacted by the states. For example, in *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a New York statute providing that no employee of a bakery could work more than 60 hours per week or 12 hours per day. The Court construed the liberty component of the Due Process Clause to encompass the substantive constitutional right of employers and employees to contract free from unreasonable government interference. Subsequently in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), the Court applied this doctrine in order to invalidate a minimum wage law for women and children. However, due to the effects of the Great Depression and President Roosevelt’s New Deal initiatives, coupled with the Court’s newfound concern with inequalities in bargaining power between employers and employees, the Court soon reversed course from *Lochner* and its progeny, holding that the right to freedom of contract is not included within the liberty component of the Due Process Clause. *See Nebbia v. New York*, 291 U.S. 502 (1934) (upholding state law setting minimum and maximum prices for milk); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding state minimum wage law for women). From this point forward, the Court subjected laws burdening economic rights to deferential rational basis review. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955) (upholding state law allowing optometrists but not opticians to fit lenses under rational basis review). In fact, the Court has not sustained economic rights under substantive due process since 1937. *See Robert G. McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 38 (1962).

33 *U.S. Const.* art. I, § 8, cl. 3.
interstate commerce and goods shipped in interstate commerce, but not intrastate or local commercial matters only incidentally affecting interstate commerce. The first case to comprehensively demarcate the scope and limits of Congress commerce power was *Gibbons v. Ogden* in 1824. *Gibbons* was a landmark case in which Chief Justice Marshall declared that Congress possesses the power to regulate interstate commerce. Marshall’s opinion focused on defining two key terms contained in the Commerce Clause: (1) “commerce” and (2) “among.” Marshall articulated that “commerce” encompassed all forms of trade among the states, asserting that “[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse.” This section of Marshall’s opinion, defining commerce to include trade and navigation, is largely uncontroversial. On the other hand, Marshall’s discussion of the scope of the word “among” remains the focal point of the Commerce Clause debate between proponents of big government and classical liberals today. Marshall delineated the scope of the term as follows: “[c]ommerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”

This broad and ambiguous language has been misinterpreted by legal scholars who theorize that Congress’ commerce power extends to essentially any purpose, as long as it can be shown that the activity sought to be regulated has at least an incidental effect on interstate commerce. For example, Laurence Tribe suggests that Chief Justice Marshall intended to provide

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35 See *Gibbons v. Ogden*, 22 U.S. 1, 2 (1824).

36 Id. at 189.

37 See Mark at 674.

38 *Gibbons*, 22 U.S. at 194.
Congress with a “plenary power” to regulate commercial intercourse, including local activities having only an indirect interstate effect. Tribe’s understanding of Marshall’s seminal opinion is incorrect. In his opinion, Marshall acknowledged a significant limitation on Congress’ exercise of the commerce power: although Congress possesses the authority to regulate economic activities which affect the entire nation, “[t]he completely internal commerce of a State … may be considered as reserved for the State itself.”

Just as important to Marshall’s Commerce Clause framework as the principle that Congress has the power to regulate the channels and instrumentalities of interstate commerce is the tenet that Congress has no power whatsoever to regulate commercial activities that are purely intrastate in nature. Thus, the rule established in Gibbons can be accurately stated as follows: (1) Congress has the power to regulate the channels and instrumentalities of interstate commerce; (2) Congress cannot regulate purely intrastate or internal commerce; and (3) Congress has some power to regulate intrastate commercial activities that affect interstate commerce. Although Gibbons left the scope of this third category unresolved, Justice Marshall’s conception of the Commerce Clause is a far cry from the unfettered construction of the clause adopted by the post-New Deal Court.

39 See Laurence Tribe, American Constitutional Law § 5-4, at 232.
40 Gibbons, 22 U.S. at 195.
41 The channels and instrumentalities of interstate commerce are the methods of transporting goods across state lines. These include roads, rivers, railroads, and the sky. It is indisputable that it is within Congress’ power to regulate commercial activity on federal highways, for example. See Epstein, supra note 5, at 1420-21.
42 See id. at 1407 (“The principle that the power of Congress did not extend to the internal commerce of the state was as important to the overall scheme as the recognition that the power of Congress extended to interstate commerce.”).
From the issuance of the *Gibbons* decision in 1824 up until the time of the New Deal, Congress’ commerce power was construed relatively narrowly by the Court. For instance, in *United States v. E.C. Knight Company*, the Court considered whether Congress could prohibit the acquisition of four Pennsylvania sugar manufacturers by a very large New Jersey sugar manufacturer under the *Sherman Act*. Writing for the Court, Chief Justice Fuller held that the federal government had no authority under the *Sherman Act* to regulate the merger since it did not implicate interstate commerce. In so holding, Fuller promulgated two essential principles which would dominate the Court’s Commerce Clause jurisprudence until 1937. The first was the “direct effects test:” Congress only has the constitutional authority to regulate intrastate or local economic activities that directly affect interstate commerce. Fuller noted that the parties to the merger did not manifest “any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected” was insufficient to sustain Congress’ commerce power.

