

# WHY DOES JUSTICE THOMAS HATE THE COMMERCE CLAUSE?

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## I. INTRODUCTION

*"Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating*

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commerce.”<sup>1</sup>

*“The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”*<sup>2</sup>

As reflected in the introductory quotes, there are two faces to the Commerce Clause, and Justice Thomas hates them both. First, the Commerce Clause is one of the most important grants of power to Congress in the Constitution, which Thomas criticizes as “Congress appropriating state police powers.”<sup>3</sup> Second, the very grant of power to Congress imposes limits on the ability of state and local governments to regulate interstate commerce.<sup>4</sup> This is called the negative or Dormant Commerce Clause, which Justice Thomas says “has no basis in the text of the Constitution, makes little sense” and is “virtually unworkable.”<sup>5</sup> To put it bluntly, Justice Thomas really, really hates the Commerce Clause.

## II. CONGRESS’S POWER TO REGULATE INTERSTATE COMMERCE

The first enumerated power the Court defined with any detail<sup>6</sup>

1. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

2. *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

3. *Morrison*, 529 U.S. at 627.

4. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (“Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action.”).

5. *Camps Newfound*, 520 U.S. at 610 (Thomas, J., dissenting).

6. Like all discussions of federal power, the Supreme Court’s part of that story begins in 1819 with *McCulloch v. Maryland*, 17 U.S. 316 (1819). *McCulloch* involved the constitutionality of the federally chartered Bank of the United States. Chief Justice Marshall stated the issue: “The first question made in the cause is—has congress power to incorporate a bank?” *Id.* at 401. In upholding federal power, Marshall stated the basic black letter law for every federal law: “This government is acknowledged by all, to be one of enumerated powers.” *Id.* at 405. But despite the fact that the Constitution did not anywhere mention the enumerated power to incorporate a bank, this black letter rule was no obstacle because of Congress’s power to choose means appropriately related to enumerated means. The Constitution empowered the central government “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies,” and this power over the “sword and the purse” included the implied power to select means to accomplish the enumerated powers or ends. *Id.* at 407. The Constitution required that means must bear a “necessary and proper” relationship to the enumerated ends. U.S. CONST. art. I, § 8, cl.18. “Necessary,” Marshall said, did not mean “an absolute physical necessity” but rather “no more than that one thing is convenient, or useful, or essential to another.” *McCulloch*, 17 U.S. at 413. Marshall concluded that “necessary”

was the Commerce Power in *Gibbons v. Ogden*,<sup>7</sup> and the breadth of power recognized in *Gibbons* was “embracing and penetrating”<sup>8</sup> in its scope. In *Gibbons*, New York gave a monopoly on steamboat traffic between New York and New Jersey to Fulton and Livingston, inventors of the steamboat, who in turn granted a license to Ogden.<sup>9</sup> *Gibbons* operated a steamboat between New York and New Jersey without the consent of New York or a license from Fulton and Livingston. Ogden sued *Gibbons* to enjoin *Gibbons* from operating a steamboat in contravention of Ogden’s monopoly. Chief Justice Marshall held that federal law gave *Gibbons* a license to operate a steamboat interstate, including between New York and New Jersey.<sup>10</sup> If Congress had the federal commerce power to give *Gibbons* a license, then the New York monopoly to Fulton and Livingston—and their franchise to Ogden—was inconsistent with that federal license and invalid under the Supremacy Clause.<sup>11</sup>

Chief Justice Marshall in *Gibbons* gave a broad and expansive definition to Congress’s commerce power. He began his discussion of federal commerce power with the text of Article 1, Section 8, Clause 3: “The words are, ‘Congress shall have power to regulate commerce with foreign nations, and among the several States, and

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included “all means which are appropriate.” *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). History shows that the one word that best sums up the necessary and proper requirement in the Constitution for the relationship between means and enumerated ends is “appropriate.” Of the seventeen amendments added to the U.S. Constitution since *McCulloch*, eight of them included enabling or enforcement clauses, little necessary and proper clauses, each of the eight using the word “appropriate.” The first amendment to use the term “appropriate” and typical of the other seven is the Thirteenth Amendment, which reads, “Section 2. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII.

7. 22 U.S. 1 (1824).

8. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

9. *See* *Ogden v. Gibbons*, 1819 WL 1690 (N.Y. Ch. 1819).

10. Although Marshall does not refer to it by name, he found that the Federal Coastal Act of 1793 gave *Gibbons* such a license. Though again the name is not used, the act is mentioned by attorneys for *Gibbons* and by Justice Johnson in his concurring opinion. *Gibbons v. Ogden*, 22 U.S. 1, 234-35 (1824).

11. *See id.* at 211 (“The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”). As to the particular New York law, the Court said, “the act of a State inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.” *Id.* at 221.

with the Indian tribes.”<sup>12</sup> Chief Justice Marshall went on to provide a comprehensive definition of commerce and the scope of Congress’s power to regulate it. Commerce included all forms of commercial intercourse,<sup>13</sup> including navigation,<sup>14</sup> and the power “to regulate” was “complete,”<sup>15</sup> “plenary,”<sup>16</sup> and only limited by the power of the people to vote.<sup>17</sup> Chief Justice Marshall’s interpretation of “among” was equally all-encompassing. He defined “among” to mean “intermingled with,” which to him meant that commerce among the several states did not stop at the borders of each state, but included the interior of the state as well.<sup>18</sup> However, “among” did not include “that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or *affect* other States.”<sup>19</sup> “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”<sup>20</sup> Thus, the only limit he recognized on Congress’s commerce power was that it did not include “the completely interior traffic of a State,”<sup>21</sup> “the exclusively internal commerce of a State.”<sup>22</sup>

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12. *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824). This paper does not attempt to discuss any issues related to Congress’s power to regulate foreign commerce, but the issues are roughly the same.

13. *Id.* at 189-90 (“Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”).

14. *Id.* at 190 (“All America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation.”).

15. *Id.* at 196 (Marshall said that the commerce power, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).

16. *Id.* at 197 (Marshall stated that Congress’s power over commerce “is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government . . .” More specifically, the existence of the states did not limit federal power.)

17. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (As Marshall said, “[T]he 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.”).

18. *Id.* at 194 (“The subject to which the power is next applied, is to commerce ‘among the several States.’ The word ‘among’ means intermingled with. A thing which is among others, is intermingled with them.”).

19. *Id.* (emphasis added).

20. *Id.*

21. *Id.*

22. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).

In short, Congress's commerce power included (1) "all the external concerns of the nation," (2) "those internal concerns which affect the States generally," but (3) "not to those which are completely within a particular state and which do not affect other states," that is, not to "[t]he completely internal commerce of a State." The commonly quoted statement of Congress's power to regulate interstate commerce reflects this definition:

First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.<sup>23</sup>

This is the most common modern statement of Congress's commerce power<sup>24</sup> and includes both the "external concerns"—channels and instrumentalities of interstate commerce—and the "internal concerns"—"activities that substantially affect interstate commerce."<sup>25</sup> This definition and *Gibbons* describe two types of commerce power. First, Congress has the ability to regulate anything "in commerce," that is, anything crossing from one state

23. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (citations omitted).

24. There is a lack of logic to this statement of commerce power. Professor Engdahl captures the illogic perfectly:

Chief Justice Rehnquist's taxonomy of the commerce power—now intoned as a ceremonial incantation by every inferior court—is positively dysfunctional. The cases involving "persons or things in interstate commerce" certainly are Commerce Clause cases, but the "instrumentalities" cases, which Chief Justice Rehnquist put in the same category, are really Necessary and Proper Clause cases. The same is true for some of the "channel" cases, which Chief Justice Rehnquist separated out as category one, and all of the "affecting" cases, which he segregated as category three. Chief Justice Rehnquist's attempt at categorization is akin to a zoologist describing vertebrates as comprised of three groups—herbivores, mammals, and primates. Such confused classification obscures the very distinctions that are essential to understanding and utility.

David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 115 (1998) (citations omitted).