The second principle was the crucial distinction between commerce on the one hand, and manufacturing on the other. Fuller articulated that while the sale and shipment of goods in interstate commerce fell within the scope of the Commerce Clause, local manufacturing

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43 *United States v. E.C. Knight Co.*, 156 U.S. 1, 9 (1895) (Stating that the *Sherman Act* prohibited contracts “in restraint of trade or commerce among the several states.”).

44 *Id.* at 17.

45 *See* Steven K. Balman, *Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause*, 41 TULSA L. REV. 125, 139 (2005) (“E.C. Knight posited a manufacturing/commerce dichotomy and made a distinction between direct effects on commerce (proper subjects of the commerce power) and indirect effects on commerce (matters outside the scope of the commerce power).”).

46 *E.C. Knight*, 156 U.S. at 17.
activities did not.\footnote{47}{Id. at 13 (“The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce.”).} Applying this principle to the conduct of the parties, Fuller concluded that Congress could not regulate the production and sales of the sugar monopoly without intruding into the realm of manufacturing.\footnote{48}{Id. at 17.}

Similarly, in the 1918 case of \textit{Hammer v. Dagenhart}, the Court invalidated a federal law forbidding the shipment in interstate commerce of goods manufactured in any plant that used child labor.\footnote{49}{See Epstein, supra note 6, at 1427 (discussing that child labor was defined by the act as the employment of children under the age of fourteen).} The Court found that the act regulated an activity that was purely local in nature.\footnote{50}{\textit{Hammer v. Dagenhart}, 247 U.S. 251, 271-72 (1918) (“The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states.”) (emphasis added).} This act was not an effort to control the type or quality of the goods produced, but rather the conditions under which the goods were manufactured. Thus, \textit{Hammer} erected a barrier prohibiting Congress from using its commerce power in order to prescribe the conditions under which workers performed their jobs.\footnote{51}{See Mark at 678.} Despite the fact that the Court accorded Congress with substantial latitude to regulate the transportation of goods across state lines during this era,\footnote{52}{Despite the Court’s consistent application of a narrow conception of the Commerce Clause during this era, the Court’s ruling in the 1903 case of \textit{Champion v. Ames}, 188 U.S. 321 (1903), foreshadowed the later adoption of a much more expansive Commerce Clause jurisprudence. In \textit{Champion}, the Court upheld Congress’ authority to prohibit the transportation of lottery tickets among the several states. \textit{Id.} at 327. According to Epstein, the significance of \textit{Champion} is that the law’s purpose was not to protect interstate commerce, but rather to regulate individual conduct far removed from the commercial sphere. See Epstein, supra note 5, at 1422. Thus, \textit{Champion} demonstrated for the first time that \textit{Congress could use the Commerce Clause as a vehicle to regulate public health, safety, and morals, a responsibility traditionally reserved to the states under their police power, under the pretext of regulating commerce across state lines.} As libertarian scholar Douglas Kmiec aptly put it, the \textit{Champion} decision “took the commerce power beyond commerce.” Douglas W. Kmiec, \textit{Gonzales v. Raich: Wickard v. Filburn}}
nevertheless the Court’s relatively strict construction of the Commerce Clause unequivocally denied Congress the authority to exercise a plenary police power over local commercial activity.\footnote{53}

Proponents of the Constitution in Exile movement identify the Court’s deference to Congress during the latter stages of President Roosevelt’s New Deal as the event that ultimately sent the Commerce Clause into exile. During this period, the Court espoused an extraordinarily expansive view of Congress’ commerce power, effectively providing Congress with the authority to regulate myriad matters by reference to the Commerce Clause. In response largely to the horrors of the Great Depression, coupled with the enormous practical implications of President Roosevelt’s proposed court packing plan for the future institutional legitimacy of the Court, a bare majority of the Court reversed course and began upholding aspects of the New Deal.\footnote{54} In the words of Epstein, the New Deal was not a return to the proper understanding of the

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\textit{Displaced}, 2004 \textsc{Cato Sup. Ct. Rev.} 71, 83 (2004). \textit{See also} Balman at 140 ("Champion … is significant because it recognized a national "police power" that was analogous to the state "police power." Accordingly, the commerce power was not limited to statutes that advanced or protected interstate commerce, Congress could regulate and protect the public morality."); Epstein, supra note 5, at 1423 ("\textit{Champion} is perhaps the first case in which Congress had consciously sought to exploit the outer reaches of the commerce clause in ways that might trench upon the power of the states.").

\footnote{53} \textit{See, e.g., A.L.A. Schechter Poultry Corp. v. United States}, 295 U.S. 495 (1935) (In what has commonly become known as the "Sick Chicken Case," the Court considered the question of whether the \textit{National Industry Recovery Act} ("NIRA"), which authorized the president to approve "codes of fair competition" developed by boards from various industries, exceeded Congress’ power under the Commerce Clause. The Schechters, who purchased live poultry from out-of-state, slaughtered them, and then sold sick chickens to butchers, were convicted under the act. Applying the \textit{E.C. Knight} direct impact test, the Court struck down NIRA holding that neither the slaughtering of chickens nor the sales to butchers constituted transactions in interstate commerce.).