25. The Court has not attempted to define channels and instrumentalities of interstate commerce, but the reference seems to be to those things involving more than one state, what Marshall called "the external concerns of the nation." *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824). The reference to "activities that substantially affect" interstate commerce is similar to *NLRB. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), but also seems to refer to what Marshall called "internal concerns" or activities "which are completely within in a particular state." *Gibbons*, 22 U.S. at 195. Marshall said that such internal concerns were not subject to federal commerce power, but implicitly only if they "do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.*

to another state.<sup>26</sup> Regulating anything in commerce is the clearest form of federal power. Second, Congress has the ability to regulate local activities affecting interstate commerce—activities totally within one state but affecting other states or the national interest.<sup>27</sup> The Court defined this second type of commerce power in *NLRB v. Jones & Laughlin Steel Corp.*: “Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”<sup>28</sup>

Justice Thomas hates this latter part of the commerce power: “To regulate activities affecting interstate commerce.” Specifically, he hates how the Supreme Court has defined “activities.” After *Jones & Laughlin*, there were two important additional developments to the Court’s approach in determining which local activities substantially affected interstate commerce. First, and perhaps the most criticized,<sup>29</sup> was *Wickard v. Filburn*,<sup>30</sup> which is generally credited for introducing the class or aggregate impact as a way of satisfying the substantial effects test: “That appellee’s

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26. The *Champion v. Ames* Court upheld the right of Congress to regulate interstate shipments of lottery tickets. See 188 U.S. 321 (1903). It examined the precedents closely and found broad power to regulate anything crossing from state to state. *Id.* The Court summarized the cases: “They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph.” *Id.* at 352-53. The Court concluded, “In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution.” *Id.* at 356. One article criticized the *Champion* rule but admits the truth of it: “The mere fact that a good or a person crossed a state line was deemed sufficient to give Congress the power to ban it.” Barry Friedman & Genevieve Lakier, “To Regulate,” Not “To Prohibit”: *Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 290 (2012).

27. Marshall excluded from federal power those internal concerns “completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.” *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824). This exclusion allows Congress to regulate those activities completely within one state that affect other states.

28. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). As to the importance of *Jones & Laughlin*, Justice Kennedy says it simply: “The case that seems to mark the Court’s definitive commitment to the practical conception of the commerce power is *NLRB v. Jones & Laughlin Steel* . . .” *United States v. Lopez*, 514 U.S. 549, 573 (1995) (citations omitted) (Kennedy, J., concurring).

29. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012) (“*Wickard* has long been regarded as ‘perhaps the most far reaching example of Commerce Clause authority over intrastate activity . . .’”) (citation omitted).

30. *Wickard v. Filburn*, 317 U.S. 111 (1942).

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.”<sup>31</sup> Second, the Court in *Gonzalez v. Raich* took a step away from the substantial effects test and reintroduced the rational basis test as part of the analysis: “In assessing the scope of Congress’s authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>32</sup>

In *Wickard*, Farmer Filburn exceeded quotas established by the Agricultural Adjustment Act of 1938, which limited the acreage and the number of various commodities that a farmer could grow.<sup>33</sup> Farmer Filburn exceeded those quotas by eleven acres and 239 bushels of wheat, all primarily for home consumption.<sup>34</sup> The Court upheld the federal law as a proper exercise of Congress’s commerce power, finding that home consumption of home-grown wheat in the aggregate substantially affected interstate commerce.<sup>35</sup>

*Wickard* was not the first case<sup>36</sup> to use the class or aggregate

31. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). The Court in *Wickard* does not actually use the term “class or aggregate impact,” but it does apply that logic. The Court in *Gonzales v. Raich* heavily relied on *Wickard*’s use of “class of activity” and “aggregate” impact in finding a substantial impact on interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 18-19 (2005).

32. *Gonzales*, 545 U.S. at 22.

33. *Wickard*, 317 U.S. at 114.

34. The amount that Filburn was over was clear. *Id.* at 114-15. Exactly what he did with the excess was less clear. As the Court stated it, “The intended disposition of the crop here involved has not been expressly stated.” *Id.* at 114. But the Court seemed to treat Filburn’s overage as part of that twenty percent of all wheat grown for home consumption. *Id.* at 127.

35. The Court does not actually say this in so many words. It did state that “the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.” *Id.* at 124.

36. In *NLRB. v. Fainblatt*, 306 U.S. 601 (1939), the Court looked at the aggregate impact of the type of business on interstate commerce. *Fainblatt*, a New Jersey operation, made women’s sports garment out of fabrics sent from New York and returned to New York dealers or directly to customers in other states. *Id.* at 602-03. Though businesses like *Fainblatt* had an average of only thirty-two employees, the women’s clothing industry consisted of over 3,414 businesses and ranked ninth in number of workers employed nationally. *Id.* at 607 n.2. The *Fainblatt* Court said:

Nor do we think it important, as respondents seem to argue, that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.

impact concept, but *Wickard* is closely associated with the use of the aggregate impact doctrine to satisfy the substantial effects test.<sup>37</sup> The facts in *Wickard* supported the conclusion that the class impact of homegrown and home-consumed wheat on the price of interstate and foreign commerce was substantial, if not dramatic. The opposing parties “stipulated a summary of the economics of the wheat industry”<sup>38</sup> and three key facts emerged.<sup>39</sup> First, the interstate commerce in wheat was “large and important.”<sup>40</sup> Second, there was a large international market in wheat that significantly impacted interstate commerce.<sup>41</sup> Third, homegrown, home-consumed wheat was not a trivial factor in the market.<sup>42</sup> In fact, the Court found that the consumption of homegrown wheat “constitute[d] the most variable factor in the disappearance of the wheat crop,”<sup>43</sup> and that it had a variability factor of twenty percent.<sup>44</sup> To put it simply, when the price of wheat was high, farmers sold it in the interstate and foreign markets.<sup>45</sup> When it was cheap, they fed it to their livestock and made flour for home consumption.<sup>46</sup> Thus, the class or aggregate impact of homegrown and home-consumed wheat on interstate commerce was substantial. However, the Court readily acknowledged that Congress was stretching its powers: “Even today, when this power has been held to have great latitude, there is no decision of this

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NLRB. v. Fainblatt, 306 U.S. 601, 606 (1939) (citations omitted).

37. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012) (“Congress’s power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.”).

38. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

39. Although this article emphasizes just three of the economic findings submitted by the parties, the Court’s holding in *Wickard* is based upon its overall conclusion that “[c]ommerce among the states in wheat is large and important.” *Id.*

40. *Id.* And its problems were national in scope: “Although wheat is raised in every state but one, production in most states is not equal to consumption.” *Id.*

41. “Largely as a result of increased foreign production and import restrictions,” United States exports had fallen from twenty-five percent of production in the 1920s to less than ten percent in the decade preceding. *Id.*

42. *Id.* at 128.

43. *Wickard v. Filburn*, 317 U.S. 111, 127 (1942).

44. *Id.*

45. See *id.* at 128 (“It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases.”).

46. *Id.* (“But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.”)

Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof.”<sup>47</sup>

In *Gonzalez v. Raich*,<sup>48</sup> the Court held that the federal government had the commerce power to regulate the in-state growth of marijuana for in-state medicinal use if Congress rationally believed that the local activity might substantially affect interstate commerce. In *Raich*, the Supreme Court began its analysis by acknowledging the substantial effects test: “Our case law firmly establishes Congress’[s] power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”<sup>49</sup> Then, *Raich* pivoted to the rational basis test: the Court’s role in determining the scope of Congress’s commerce power was “a modest one,” and the test was not whether the use of homegrown, home-consumed marijuana “taken in the aggregate, substantially affect[ed] interstate commerce in fact,” but “only whether a ‘rational basis’ exist[ed] for saying so.”<sup>50</sup> In other words, the Court did not have to find that local activity substantially affected interstate commerce. The Court’s only job was to determine whether Congress could rationally believe that local activity substantially affected interstate commerce. From there, it was a short journey to find that Congress might rationally have believed that there were “enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere.”<sup>51</sup> Moreover, there were “concerns about diversion into illicit channels,” that the law “ensnares some purely intrastate activity is of no moment.”<sup>52</sup>

*Raich* was not the first case to use the rational basis test, but *Raich* reemphasized and relied on the rational basis test with a certain level of finality not found in earlier cases.<sup>53</sup> The Court first

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47. It was enough under the act that it was “available for market.” There was no requirement that “any part of the wheat either within or without the quota is sold or intended to be sold.” *Wickard v. Filburn*, 317 U.S. 111, 119 (1942).

48. *Gonzales v. Raich*, 545 U.S. 1, 26-27 (2005).

49. *Id.* at 17.

50. *Id.* at 22.

51. *Id.* Justice Scalia in his concurring opinion summarized the majority’s point well: “[M]arijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State.” *Id.* at 40 (Scalia, J., concurring).

52. *Id.*

53. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), which is not

used the rational basis test to determine Congress's commerce power in *Heart of Atlanta Motel, Inc. v. United States*.<sup>54</sup> There, the Court found that racial discrimination by places of accommodation against persons traveling interstate was rationally related to interstate commerce and subject to federal regulation.<sup>55</sup> However,

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narrowly speaking a rational basis commerce power case, but all of the justices except for Chief Justice Roberts stated the rational basis test as the generally operative test. The majority found that the Affordable Care Act's Individual Mandate, a provision requiring that most persons have some form of health insurance, was not within Congress commerce power because it regulated inactivity, not activity. *Id.* at 552. Despite the Court's not applying either the substantial effects or rational basis test, the case is instructive as to the rational basis test. Only Chief Justice Roberts in announcing the judgment for the Court, in which Justice Breyer and Kagan joined in part, did not mention the rational basis test. *See id.* at 529-89. Justice Ginsburg, joined by Justices Sotomayor, Breyer, and Kagan, on the judgment but dissenting as to the commerce power holding, was as complete an adoption of the rational basis test as is possible: "When appraising such legislation, we ask only (1) whether Congress had a 'rational basis' for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a 'reasonable connection between the regulatory means selected and the asserted ends.' In answering these questions, we presume the statute under review is constitutional and may strike it down only on a 'plain showing' that Congress acted irrationally." *Id.* at 602-03 (citations excluded). The Court cited to the usual commerce power suspects, *Raich*, *McClung*, *Heart of Atlanta Motel* among others, but also to *United States v. Carolene Products*, the seminal rational basis case due process clause case. *Id.* Perhaps even more telling as to the ascendancy of the rational basis test, the dissent of Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, conceded, though almost begrudgingly, that the rational basis test was the correct test, except that it was inapplicable to inactivity: "It is true enough that Congress needs only a 'rational basis' for concluding that the *regulated activity* substantially affects interstate commerce. But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce." *Id.* at 657-58 (Scalia, J., dissenting) (Justice Scalia's emphasis) (internal quotation marks omitted).

54. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In *Katzenbach v. McClung*, a companion case to *Heart of Atlanta Motel*, Ollie's Barbecue was a local restaurant in Birmingham, Alabama, which had purchased \$69,683 or forty-six percent of its food from a supplier who at purchased it interstate. 379 U.S. 294, 296 (1964). The Court found that Congress could rationally believe that racial discrimination by restaurants serving only local customers but who bought some portion of their supplies in interstate commerce impacted interstate commerce and was thus subject to federal control. *Id.* at 304. The Court mentioned the rational basis test in *Heart of Atlanta Motel*, but its best statement of the test is found in *McClung*: "But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Id.* at 303-04. As for the facts in *McClung*, the Court concluded that Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce." *Id.* at 304.

55. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). Later, the Court concluded, "that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this

after an extended discussion of its commerce power cases, the Court concluded with the language of the substantial effects test: “Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”<sup>56</sup> Although applying the substantial effects test, including the aggregate impact, left little doubt that racial discrimination against interstate travelers would have a substantial or harmful impact on interstate commerce, the Court did not leave it there.<sup>57</sup> It added that the question was “whether Congress had a rational basis”<sup>58</sup> for its per se holding that racial discrimination by hotels serving interstate travelers always affected interstate commerce. The Court offered no precedents for the need to only find a rational basis—the Court brought the rational basis test into the commerce power cases without explanation.<sup>59</sup>

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Court for 140 years.” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

56. *Id.* at 258.

57. Justice Black’s concurring opinion had a note of caution but ultimately yielded to the class impact test: “I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act. But in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow.” *Id.* at 275 (Black, J., concurring).

58. *Id.* at 258. *Katzenbach v. McClung*, 379 U.S. 294 (1964), a companion case, found that racial discrimination by restaurants serving only local customers but who bought some portion of their supplies in interstate commerce impacted interstate commerce and was subject to federal control.

59. *Maryland v. Wirtz* was the first Supreme Court case to apply the rational basis test to a Commerce Clause case after *Heart of Atlanta Motel* and *McClung*. 392 U.S. 183 (1968), *overruled by Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Both *Usery* and *Garcia* were reversed on Tenth Amendment grounds, not on the definition of commerce power. See *Garcia*, 469 U.S. 528; *Nat’l League of Cities*, 426 U.S. 833. *Wirtz* was of primary importance because it was upheld against a Tenth Amendment challenge to Congress’s right to impose the federal Fair Labor Standards Act on state and local government. See *Wirtz*, 392 U.S. 183. In 1981, *Hodel v. Indiana* applied the rational basis test in commerce cases to a federal law requiring corrective measures to restore surface land subject to strip mining that was alleged to be in violation of commerce power in addition to numerous other constitutional provisions. 452 U.S. 314 (1981).

### A. THE “DRAMATIC DEPARTURE IN THE 1930S”

In *United States v. Lopez*, a case finding that a federal law banning gun ownership on school grounds was outside of federal commerce power, Justice Thomas dated his view of commerce power, not from *Gibbons v. Ogden*, but from the text of the framers.<sup>60</sup> Justice Breyer argued in his dissent in *Lopez* that ever since *Gibbons*,<sup>61</sup> except for the “wrong turn” in *Hammer v. Dagenhart*,<sup>62</sup> which was quickly corrected in *Jones & Laughlin*, there had been a consistent upholding of federal power to address “economic realities.”<sup>63</sup> Justice Thomas disagreed, arguing that “[i]f anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.”<sup>64</sup> The “century and a half” seems to refer to the drafting of the Constitution.<sup>65</sup> By “dramatic departure,” Justice Thomas was seemingly referring to *Jones & Laughlin*.<sup>66</sup> Justice Breyer was almost certainly wrong that, except for *Hammer*, there had been a consistent upholding of federal commerce power.<sup>67</sup> But Justice Thomas was almost certainly wrong that *Jones & Laughlin* departed from “a century and a half of precedent.” Whatever the “wrong turn,” there was no straight line between the constitutional text or even *Gibbons* and *Jones & Laughlin*.

Congress did little to regulate interstate commerce after

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

61. *Id.* at 631 (Breyer, J., dissenting). And for him that meant upholding the federal limitation on gun possession on school grounds: “Upholding this legislation would do no more than simply recognize that Congress had a ‘rational basis’ for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten.” *Id.*

62. See generally *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

63. *Lopez*, 514 U.S. at 631 (Breyer, J., dissenting).

64. *Id.* at 599 (Thomas, J., concurring).

65. Justice Thomas does not mention the 150 years of precedents that *Jones & Laughlin* departs from. See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Since *Gibbons* was decided in 1824, barely a hundred years before, he seems to be referring to the text of the Constitution or to the Framers’ view at the time of the ratification of the Constitution. See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824).

66. Again, Justice Thomas does not specifically mention what he considers to be the “dramatic departure,” but he seems to be referring to *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which is as this article later discusses is his nemesis case.

67. Any number of cases, in addition to *Hammer*, found Congress did not have commerce power. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which struck down the National Industrial Recovery Act and *Carter v. Carter Coal. Co.*, 298 U.S. 238 (1936), which found invalid the Bituminous Coal Conservation Act of 1935.