\footnote{54} \textit{See} Balman at 143.
Commerce Clause but rather “a sharp departure from previous case law, and one that moved federal power far beyond anything Chief Justice Marshall had in mind.” 55

Adherents of the movement point to three decisions of the Court in particular that facilitated the decline of the true understanding of the Commerce Clause. The first case to send the Constitution into exile was NLRB v. Jones & Laughlin Steel Corp. 56 In Jones & Laughlin, the Court upheld the National Labor Relations Act, which protected the rights of employees to enter into collective bargaining agreements. 57 The significance of the Court’s holding lies in the fact that the collective bargaining agreements protected by the act related only to matters of local employment and arguably did not burden interstate commerce at all. 58 Writing for the Court, Chief Justice Hughes justified this radical departure from past precedent by establishing a revolutionary rule with dramatic implications for the future of the Commerce Clause: that activities which are wholly intrastate in nature, such as individual collective bargaining contracts in a local industry, can be regulated by Congress if they substantially affect interstate commerce. 59 Another equally important implication of Jones & Laughlin was the Court’s

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55 Epstein, supra note 5, at 4000. See also id. at 1443 (discussing that the Court “systematically removed” many of the previous limitations on the reach of the Commerce Clause).

56 301 U.S. 1 (1937).

57 See id. at 37.

58 Epstein, supra note 5, at 1446.

59 See Jones & Laughlin, 301 U.S. at 41 (The Court found that the purely intrastate activities of unionizing and striking had a close relation to interstate commerce, stating that “[t]he stoppage of [work] by industrial strife would have a most serious effect upon interstate commerce … [I]t is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic.”).
abandonment of the longstanding manufacturing-commerce distinction first announced in *E.C. Knight*.  

Subsequently in *United States v. Darby*, the Court upheld one of the centerpieces of President Roosevelt’s New Deal, the *Fair Labor Standards Act* (“FLSA”), against a Commerce Clause challenge. The FLSA imposed minimum wage and overtime requirements on employers engaged in the manufacturing of goods sold in interstate commerce. Applying the “substantial effects” test formulated in *Jones & Laughlin*, the Court effectively subjected the act to rational basis review and deferred to Congress’ judgment that the act substantially affected interstate commerce. Manifesting the astonishing extent to which the Court’s Commerce Clause jurisprudence had evolved over the past two decades, the Court even went so far as to explicitly overrule *Hammer*.

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60 See id at 34-5 (The Court implied that the manufacturing-commerce distinction was no longer tenable in light of the fact that the modern manufacturing process involved “a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country- a definite and well-understood course of business.”).

61 312 U.S. 100 (1941).

62 See Balman at 144.

63 See Epstein, supra note 5, at 1448 (Not only did the Court decline to scrutinize Congress’ findings of substantial interstate commerce affect, but as Epstein notes, it altogether refused to inquire into the underlying motives for Congress’ decision, thereby realizing the fear first expressed all the way back in 1903 in *Champion*, that the Commerce Clause would someday be used as a pretext for Congress to pursue to inappropriate non-economic ends. “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”) (quoting *Darby*, 312 U.S. at 115) (emphasis added).

64 312 U.S. at 116-17 (“The conclusion is inescapable that Hammer v. Dagenhart, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.”).
The final case in the Court’s New Deal Commerce Clause revolution was *Wickard v. Filburn.* 65 In *Wickard*, the Court upheld the *Agricultural Adjustment Act*, which permitted the Secretary of Agriculture to set wheat production limits. 66 Filburn, a farmer who exceeded his individual allotment by planting excess wheat solely for *home consumption*, was fined under the act. 67 Writing for the Court, Justice Jackson completely disregarded the longstanding distinction between direct and indirect effects on commerce, 68 and promulgated what became known as the “aggregate effects doctrine:” 69 Congress’ commerce power extends to wholly intrastate activities of similarly situated individuals such as Filburn, which while trivial in and of themselves, when aggregated together as a class of activities could be said to have a “substantial effect on price and market conditions.” 70 Coupling this newly crafted doctrine with the highly deferential rational basis standard, 71 under which the Court refuses to scrutinize congressional findings of substantial interstate commerce effect, the *Wickard* majority effectively allowed Congress to use the Commerce Clause as a pretext to regulate the public health, safety, and morals, a power traditionally reserved to the states under their police power.

65 317 U.S. 111 (1942).