*Gibbons*; states passed most of the regulations.<sup>68</sup> Additionally, the Court opinions upholding state power were corrupted to justify limiting federal power involving local activities affecting interstate commerce.<sup>69</sup> For example, in 1895 in *United States v. E.C. Knight Co.*, the Court held that commerce did not include manufacturing.<sup>70</sup> Then, in 1918, the Court defined Congress's limited power to regulate things traveling in interstate commerce in *Hammer v. Dagenhart*.<sup>71</sup>

In *E.C. Knight*, the Court held that Congress did not have the commerce power to regulate a business trust<sup>72</sup> with a monopoly on refined sugar.<sup>73</sup> The Sherman Antitrust Act,<sup>74</sup> passed in 1890, specifically referred to commerce power: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

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68. See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) ("For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce."). *Gibbons* itself, it might be noted, was not really an attempt to expand Congress's powers, but just a regulation of vessels as originating in the United States, which Marshall then used to expand federal commerce power and in *dicta* to limit state regulation of interstate commerce. See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

69. Most famously, the Court in *Kidd v. Pearson*, 128 U.S. 1 (1888), upheld the right of Iowa to ban the manufacturing of alcoholic beverages in Iowa against a Dormant Commerce Clause challenge on the grounds that manufacturing was not commerce. *Kidd* was cited in *United States v. E.C. Knight Co.* as support for the proposition that Congress did not have the commerce power to regulate manufacturing. 156 U.S. 1, 14 (1895).

70. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12, 17 (1895) ("Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it.")

71. *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941).

72. "A trust is a structure where a trustee carries out the business on behalf of the trust's members (or beneficiaries). A trust is not a separate legal entity." *Trust*, GOVERNMENT OF W. AUSTRALIA: SMALL BUSINESS DEVELOPMENT CORPORATION, <https://www.smallbusiness.wa.gov.au/business-advice/business-structure/trust> (last visited Sept. 7, 2019).

73. *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895) (The Court had conceded this: "By the purchase of the stock of the four Philadelphia refineries with shares of its own stock the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States.")

74. The *E.C. Knight* case does not actually refer to the act by this name, but it was the commonly used name.

commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”<sup>75</sup> The Court said that manufacturing was not commerce and therefore was not subject to federal commerce power.<sup>76</sup> The flaw in the Court’s reasoning was that even if manufacturing itself was not commerce, Congress under *Gibbons* could regulate anything within a state that merely affects interstate commerce.<sup>77</sup> Justice Thomas believes that the Court went astray when it ceased to follow *E.C. Knight*: “If federal power extended to these types of production ‘comparatively little of business operations and affairs would be left for state control’ . . . . Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.”<sup>78</sup>

Because of *E.C. Knight*,<sup>79</sup> Congress thought that it could not regulate manufacturing using child labor, so it sought to regulate the interstate shipment of goods made by child labor. Under

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75. *United States v. E.C. Knight Co.*, 156 U.S. 1, 7 (1895).

76. *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, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.”).

77. The *E.C. Knight* Court said that its decision was supported by the 1888 case, *Kidd v. Pearson*, 128 U.S. 1 (1888), which had held that Iowa could bar the manufacturing of liquors in Iowa, all of it sold outside of the state of Iowa. *E.C. Knight Co.*, 156 U.S. at 22. The Court said the fact that “an article is manufactured for export to another state does not of itself make it an article of interstate commerce.” *Id.* at 13. The *Kidd* Court cited *Coe v. Errol*, 116 U.S. 517 (1886) in support. *Coe* had held that the town of Errol, New Hampshire had the right to tax logs being held in its rivers for transport interstate to Maine. *Coe*, 116 U.S. at 528-29. Under the Dormant Commerce Clause, the city could not tax interstate commerce, but the Court said, the logs were not interstate commerce until the interstate journey actually began. *Id.* The point of both *Kidd* and *Coe* was to uphold state power, but *E.C. Knight* used them to impose a limit on federal power. The *E.C. Knight* Court was in error. However accurate either *Kidd* or *Coe* was with regard to the Dormant Commerce Clause’s limits on state power, Congress according to *Gibbons* could still regulate in-state commerce and activities that were not interstate commerce if the local activity affected interstate commerce.

78. *United States v. Lopez*, 514 U.S. 549, 598 (1995) (citations omitted).

79. Later, the Court avoided its limiting precedent in *E.C. Knight* as to things affecting interstate commerce by creating the fiction that a series of local activities in different states was in “the stream of commerce” and thus within Congress’s power to regulate things in interstate commerce. *See Swift & Co. v. United States*, 196 U.S. 375 (1905); *Stafford v. Wallace*, 258 U.S. 495 (1922). Under the streams of commerce logic, Congress could regulate local activity within one state not based upon its effect on interstate commerce, but because it fell within Congress’s power to regulate things in commerce. *See id.* With the *Jones & Laughlin* case later rejecting the *E.C. Knight* and the *Hammer* cases, there was no need for the “stream of commerce” fiction as a workaround. The Court will still occasionally, including in *Raich*, mention the “stream of commerce,” but it is no longer a meaningful test. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 74 (2005).

*Gibbons*, this would seem to be commerce from one state to another state.<sup>80</sup> Congress passed a law that did not prevent manufacturing with child labor as such, but the law banned the shipment in interstate commerce of goods made by child labor. In essence, Congress was trying to use its power to regulate things crossing state lines, not its power to regulate in-state commerce affecting other states. The Court in *Hammer* stopped this attempt to maneuver around *E.C. Knight* in its tracks: “The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof.”<sup>81</sup> The Court in *Hammer* also used the direct/indirect test<sup>82</sup> and the concept of dual

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80. The *Hammer* Court gave a narrow *Gibbons*’s definition of commerce: “In *Gibbons v. Ogden*, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, ‘It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.’ In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities.” *Hammer v. Dagenhart*, 247 U.S. 251, 269-70 (1918) (citation omitted).

81. *Hammer*, 247 U.S. at 272. The Court distinguished a number of cases that had seemed to allow the regulation of anything traveling in interstate commerce. See *id.* at 270-71. In *Champion v. Ames* (The Lottery Case), the Court held that Congress could pass a law to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. 188 U.S. 321 (1901). *Hipolite Egg Co. v. United States* sustained the power of Congress to pass the Pure Food and Drug Act which prohibited the introduction into the states by means of interstate commerce of impure foods and drugs. 220 U.S. 45 (1911). *Hoke v. United States* upheld the constitutionality of the so-called ‘White Slave Traffic Act’ that forbade the transportation of a woman in interstate commerce for the purpose of prostitution. 227 U.S. 308 (1913). *Caminetti v. United States* also held that Congress could prohibit the transportation of women in interstate commerce for immoral purposes. 242 U.S. 470 (1917). And *Clark Distilling Co. v. Western Maryland Railway Co.* upheld the power of Congress over the interstate transportation of intoxicating liquors. 242 U.S. 311 (1916). The *Hammer* court distinguished these other cases as involving the need to use a ban on interstate commerce to prevent the spread of evil results. *Hammer*, 247 U.S. at 271. In *Hammer*, there were no evil products being transported. *Id.* at 272. The Court also said that the Child Labor Act violated the Tenth Amendment’s in that “it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved.” *Id.* at 275.

82. One of the more incomprehensible limitations in the application of *Gibbons*’s broad view of commerce power was the direct/indirect limitation on Congress’s ability to regulate local activity affecting interstate commerce. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), was one of the most famous cases to attempt to limit commerce power to those cases where local activities directly affected interstate commerce as opposed to just being indirect. The Court said there was “a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle.” *Id.* at 546. It believed that if the Commerce Clause reached “all enterprises and

federalism<sup>83</sup> to limit federal power, but Justice Thomas does not appear to rely on either of those doctrines,<sup>84</sup> and both have been largely discredited.<sup>85</sup>

There were a number of limiting decisions as to Congress's commerce power during the period from *E.C. Knight* to the Court's more modern approach in *Jones & Laughlin*, but the Court did not consistently rule against Congress's commerce power. Many of the cases during this period were similar to later, more modern approaches. During the same time period that the Court limited Congress's commerce power in *E.C. Knight* and *Hammer*, the Court decided other cases that allowed for a more expansive view of commerce power. The substantial effects test had its origins in

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transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people . . . ." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935). *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), attempted to define the difference between direct and indirect effects on interstate commerce: "The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about." *Id.* at 307-08. *Jones & Laughlin* and *Wickard* rejected the relevancy of the test. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 122-23 (1942) (citations omitted).

83. Perhaps the most bizarre of the limitations of the *Gibbon's* test was the concept called Dual Federalism. The Court's most revealing discussion of the dual federalism doctrine is found in a spending power case, *United States v. Butler*, 297 U.S. 1 (1936). Under the concept, there are some powers exclusively in control of the federal government and under the Tenth Amendment others exclusively under the control of state governments. The doctrine is erroneous because Congress can regulate anything, even if it falls within a state's police power if it also falls within one of Congress's enumerated powers. The doctrine can be found in both *E.C. Knight* and *Hammer*. See *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918) ("The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution."); *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895). The doctrine is rejected in *United States v. Darby*: "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." 312 U.S. 100, 114 (1941).

84. Justice Thomas does cite favorably in his *Lopez* opinion to *Carter v. Carter Coal*, one of the more notorious cases using the direct/indirect test: "As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See *Carter, v. Carter Coal, Co.*, 298 U.S. 238 (1936)." *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring). Thomas does not specifically mention the direct/indirect language.

85. See *Wickard*, 317 U.S. at 122-23 (rejecting the direct/indirect test); *United States v. Darby*, 312 U.S. 110, 114 (1940) (rejecting the concept that federal power is limited by state power).

one of those cases, *Southern Railway Co. v. United States*.<sup>86</sup> A federal railway safety act applied to all railroad cars, including intrastate ones using an interstate rail line.<sup>87</sup> In addressing whether the act was constitutional, the Court said the issue was whether there was “a real or substantial relation or connection” or a “close or direct relation or connection” between intrastate traffic and “the safety of interstate commerce and of those who are employed in its movement[.]”<sup>88</sup>

One of the most famous cases allowing for a more expansive view of commerce power were the *Shreveport Rate Cases*<sup>89</sup> where the Court indirectly upheld the authority of the Interstate Commerce Commission (ICC)<sup>90</sup> to set rates for the intrastate commerce between cities within the same state.<sup>91</sup> The Court said

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86. *S. Ry. Co. v. United States*, 222 U.S. 20 (1911). In another case earlier in the same year also cited by *Jones & Laughlin, Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm’n*, 221 U.S. 612 (1911), the Court upheld a safety measure related to hours of employment. The act included in its coverage employees whose work was strictly for intrastate commerce. *Id.* at 623-24. The railroad was undone by its own argument, that “the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees” between interstate and intrastate work. *Id.* at 618. Without giving any rationale, the Court held that the interwoven operations confirmed that both were subject to Congress’s commerce power: “Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting.” *Id.*

87. *S. Ry. Co.*, 222 U.S. at 26 (“[I]t must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.”).

88. *Id.* at 26 (emphasis added). It is worth noting that the Court uses the modifier direct as synonymous with a close relationship, not the direct/indirect metaphysical connection of other cases.

89. *Hous., E. & W. Tex. R.R. Co. v. United States*, 234 U.S. 342 (1914).

90. The ICC was the first administrative agency to regulate interstate commerce. See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) (“It was not until 1887 with the enactment of the Interstate Commerce Act that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others.”); see also *R.R. Comm’n of Wis. v. Chi., B. & Q. R. Co.*, 257 U.S. 563, 582 (1922) (“The Interstate Commerce Act of 1887 . . . was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities.”).

91. The Texas railroads in the case were subject to regulation by the Texas Railroad Commission for in-state rates and by the ICC for interstate rates. The in-state rates were much cheaper. As an illustration, the rate from Dallas, Texas for the 147.7 miles to Marshall, Texas near the Louisiana border was 37 cents while the in-state rate from Shreveport, Louisiana for the 42 miles to Marshall, Texas was 56 cents, over 50% higher for less than 1/3 the distance. To prevent discriminatory pricing, the ICC ordered that the interstate rate be lowered to be the same as the Texas in-state rate. *Hous., E. & W. Tex. R.R. Co.*, 234 U.S. at 346.

that “Congress is empowered to regulate, that is, to provide the law for the government of interstate commerce” and, parroting *McCulloch*, “to enact ‘all appropriate legislation’ for its ‘protection and advancement.’”<sup>92</sup> The Court, setting the precedent relied on in the *Jones & Laughlin* decision, held that the ICC’s authority “necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic.”<sup>93</sup> It was argued that under its commerce power, the ICC had no authority to consider the in-state rate at all.<sup>94</sup> The Court determined that “[i]t is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government.”<sup>95</sup>

### B. *LOPEZ AND MORRISON: TWO OUTLIERS LIMITING FEDERAL COMMERCE POWER*

*United States v. Lopez* in 1995 and *United States v. Morrison* five years later were outlier cases. Both were the first commerce power cases the Supreme Court had decided, since before *Jones & Laughlin* in 1937, which found that federal laws were outside the scope of Congress’s commerce power.<sup>96</sup> *Lopez* found that Congress did not have the commerce power to criminalize the possession of a gun on or near a public or private school.<sup>97</sup> *Morrison* held that Congress did not have commerce power to provide a civil remedy for gender-motivated violence.<sup>98</sup> In both cases, the Supreme Court

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92. *Hous., E. & W. Tex. R.R. Co. v. United States*, 234 U.S. 342, 351 (1914) (citations omitted).

93. *Id.*

94. *Id.* at 349 (“The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission’s power.”).

95. *Id.* at 350.

96. Though citing *Wickard* instead of *Jones & Laughlin*, the dissent made this point in *Morrison*: “The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, extended to all activity that, when aggregated, has a substantial effect on interstate commerce.” *United States v. Morrison*, 529 U.S. 598, 637 (2000) (citations omitted) (Souter, J., dissenting).

97. *See United States v. Lopez*, 514 U.S. 549 (1995).

98. *See Morrison*, 529 U.S. 598.

applied the substantial effects test,<sup>99</sup> not the rational basis test.<sup>100</sup> Although many themes run throughout *Lopez* and *Morrison*, at the most elemental level, the majority found that neither law involved local activities with a substantial effect on interstate commerce.<sup>101</sup> The dissent found that Congress could have rationally believed that there was a substantial effect.<sup>102</sup>

In *Lopez*, Justice Thomas (in a concurring opinion) expressed the belief that the Court went astray when it ceased to follow *E.C. Knight*: “If federal power extended to these types of production ‘comparatively little of business operations and affairs would be left for state control’ . . . . Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.”<sup>103</sup> Justice Thomas summarized his view of the Commerce Clause in his concurrence in *United States v. Morrison*.<sup>104</sup> He claimed that “the very notion of a ‘substantial effects’ test” was “inconsistent with the original understanding” of the Constitution, that it was a “rootless and malleable standard” leading to the view that federal commerce power had “virtually no limits,” and that until the Court adopted “a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of

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99. See *United States v. Lopez*, 514 U.S. 549, 559 (1995) (“We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”); *United States v. Morrison*, 529 U.S. 598, 610 (2000) (“Reviewing our case law, we noted that ‘we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.’”). *Lopez*, quoting *Jones & Laughlin*, warned that commerce power should not be so extended as to “obliterate the distinction between what is national and what is local and create a completely centralized government.” *Lopez*, 514 U.S. at 557 (internal quotation marks omitted).

100. After summarizing *Darby* and *Wickard*, *Lopez* mentioned the rational basis test but did not apply it: “Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.” *Id.* at 557 (internal quotation marks omitted). Justice Breyer’s dissenting opinion in which Souter, Stevens, and Ginsburg joined relied on the rational basis test. *Id.* at 616-17. The first mention of the rational basis test in *Morrison* was in Justice Souter’s dissenting opinion in that case: “But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned.” *Morrison*, 529 U.S. at 634 (Souter, J., dissenting).