66 See id. at 127-28.

67 See id. at 114.

68 See Balman at 145.

69 See Mark at 680.

70 See *Wickard*, 317 U.S. at 127-28 (“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.”).

71 See Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 509-17 (2007) (asserting that beginning with *Wickard*, the Court tended to apply the rational basis test to evaluate the government’s claim that a given activity substantially affects interstate commerce). See also id. at 519 (arguing that the rational basis test is an extremely permissive and deferential test that almost any proffered government justification will satisfy).
Under this judicially crafted “aggregate effects doctrine,” hardly anything is considered to be a purely local activity that does not have any effect whatsoever on interstate commerce and is beyond the reach of Congress’ commerce power. One commentator has suggested that after Wickard, Congress could even regulate the prices charged by two children setting up a neighborhood lemonade stand.72 For ardent libertarian supporters of the Constitution in Exile movement, the Wickard decision signaled the end of federalism in the realm of the Court’s Commerce Clause jurisprudence. For instance, Barnett declared that after Wickard, “the enumeration of powers ha[d] largely been vitiated as a limitation on the scope of the national government.”73

The libertarians’ concerns were not unwarranted as shown by the fact that Congress began using its commerce power to regulate matters far removed from the context of nationwide

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72 See Balman at 145 (“Two children, Rachel and Josh, set up a neighborhood lemonade stand. After Wickard, could Congress regulate their prices? Does it matter that their stand has, at most, a trivial effect on the economy?”) (quoting NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 132 (4th ed., Lexisnexis 2002).

economic and commercial activity, such as discrimination by private business owners.\textsuperscript{74} In light of the Court’s expansive construction of the Commerce Clause, Epstein poignantly argues that a theory that allows Congress to regulate any activity that even indirectly burdens commerce does away with the fundamental constitutional principle that the federal government is one of limited and enumerated powers.\textsuperscript{75} The upshot of the New Deal revolution is that “commerce” was effectively redefined as a national police power that included every stage of the commerce process and any activity that potentially affected interstate commerce, even if only cumulatively and inferentially. To the dismay of the movement, at least until 1995, this boundless conception of the Commerce Clause carried the day.

**Part III: Despite the Rehnquist Court’s “New Federalism,” the Constitution in Exile Theory Has Not Yet Been Accepted by the Court**

According to many commentators, the expansive post-New Deal interpretation of the Commerce Clause, giving Congress essentially unlimited power to regulate interstate and even intrastate commerce, came to a screeching halt in the Rehnquist Court’s 1995 decision in *United States v. Lopez*.\textsuperscript{76} Before analyzing *Lopez* however, it is important to provide a brief background

\textsuperscript{74} For example, in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Court upheld the public accommodations provision of the *Civil Rights Act of 1964*, which prohibited discrimination in private establishments such as hotels, restaurants, and bars. See *Heart of Atlanta Motel*, 379 U.S. at 247-50. While conceding that a single private business owner’s act of discrimination is purely a local non-commercial matter, the Court nevertheless utilized *Wickard’s* aggregating principle to find that discrimination by private business owners as a whole has a detrimental effect on interstate commerce, since it discourages minorities from traveling from state to state. See id. at 273 (“I agree that as applied to this motel and this restaurant the Act is a valid exercise of congressional power, in the case of the motel because the record amply demonstrates that its practice of discrimination tended directly to interfere with interstate travel”) (Black, J., concurring). Evidencing the post-New Deal Court’s unwillingness to thoroughly scrutinize Congress’ use of the commerce power, the Court refused to question Congress’ findings of substantial interstate commerce effect. See *Mark* at 681.

\textsuperscript{75} See Epstein, *supra* note 5, at 1396.

\textsuperscript{76} 514 U.S. 549 (1995).
description of the overarching jurisprudential approach adopted by the Rehnquist Court. The predominately conservative Rehnquist Court initiated a movement termed by legal scholars as the “New Federalism”\footnote{See Balman at 145-50.} or the “federalism revolution.”\footnote{See \textit{Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court} 101 (Doubleday 2007).} Throughout the 1990s, Chief Justice Rehnquist along with Justices Kennedy, O’Connor, Scalia, and especially Thomas, made a concerted effort to revitalize the doctrine of states’ rights.\footnote{See id.} In stark contrast to the \textit{Wickard} Court’s deference to Congress, the Rehnquist Court erected a doctrine known as “dual federalism,” under which a federal law was required to pass through two hurdles in order to be constitutional: (1) it must be linked to one of Congress’ enumerated powers and (2) it cannot unduly impinge on state sovereignty.\footnote{See John Kincaid, \textit{From Cooperative to Coercive Federalism}, 509 Annals of the American Academy of Political and Social Science 139, 140 (1990).} The addition of this second prong to the traditional legal framework for evaluating acts of Congress served to circumscribe Congress’ authority to enact legislation intruding into the sphere of state sovereignty to an extent not seen since prior to the New Deal. According to Linda Greenhouse, the Court’s decisions during this period indicated “a narrow majority's determination to reconfigure the balance between state and Federal authority in favor of the states.”\footnote{Linda Greenhouse, \textit{Federalism: States are Given New Legal Shield by Supreme Court}, N.Y. Times, June 24, 1999.} The Commerce Clause approach adopted by the Rehnquist Court is appropriately summed up by Chief Justice Rehnquist’s pronouncement that “[s]imply because
Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”