101. See *Lopez*, 514 U.S. at 563; *Morrison*, 529 U.S. at 617-18.

102. See *Lopez*, 514 U.S. at 623 (Breyer, J., dissenting); *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

103. *Lopez*, 514 U.S. at 598.

104. *Morrison*, 529 U.S. at 627.

regulating commerce.”<sup>105</sup>

*Lopez* and *Morrison* best capture Thomas’s disdain for the “substantial effects” view of the commerce power, and both cases (independent of Thomas’s views) were outlier cases. The “very notion” that Congress might have the power to regulate local activities substantially affecting interstate commerce offended Justice Thomas’s textual sensibilities. Justice Thomas does not just want us to not walk on the grass; he does not even want us to think about walking on the grass.

The Court in *Lopez* identified three categories of federal commerce power: “channels of interstate commerce,” “instrumentalities of interstate commerce,” and “those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”<sup>106</sup> These categories were first used by the Court in *Perez v. United States*.<sup>107</sup> The Court also used them in *Raich*.<sup>108</sup> In *Perez*, Congress made loan sharking a federal crime subject to as many as twenty years in prison.<sup>109</sup> Unlike what is common with regard to federal criminal statutes, there was no “jurisdictional peg” to tie loan sharking to the channels or instrumentalities of interstate commerce or to any effect of interstate commerce.<sup>110</sup>

Because these categories are so widely quoted or paraphrased by the courts,<sup>111</sup> it is important to distinguish them from the

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105. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

106. *United States v. Lopez*, 514 U.S. 558-59 (1995) (citations omitted).

107. *Perez v. United States*, 402 U.S. 146, 150-51 (1971).

108. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

109. 18 U.S.C. § 894 (2019).

110. Jurisdictional peg is a common concept, not actually dealing with jurisdiction but with Congress’s specifically tying a law to its commerce power. Jurisdictional peg is the phrase used by the Second Circuit in the opinion below in *Perez*: “We will concede at the outset that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense.” *United States v. Perez*, 426 F.2d 1073, 1075 (2d Cir. 1970). The law did not require the trial court to find any interstate activities to make it a federal crime. *Id.* at 1073-74. The actual crime in *Perez* did not involve any interstate aspects. *Id.* at 1074-75. *Perez* had loaned \$3,000 to a New York City butcher to build a local butcher shop. *Id.* at 1074. There was no evidence that *Perez* had any association with organized crime or any other interstate connections. *Id.* at 1074.

111. *See Gonzales*, 545 U.S. at 16-17. Justice Scalia claims that the reference to these three categories seems more rote than instructive: “[O]ur cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories . . .” *Id.* at 33 (Scalia, J., concurring). Supporting Justice Scalia’s point about mechanical references, the *Raich* case indicates what often happens to

substantial effects test. Additionally, Justice Thomas does not seem to include either of the first two in his criticism of commerce power.<sup>112</sup> Justice Scalia in *Lopez* specifically stated that the first two are part of the textual grant of commerce power, while the substantial effects test was not.<sup>113</sup> In both of the first two categories, the Court was referring to Congress's power to regulate commerce between two states, not local activities affecting interstate commerce.<sup>114</sup> Commerce between two states is the clearest form of the federal power. Unfortunately, there is no obvious distinction between the channels category and the instrumentality category. Further, the Court illustrates both the channels and instrumentalities categories using cases involving the effect on interstate commerce, further confusing the distinctions.<sup>115</sup> But neither channels nor instrumentalities of interstate commerce were involved in the *Lopez* case.<sup>116</sup>

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Supreme Court precedents. *Perez* and *Lopez* cited historical examples that supported the categories, while *Raich* just cited the categories without any historical context. *See supra* notes 106-09. The problem is that the first two categories make little enough sense even with the historical references and make virtually none without them. But since the reversal of *Hammer*, few have questioned federal power to regulate anything crossing state lines. *But see* Barry Friedman & Genevieve Lakier, "To Regulate," Not "To Prohibit": Limiting the Commerce Power, 2012 SUP. CT. REV. 255, 258-59 (2012) ("This article calls for a reexamination of the long-standing, yet inadequately examined, assumption that Congress's power to regulate interstate commerce necessarily includes the power not only to (as the *Raich* Court put it) 'protect' interstate markets but also to 'eradicate' them.").

112. Justice Thomas limits his criticism of the Commerce Power to the third category, activities that substantially affect interstate commerce.

113. *See* *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) ("The first two categories are self-evident, since they are the ingredients of interstate commerce itself . . . [U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.").

114. *Id.*

115. As to the channels of interstate commerce, *Lopez* used *Darby*, the transportation of goods made by person paid less than required by the FLSA, and *Heart of Atlanta Motel*, the movement of persons across state lines, as examples. *See* *United States v. Lopez*, 514 U.S. 549, 558 (1995). *Perez* used as an example of protecting the channels of interstate commerce, the Lindbergh Act, which made it a crime for either the victim to be transported or the kidnapper to travel across state lines. *United States v. Perez*, 402 U.S. 146, 150 (1971). As for the second category, the instrumentalities of interstate commerce, *Lopez* gave as examples the *Shreveport Rate Cases* and *Southern Railroad Co.*; both involved the regulation of local activities affecting interstate commerce, not the regulation of things crossing state lines. *See Lopez*, 514 U.S. at 558.

116. Congress did not refer to any interstate contacts in passing the law in *Lopez*. *See Lopez*, 514 U.S. 549. Later, Congress amended the law to refer to interstate travel. 18 U.S.C. § 922 (2019) ("It shall be unlawful for any individual knowingly to possess a

After mentioning the three categories, *Lopez* turned to the issue of “activities that substantially affect interstate commerce.”<sup>117</sup> The majority opinion, although mentioning both *McClung* and *Heart of Atlanta Motel*, emphasized the substantial effects test:<sup>118</sup> “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>119</sup> The law in *Lopez* banning the possession of a gun on or near school grounds made no attempt to tie the crime to any aspect of interstate commerce.<sup>120</sup> It was also totally devoid of any connection to “any sort of economic enterprise, however broadly one might define those terms,” what the Court called “commerce.”<sup>121</sup> Since no economic enterprise or commerce was involved, the Court said that the class or aggregate impact doctrine did not apply: “It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”<sup>122</sup> The

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firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.”); David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 25 (2012) (“Congress more or less reversed the result in *Lopez* by modifying the Gun-Free Schools Zone Act to limit it to firearms ‘that ha[ve] moved in or otherwise affect[ed]’ interstate commerce.”).

117. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

118. After discussing *Jones & Laughlin, Darby*, and *Wickard*, the Court briefly mentioned the rational basis line of cases: “Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.” *Id.* at 557. The Court again briefly referred to the rational basis test in responding to Justice Breyer’s dissenting opinion: “Justice BREYER rejects our reading of precedent and argues that ‘Congress . . . could rationally conclude that schools fall on the commercial side of the line.’” *Id.* at 565. But there was no attempt to apply or distinguish the rational basis test.

119. *Id.* at 559-60 (citations omitted). Justice Kennedy called *Perez*, *Heart of Atlanta Motel*, and *McClung* “[l]ater examples of the exercise of federal power where commercial transactions were the subject of regulation.” *Id.* at 573. He did not seem to see them as significant advancements: “These and like authorities are within the fair ambit of the Court’s practical conception of commercial regulation and are not called in question by our decision today.” *Id.* at 573-74 (Kennedy, J., concurring).

120. The federal crime, the Court said, “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” *Id.* at 561. Nor did the facts raise any issues as to interstate commerce: “Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.” *Id.* at 567.

121. *Id.* at 561.

122. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

Court for the first time distinguished between commercial or economic activity as opposed to noneconomic or noncommercial activity.<sup>123</sup> Whether this was a helpful distinction or not, even in the *Heart of Atlanta Motel* and *McClung* rational basis cases involving racial discrimination, the emphasis was on the economic harm<sup>124</sup> of racial discrimination on interstate travelers and on goods purchased in interstate commerce.<sup>125</sup> Without rejecting the substantial effects test, the *Lopez* Court was at least willing to halt its expansion:

Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. [See *Hodel*, *Perez*, *McClung*, *Heart of Atlanta Motel*]. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden* . . . and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel* . . . . This

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123. Justice Souter in dissent did not think the distinction workable: “The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly.” *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting); see also Barry Friedman & Genevieve Lakier, “*To Regulate*,” Not “*To Prohibit*”: *Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 256 (2012) (“Commencing with *United States v. Lopez*, the Supreme Court drew a line resting on the distinction between ‘economic’ and ‘non-economic’ activity. That line quickly withered.”).

124. Justice Souter did not agree: “The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases (*McClung* and *Daniel*) or *Perez*—in each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself ‘commercial.’” *Lopez*, 514 U.S. at 628 (Souter, J., dissenting). Justice Breyer in dissent also makes a strong argument against the commercial and noncommercial distinctions, equating the distinction to *E.C. Knight’s* manufacturing versus commerce, or the direct/indirect test. *Id.* at 627-28 (Breyer, J., dissenting). The issue, he said, was the actual practical effect on interstate commerce. *Id.* (Breyer, J., dissenting).

125. Justice Douglas in a concurring opinion in *Heart of Atlanta Motel* had argued against a commerce power approach in favor of a Section 5 of the Fourteenth Amendment approach: “My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the ‘right of persons to move freely from State to State’ ‘occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.’” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 279 (1964) (Douglas, J., concurring) (citations omitted).

we are unwilling to do.<sup>126</sup>

In *United States v. Morrison*, the victim had been raped by two football players at Virginia Tech and after the school's failure to punish her attackers, she filed a civil action in federal court alleging damages under the federal Violence Against Women's Act of 1994 (VAWA). The Supreme Court affirmed the lower court's dismissal of her action as being beyond the scope of Congress's power, either under the commerce clause or Section Five of the Fourteenth Amendment.<sup>127</sup> Congress's power under Section Five of the Fourteenth Amendment to protect against equal protection violations is limited to state actions and did not extend to the private actions in the case.<sup>128</sup>

As to the commerce power, the law itself had no jurisdictional pegs,<sup>129</sup> but it did include "gender motivated violence . . . affecting interstate commerce."<sup>130</sup> The Court cited *Lopez*, stating that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."<sup>131</sup> Following this logic, the Court emphasized the importance of economic versus noneconomic activity:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is

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126. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

127. *See United States v. Morrison*, 529 U.S. 598, 627 (1995) ("But Congress'[s] effort in [the VAWA] to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment.").

128. *See id.* at 621.

129. Just as the School Gun Act in *Lopez*, the Court said that the VAWA contained no jurisdictional element that might indicate some connection to commerce. *Id.* at 612 ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress's regulation of interstate commerce."). The Court compared the civil remedy in VAWA with the criminal provision of the VAWA, which states: "A person who travels across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b)." *Id.* at 613 fn.5; 18 U.S.C. § 2261(a)(1) (2000).

130. 34 U.S.C. § 12361(a) (2000).

131. *Morrison*, 529 U.S. at 610 (citing *United States v. Lopez*, 514 U.S. 549, 560 (1995)).

economic in nature.<sup>132</sup>

Furthermore, the presence of substantial congressional findings of impact on interstate commerce did not convince the Court: “[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, ‘[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.’<sup>133</sup> Rather, the Court continued, “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”<sup>134</sup>

In terms of the impact on interstate commerce, the Court reasoned, “[i]ndeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.”<sup>135</sup> The Court held that Congress could not “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”<sup>136</sup> The Constitution required, the Court said, “a distinction between what is truly national and what is truly local.”<sup>137</sup> The Court concluded that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”<sup>138</sup>

### C. JUSTICE THOMAS’S VIEW OF COMMERCE POWER; SOMEONE TAKES A “WRONG TURN”

Although the majority in *Lopez* found a law outside of Congress’s commerce power for the first time in almost sixty years, Justice Thomas was far from satisfied. But his plea was modest in the beginning: “In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original

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132. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

133. *Id.* at 614.

134. *Id.* (citations & internal quotation marks omitted).

135. *Id.* at 615 (citations omitted).

136. *Id.* at 617 (2000).

137. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

138. *Id.* at 618.

understanding of that Clause.”<sup>139</sup> He called for “reconsider[ing] the ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause” and one that did not require wholesale rejection of recent precedent.<sup>140</sup> His goal was “a coherent test” that did not, in the words of his nemesis case *Jones & Laughlin*, “obliterate the distinction between what is national and what is local and create a completely centralized government.”<sup>141</sup>

His principal objection seemed to be that the “substantial effects” test presented the danger of Congress having unlimited police powers, the kind of power that only states are supposed to have, the power to address any social issue without having to tie the law to some enumerated power.<sup>142</sup> Such a federal police power, Justice Thomas seemed to say, was inconsistent with the states’ reserved powers under the Tenth Amendment: “Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them.”<sup>143</sup> This somewhat resembles the discredited concept of dual federalism, but it does not seem to be Justice Thomas’s main point.<sup>144</sup>

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

140. *Id.* at 585. In *Lopez*, Thomas identified *United States v. Dewitt*, 76 U.S. 41 (1869), as “the first time the Court struck down a federal law as exceeding the power conveyed by the Commerce Clause.” *Id.* at 597 (Thomas, J., concurring). He later states the case as being beyond Congress taxing power. *Gonzales v. Raich*, 545 U.S. 1, 61 (1869) (Thomas, J., dissenting). Thomas would go back to the two-page opinion of *Dewitt* in his later commerce power cases. In *Lopez*, he summarized *Dewitt*: “[T]he Court invalidated a nationwide law prohibiting all sales of naphtha and illuminating oils. In so doing, the Court remarked that the Commerce Clause has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States.” *Lopez*, 514 U.S. at 597 (quoting *United States v. Dewitt*, 76 U.S. 41, 44 (1869)).

141. *Lopez*, 514 U.S. at 585 (Thomas, J., concurring) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

142. *See id.* at 584 (“This [substantial effects] test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.”).

143. *Id.* at 585 (Thomas, J., concurring) (quoting *Chisholm v. Georgia*, 2 U.S. 419, 435 (1793)).

144. Justice O’Connor for the Court in *New York v. United States* expressed her view of the Tenth Amendment: “In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” *New York v. United States*, 505 U.S. 144, 156 (1992).

It is worth noting that Justice Scalia did not share Justice Thomas's broad concern for Congress's commerce power. Justice Scalia said that the Congress's commerce power "was not a major subject of controversy, neither during the constitutional debates nor in the ratifying conventions."<sup>145</sup> He continued by pointing out that both Madison and Hamilton in the Federalist papers "wrote numerous discourses on the virtues of free trade and the need for uniformity and national control of commercial regulation, but said little of substance specifically about the Commerce Clause."<sup>146</sup> As for Madison, Scalia said that he did "not seem to have exaggerated when he described the Commerce Clause as an addition to the powers of the National Government which few oppose and from which no apprehensions are entertained."<sup>147</sup>

Justice Thomas saw the *Lopez* win as not a victory, but as a narrow escape. He was, of course, concerned about the improper regulation of the possession of guns, but more than that:

[I]t seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the [fifty] States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce.<sup>148</sup>

The very fact that the Court had to reject the federal gun possession law was too much in and of itself a slippery slope: "Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination."<sup>149</sup>

Thomas's "discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law"<sup>150</sup> began

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145. *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 264 (1987) (internal quotations marks & citations omitted) (Scalia, J., concurring in part).

146. *Id.* at 264.

147. *Id.*

148. *United States v. Lopez*, 514 U.S. 549, 585 (1995).