Although a number of prominent legal scholars including Steven Calabresi have asserted that the Rehnquist Court’s “New Federalism” exhibits the judiciary’s newfound commitment to significantly curtailing Congress’ commerce power to pre-New Deal levels, this Paper asserts that this position is entirely without merit. The two cases that these scholars rely upon to support their argument, United States v. Lopez and United States v. Morrison, do not demonstrate a resurgence of the pre-Wickard view that Congress has very little power to regulate intrastate economic activity, but rather evidence the Rehnquist Court’s refusal to no longer blindly defer to the findings of Congress. In other words, Wickard’s expansive use of the “aggregate effects” doctrine has not been overruled, but instead has only undergone slight modification. Despite the fact that Epstein, Barnett, and other passionate libertarians have worked tirelessly attempting to

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persuade the Court to adopt the movement’s Commerce Clause philosophy over the past twenty years, a majority of the Court has thus far refused to embrace the movement’s ideals. As of today, Justice Thomas is the only sitting justice on the Court who has explicitly subscribed to the movement’s viewpoint. Although the Court has shifted steadily to the right over the past several decades, divisions among the Court’s conservatives have ultimately prevented the theory from taking hold.\textsuperscript{86} Therefore, there would have to be a major shift in the Court’s membership in order for this libertarian view of the Commerce Clause to command the Court.

Legal scholars point to \textit{United States v. Lopez} as evidence that the movement is beginning to have a noticeable impact on the Court’s Commerce Clause jurisprudence. In \textit{Lopez}, the Court invalidated the \textit{Gun-Free School Zones Act} (“GFSZA”), which made it a federal crime to possess a gun in close proximity to a school.\textsuperscript{87} Writing for the Court, Chief Justice Rehnquist placed substantial weight on the fact that Congress did not include \textit{any findings} in the legislation linking the possession of a weapon on school grounds to interstate commerce.\textsuperscript{88} “Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce; and there is \textit{no requirement [in the legislation] that his possession of the

\textsuperscript{86} The main dispute among the Court’s conservatives has been over the proper role of the judiciary under Article III of the Constitution. On one hand, Justice Thomas has counseled his colleagues to actively strike down laws that are repugnant to the Constitution. On the other hand, the ardent originalist, Justice Scalia, is an outspoken critic of judicial activism. Scalia has urged his colleagues to restrain themselves from overturning legislation in the name of ambiguous economic rights that are not clearly enumerated in the Constitution. See Rosen at 7. While Scalia certainly has reservations about the Court’s expansive Commerce Clause jurisprudence, in his mind these reservations must take a back seat to the crucial value of judicial restraint. The clash between Justice Thomas’ enthusiastic support for judicial activism and the conventional wisdom among conservatives that the principle of \textit{stare decisis} must be respected has prevented a libertarian conception of the Commerce Clause from commanding a majority of the Court.

\textsuperscript{87} See \textit{Lopez}, 514 U.S. at 551.

\textsuperscript{88} \textit{ld}. at 567.
firearm have any concrete ties to interstate commerce.”\textsuperscript{89} Furthermore, Rehnquist articulated that the possession of a gun in a school zone has nothing to do with economic activity at all and therefore falls outside the scope of even the expansive post-New Deal conception of the Commerce Clause.\textsuperscript{90} Since the GFSZA was a criminal statute lacking any perceptible commercial character,\textsuperscript{91} the Court dismissed the government’s argument that Wickard’s “aggregate effects” doctrine could be used to sustain the statute.\textsuperscript{92}

The primary significance of the \textit{Lopez} decision is that it marks the first time since 1937 that the Court has struck down a federal law on Commerce Clause grounds.\textsuperscript{93} Richard Epstein heralded \textit{Lopez} as a revolutionary decision that provided a vital opportunity for the Court to finally “usher in a new age of constitutional restraint.”\textsuperscript{94} Although proponents of the Constitution in Exile movement including Epstein concurred with the majority’s invalidation of the GFSZA, the Court manifestly refused to ground its decision in the anti-New Deal philosophy advocated by the libertarian movement. The Court declined to revive the \textit{E.C. Knight} “direct impact” test and instead struck down the act merely because Congress failed to produce any findings whatsoever linking the act to interstate commerce. Since Congress didn’t include any findings in

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} \textit{See id.} at 561 (Articulating that the activity sought to be regulated had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”).

\textsuperscript{91} \textit{See id.}

\textsuperscript{92} \textit{See id.} at 564 (discussing that the GFSZA allows Congress to intrude on the sovereign sphere of the states in regulating criminal law and expressing concern that affirming the act would extend this unlimited power to other areas, such as education); Mark at 684 (“Possession of a weapon in a school zone was not even remotely related to an economic enterprise.”).


\textsuperscript{94} Epstein, \textit{supra} note 74, at 167.
the GFSZA, even if the Court had wanted to defer to Congress as it had done in previous Commerce Clause disputes, it essentially had nothing to defer to. The Court’s opinion implies two key principles going forward. The first represents a minor inroad on the post-New Deal conception of the commerce power: that the Court would no longer refuse to question Congress’ judgment that a particular activity has a substantial interstate commerce effect. On the other hand, the second evidences the Court’s unambiguous affirmation of the New Deal line of cases: that if Congress had produced such evidence of a substantial but indirect interstate commerce effect in *Lopez*, the act would have been upheld, notwithstanding the fact that such a local activity did not have a direct impact on interstate commerce. In fact, in the aftermath of *Lopez*, Congress reenacted the GFSZA, making it a federal crime to possess a weapon in a school zone if the weapon has been transported in interstate commerce, thereby providing the evidentiary link missing in the original statute.95

In addition, the *Lopez* Court promulgated a second slight encroachment on Congress’ commerce power by limiting the use of *Wickard*’s “aggregate effects” doctrine. To the disappointment of libertarian scholars, however, the Court did not overrule *Wickard*’s “aggregate effects” doctrine, but rather held that it was inapplicable where the activity being regulated is non-economic in nature.96 Incontrovertible evidence of the *Lopez* majority’s unwillingness to restore the pre-New Deal conception of the Commerce Clause can be seen by Rehnquist’s attempt to distinguish *Wickard* from *Lopez*, articulating that “[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved

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96 See *Lopez*, 514 U.S. at 560 (The Court clearly held that the *Wickard* doctrine was still applicable where the activity being regulated is economic in nature, stating “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”).
economic activity in a way that the possession of a gun in a school zone does not. “97 Thus, while Lopez established the principle that the Court would no longer blindly defer to Congress’ judgment, especially in the absence of congressional findings of substantial interstate commerce effect,98 the Lopez majority provided no indication of its desire to resurrect the restrictive pre-New Deal interpretation of the Commerce Clause.

The only tangible influence of the movement’s jurisprudential approach on the Lopez decision can be seen in Justice Thomas’ concurrence. Thomas accepted the notion espoused by Epstein and Barnett that the Court’s Commerce Clause jurisprudence has been in error since the time of the New Deal, stating that “our case law has drifted far from the original understanding of the Commerce Clause.”99 However, none of Thomas’ conservative colleagues agreed to join him in calling for a sweeping overhaul of the last seventy years of Commerce Clause jurisprudence.

Despite the shortcomings of Lopez from a libertarian perspective, Arthur Mark identifies the Court’s subsequent decision in United States v. Morrison as demonstrating that the Court had undertaken a “vigorous” reexamination of the scope of Congress’ commerce power.100 In Morrison, the Court invalidated a provision of the Violence Against Women Act (“VAWA”) that created a federal criminal cause of action for victims of gender-motivated crimes.101 A number of

97 Id.

98 See Adler at 758 (“That a given activity sufficiently affected commerce would no longer be accepted solely on Congress’s say so. The Court would make its own independent, if still deferential, assessment.”) (emphasis added).

99 Lopez, 514 U.S. at 584 (Thomas, J., concurring).

100 See Mark at 672.

101 See Morrison, 529 U.S. at 627.
legal scholars have asserted that *Morrison* came much closer than *Lopez* to restricting the scope of Congress’ commerce power to pre-New Deal levels,\(^{102}\) since unlike the GFSZA, the VAWA included extensive findings evidencing that gender-based violence discouraged interstate travel and employment.\(^{103}\) Even in the face of this “mountain of data” compiled by Congress\(^{104}\), the majority refused to apply *Wickard’s* aggregation principle.\(^{105}\) However, the position taken by these scholars is entirely unsupported. The *Morrison* majority simply applied the categorical rule established in *Lopez*, that *Wickard’s* “aggregate effects” doctrine can only be applied to uphold regulations that are economic in nature, to the unique factual circumstances of the VAWA. Since the VAWA did not regulate commercial activity such as the local production of wheat, but rather local incidents of non-economic, violent criminal conduct, the Court rejected Congress’ speculative inferences regarding the effects of gender-based violence on interstate commerce.\(^{106}\)

Taken together, *Lopez* and *Morrison* establish that the Commerce Clause does not provide Congress with a plenary police power to intrude on the sovereign sphere of the states in regulating criminal conduct that has only an attenuated effect on interstate commerce,\(^{107}\) but they nevertheless do not indicate in any way an intention to return to the pre-New Deal conception of the Commerce Clause. In summary, the original Commerce Clause analytical framework adopted by *Gibbons v. Ogden*, as modified by *Lopez* and *Morrison*, can be restated as follows:

\(^{102}\) See, e.g., Somin at 512 (“The *Morrison* decision went farther than *Lopez* in suggesting that “noneconomic activity cannot be subjected to aggregation analysis.”).

\(^{103}\) See *Morrison*, 529 U.S. at 629-33 (Souter, J., dissenting).

\(^{104}\) Id.

\(^{105}\) See id. at 599.

\(^{106}\) See *Morrison*, 529 U.S. at 599.

\(^{107}\) See Mark at 686.
(1) Congress has the power to regulate the channels and instrumentalities of interstate commerce,
(2) Congress is forbidden from regulating purely intrastate activity having no effect on interstate commerce, and (3) Congress can regulate intrastate activity having a substantial effect on interstate commerce, provided that the activity being regulated is economic or commercial in nature. Additionally under this third prong, Congress must prove that the local economic activity being regulated has more than a merely attenuated or trifling impact on interstate commerce by showing the presence of at least one of the following factors: (a) extensive findings of substantial interstate commerce effect, (b) Wickard’s aggregation principle clearly demonstrates a tight nexus between the regulated activity and substantial effect, or (c) the regulated activity is not traditionally a state concern.\textsuperscript{108}

Under the modern Commerce Clause framework, the Court will no longer go out of its way to “pile inference upon inference”\textsuperscript{109} in order to uphold federal control of activities having only a trivial connection to commerce among the several states.\textsuperscript{110} However, instead of agreeing with the movement that the Commerce Clause began its descent into exile in 1937, the Rehnquist Court simply articulated that in the unique factual scenarios presented by these two cases, Congress did not provide sufficient evidence for the Court to conclude that the regulations bore a reasonable relation to commercial activity. Once again in the \textit{Morrison} case, Justice Thomas filed a concurring opinion passionately urging his colleagues to go beyond the specific situation of the VAWA and reverse the Court’s post-New Deal approach to the Commerce Clause in its

\textsuperscript{108} See \textit{Lopez}, 514 U.S. at 565-68; \textit{Morrison}, 529 U.S. at 625-28.

\textsuperscript{109} \textit{Lopez}, 514 U.S. at 549-50.

\textsuperscript{110} See Somin at 513 (“At the very least, Morrison and Lopez stand for the proposition that the use of aggregation to justify regulation of ‘noneconomic’ activity is strongly disfavored.”).
Therefore, as exemplified by *Lopez* and *Morrison*, the primary impact of the Constitution in Exile movement has been to influence a single outspoken justice to write a few ardent, but largely overlooked, concurring opinions disparaging the previous seventy years of the Court’s Commerce Clause jurisprudence, which no other members of the Court have dared to affix their names to.

**Conclusion**

The last hope for the members of the Constitution in Exile movement to realize their dream of witnessing the Commerce Clause returning from its extended stay in exile came in the 2005 case of *Gonzales v. Raich*, where Randy Barnett represented Angela Raich before the Court. In *Raich*, the Court considered the question of whether Congress’ commerce power extended to prohibiting the intrastate cultivation of marijuana for personal medical use. The Court held that it did, articulating that since the growing of marijuana is inherently an economic activity, the application of *Wickard’s* aggregation principle is appropriate under these circumstances. Thus, instead of analyzing Angela Raich’s cultivation of marijuana for personal medical use in isolation, the Court extrapolated from the individual case of Ms. Raich

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111 See *Morrison*, 549 U.S. at 627 (“[T]he very notion of a “substantial effects” test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases. 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. Until this Court replaces its existing Commerce Clause jurisprudence with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”).

112 545 U.S. 1 (2005).

113 See Rosen at 9.

114 See *Raich*, 545 U.S. at 7.

115 See id. at 17-19 (discussing the striking similarity of the situation faced by Angela Raich to the facts of *Wickard*).
and considered whether the activity taken as a whole substantially affected interstate commerce. The Court asserted that the government’s failure to control the private growing of marijuana would undercut the regulation of the interstate marijuana market, 116 thereby providing the jurisdictional nexus needed to sustain Congress’ exercise of the commerce power. In stark contrast to *Lopez* and *Morrison*, the *Raich* majority largely refused to scrutinize Congress’ findings that the local production of marijuana, even for personal medical use, had a significant impact on the national market. 117

While the issue of what kinds of matters are truly “economic” in character remains an open question after *Raich*, one thing remains crystal clear: if the Court finds that Congress is regulating an “economic” activity, it will apply rational basis review and defer to Congress’ findings that the activity in question is within the reach of the Commerce Clause, regardless of whether the conduct has only a remote or trivial effect on interstate commerce. 118 *Raich* illuminates that once the government satisfies its initial burden of showing that the legislation in question regulates an “economic” activity, as it did in *Raich*, the Court will defer to Congress’ judgment in the absence of extraordinary circumstances. On the other hand, as *Lopez* and *Morrison* demonstrate, when Congress fails to meet its initial burden, the Court will apply a

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116 Id. at 19 (“[T]he concern making it appropriate to include marijuana grown for home consumption in the [legislation enacted by Congress] is the likelihood that the high demand in the interstate market will draw such marijuana into that market.”).

117 See id. at 18-19.

118 See id. at 22 (“We need not determine whether [Raich’s] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”) (emphasis added); see also Adler at 764 (“[S]o long as a statute largely regulates economic or commercial activity … there is no limit to the amount of non-commercial, intrastate activity that may also succumb to federal power so long as Congress enacts a sufficiently expansive regulatory regime.”).
much higher level of scrutiny. The upshot of the contemporary Commerce Clause framework is that the modern Congress has the authority to regulate activities that are personal and even private in nature, so long as these activities can be shown to have at least an indirect effect on interstate commerce. In light of the *Raich* decision, it is apparent that the original understanding of the Commerce Clause subscribed to by adherents of the Constitution in Exile movement had an inconsequential effect on the Rehnquist Court’s Commerce Clause jurisprudence. As Jeffrey Toobin fittingly stated, “The *Lopez* case had suggested that the Court really might cut back on the authority of Congress to pass laws under the Commerce Clause; the Court did no such thing. The Constitution in Exile remained in exile.”

In spite of the fact that the term “commerce” as originally understood was intended to encompass only trade and exchange, the term has been applied over the years to an increasingly broad range of economic activities. While it may not be necessary to return to a pre-

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119 See Somin at 518 (“Although Morrison did not explicitly reject the rational basis test, the majority’s failure to apply the test and [its] explicit imposition of a considerably higher standard of scrutiny strongly suggested that, at the very least, rational basis analysis does not apply to regulations of intrastate, ‘noneconomic’ activity.”).

120 Toobin at 237. This Paper is not alone in taking the position that this libertarian conception of the Commerce Clause had a negligible influence on the Rehnquist Court. See also Somin at 511 (“In Lopez and Morrison, the Supreme Court faced the difficult task of attempting to impose some meaningful limits on Commerce Clause power without launching a frontal attack on post-New Deal precedents that underpin the modern administrative state.”) (emphasis added); Adler at 755, 758 (“Despite the strong reaction, Lopez was a particularly modest opinion.” … “[The Rehnquist Court] failed to challenge any of the existing post-New Deal precedents, preferring instead to reconcile them by distinguishing, and perhaps somewhat redefining them.”); Michael S. Greve, Real Federalism: Why It Matters, How It Could Happen 25 (1999) (Stating that Lopez “did not revive the enumerated powers doctrine of the pre-New Deal era in full regalia.”); Rosen at 8 (“[T]he so-called federalism revolution on the Rehnquist Court did not deliver all of what the proponents of the Constitution in Exile had hoped.”).

121 See Raich, 545 U.S. at 58-59 (Thomas, J., dissenting).
New Deal conception of the Commerce Clause as Epstein suggests\footnote{While practical limits need to be placed on Congress’ commerce power in order to restore the federal government of limited and specifically enumerated powers envisioned by the Framers, Epstein’s perspective would have dramatic implications for constitutional law and the regulatory state. For instance, Epstein’s approach would invalidate the \textit{Civil Rights Act of 1964}, leaving the issue of private acts of discrimination by the owners of public accommodations to be regulated exclusively by contract. See Epstein, \textit{supra} note 5, at 1387 (“The labor statutes, the civil rights statutes, the farm and agricultural statutes, and countless others rest on the commerce power, or more accurately on a construction of the commerce clause that grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly.”). Epstein would even go so far as to invalidate federal statutes regulating child labor. See \textit{id.} at 1430-31 (arguing that child labor statutes cannot be sustained on Commerce Clause grounds since the only proper justification for government intervention in family relations is in cases of abuse or neglect). It is unnecessary to undo the entire post-New Deal regulatory structure in order to ensure that Congress doesn’t exceed the permissible scope of its commerce power.} in order to prevent Congress from regulating every aspect of our personal lives that could theoretically be linked to commercial activity by a creative judge, it is imperative that the Court promulgate identifiable and definite limits on Congress’ commerce power. Under the current amorphous Commerce Clause framework, Congress could potentially regulate the following “economic” activities under its commerce authority: (1) the home consumption of certain kinds of foods or beverages that Congress believes are unhealthy, (2) municipal law enforcement’s efforts to arrest a local drug kingpin, (3) an annual block party held on one of the streets of a small suburban neighborhood at which one of the neighbors grills hot dogs and hamburgers and sells them for $1 each, and even (4) sexual intercourse engaged in by consenting individuals in the privacy of their own home if they use commercially-available contraception. It would be wise for the Court to adopt a narrow definition of “economic” activity, limiting it to situations where certain conduct taken by itself affects interstate commerce, without accounting for the aggregate effects of isolated conduct that could hypothetically affect commerce if all similarly situated persons acted in precisely the same manner, in order to prevent the evisceration of the notion individual liberty
on which our Nation was founded. Judicial endorsement of a limitless national police power is utterly inconsistent with the fundamental notion of a government “of the people, by the people, [and] for the people.”123 Unfortunately, as demonstrated by the fact that even Justice Scalia concurred with the Court’s application of the aggregation principle in *Raich*,124 it is highly unlikely that a more prudent Commerce Clause approach will be accepted by a majority of the Court in the foreseeable future.

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123 President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

124 See *Raich*, 525 U.S. at 34-42 (Scalia, J., concurring).