149. *Id.*

150. *Id.* (Thomas, J., concurring). Professor Jacob calls Thomas opinion in *Lopez* one of his best defenses of originalism or textualism: "Lopez is, at least up to this point in his career, one of Justice Thomas'[s] lengthiest, most thorough, and most persuasive pronouncements on originalism. It clearly earns him a point in our scorecard." Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 611 (2007)

with the dictionary and the framers.<sup>151</sup> He summarized the early definitions and his analysis of the writings of framers of the Constitution, such as Hamilton.<sup>152</sup> “At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”<sup>153</sup> He later found support for this definition in *Knight*, where he said “this Court [has] held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the Commerce Clause.”<sup>154</sup> In what Thomas called “echoes of the discussions of the Framers regarding the intimate relationship between commerce and manufacturing,” he quoted the language of the *Knight* court: “Commerce succeeds to manufacture, and is not a part of it.”<sup>155</sup>

Justice Thomas’s primary problem is the “substantial effects” test that has been used, if not since *Gibbons*, at least since 1937 in *Jones & Laughlin*. Given Thomas’s well-deserved reputation for being a textualist, he notes the obvious: “The Commerce Clause does not state that Congress may ‘regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes.’”<sup>156</sup> Indeed, it does not, but he went one step further: “[I]t also does not support the proposition that Congress has authority over all activities that ‘substantially affect’ interstate commerce.”<sup>157</sup>

Justice Thomas also rejected the “necessary and proper”<sup>158</sup> clause as allowing Congress to expand commerce power to include local activities affecting interstate commerce.<sup>159</sup> He argued that such an expansion of federal commerce power would have made most of the other enumerated powers unnecessary, such as the

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151. *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring).

152. *Id.* at 586-87.

153. *Id.* at 585.

154. *Id.* at 597.

155. *Id.* (Thomas, J., concurring) (quoting *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895)).

156. *United States v. Lopez*, 514 U.S. 549, 587-88 (1995).

157. *Id.* at 587. As Thomas put it, “Clearly, the Framers could have drafted a Constitution that contained a ‘substantially affects interstate commerce’ Clause had that been their objective.” *Id.* at 588. Justice Thomas supports this with the Constitution’s prohibition on amendments to the Constitution that would “affect” the trafficking in the slave trade until 1808. *See* U.S. CONST. art. V. As with most such arguments, it is hard to disagree that with a Constitution the length of the Bible, the framers may have included many provisions that are implied at best.

158. U.S. CONST. art. I, § 8, cl. 18.

159. *Lopez*, 514 U.S. at 588-89 (Thomas, J., concurring).

bankruptcy power, granting patents and copyrights, or even the need for a provision specifying the power to establish post offices and post roads.<sup>160</sup> Thomas concluded that “[a]n interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.”<sup>161</sup> Such an interpretation, he said, would come “close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution.”<sup>162</sup>

The two precedents Justice Thomas dealt with in his *Lopez* concurrence were *Gibbons* and *Jones & Laughlin*. Justice Breyer claimed in his dissent that *Gibbons* supported the assertion that Congress’s power included “local activity insofar as they significantly affect interstate commerce.”<sup>163</sup> Thomas disputed that

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160. Thomas does not mention that an expansive definition of Article I, Section 8, Clause 1—“The Congress shall have Power to provide for . . . the general Welfare of the United States”—would have done the same. It has been limited to Congress’s spending for the general welfare, but even that may arguably be an expansive power beyond anything the commerce power might do. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“The breadth of this power was made clear in *United States v. Butler*, where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that ‘the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.’ Thus, objectives not thought to be within Article I’s ‘enumerated legislative fields,’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”). Or indeed any of the powers expansively defined might negate other provisions in the Constitution. See Justice Jackson’s concern about War Powers in *Woods v. Miller*: “No one will question that this power is the most dangerous one to free government in the whole catalogue of powers.” 333 U.S. 138, 146 (1948). Justice Thomas acknowledges this: “Accordingly, Congress could regulate all matters that ‘substantially affect’ the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.” *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring). *Miller* itself expressed a similar concern. In *Miller*, the Court found that Congress’s War Powers included the ability to regulate inflation in the domestic housing market, that the powers of war included the effects of war: “We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today’s decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort. Any power, of course, can be abused.” *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 143-44 (1948).

161. *Lopez*, 514 U.S. at 587.

162. *Id.* (emphasis in original).

163. *Id.* at 615 (Breyer, J., dissenting). To be fair, Justice Breyer cited to both *Gibbons* and *Wickard*. It is not clear why Justice Breyer prefers the term “significant” to the more common “substantial,” but he does.

characterization of *Gibbons*. Thomas is correct that Chief Justice Marshall in *Gibbons* did not say that Congress had the power to regulate local activity completely internal to one state if it “affects” interstate commerce. To be more accurate, Marshall said that Congress could not regulate activity solely within one state “which does not extend to or affect another state.”<sup>164</sup> Thomas claims that it misconstrues *Gibbons* to infer from the negative that federal power does not include internal commerce that “does not extend to or affect another state” to the positive “that whenever an activity affects interstate commerce it necessarily follows that Congress can regulate such activities.”<sup>165</sup> Thomas’s logic is a bit twisty, but he argues that the *Gibbons*’s qualification “which does not extend to or affect another state” was just meant to emphasize that “federal authority could not be construed to cover purely intrastate commerce,” that something that did not affect another state “could never said to be commerce ‘among the several states.’”<sup>166</sup> Even Thomas does not seem fully convinced of his attempt to show that *Gibbons* did not broadly define federal commerce power to include activities solely within one state which “affect[ed] another state.” He concedes that even if *Gibbons* is properly read as allowing Congress to regulate active totally within one state that affects interstate commerce, “the ‘affect[s]’ language, at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate and foreign commerce,” that Marshall was not claiming “that Congress could regulate *all* activities that affect interstate commerce.”<sup>167</sup> Thomas’s concession is somewhat damning in that the Court’s test, at least since the *Jones & Laughlin case*, has always required a substantial effect on interstate commerce, or in Justice Breyer’s case a significant effect.

The harder issue is what Thomas called the “wrong turn.” Justice Breyer referred to the Court’s “wrong turn” in *Hammer* in the line of cases running from *Gibbons* to *Darby*,<sup>168</sup> but Thomas

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164. *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

165. *United States v. Lopez*, 514 U.S. 549, 594 (1995).

166. *Id.* at 594-95.

167. *Id.* at 595.

168. *Darby* is an important case in that it gave an expansive view to both Congress’s power to regulate things crossing state lines and its power to regulate things affecting interstate commerce. Justice Thomas somewhat confusingly mischaracterizes Justice Breyer’s reference to the “wrong turn.” In his first reference to the wrong turn, he says, “Because this error [an overbroad interpretation of *Gibbons*] leads the dissent to characterize the first 150 years of this Court’s case law as a ‘wrong turn,’ I feel compelled to put the last 50 years in proper perspective.” *Id.* at 593. The dissent had not said that the first 150 years were a mistake, just the opposite, that except for

claims the wrong turn was “the Court’s dramatic departure in the 1930’s,”<sup>169</sup> an apparent reference to *Jones & Laughlin*.<sup>170</sup> Between *Hammer*, which concluded that Congress did not have the commerce power to regulate child labor, and *Jones & Laughlin*, which found that Congress could regulate matters that substantially affected interstate commerce, Thomas does not seem to have the best of the comparisons. *Hammer* was a notoriously wrong decision, holding that Congress did not have the commerce power to address the national economic and social disaster of child labor. *Jones & Laughlin* created a practical test for evaluating when local activities hurt interstate commerce. As between *Hammer* and *Jones & Laughlin*, it is hard to believe that *Hammer* was not the wrong turn. Justice Thomas’s final analysis of the “wrong turn” refers to *Lopez* itself:

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions. It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court’s opinion should not be viewed as “radical” or another “wrong turn” that must be corrected in the future.<sup>171</sup>

One of the most fascinating parts of Justice Thomas’s concurrence is the degree to which *Jones & Laughlin* is the name that dare not be stated. He cites the case only twice and only for the proposition that Congress did not have general police power.<sup>172</sup> Otherwise, it was not a case worth mentioning, only “a dramatic departure in the [1930s]” or “an innovation of the [twentieth] century.”<sup>173</sup> Rather than *Jones & Laughlin*, his key cases were the

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*Hammer* the past 150 years were in support of a broad view of commerce power. See *United States v. Lopez*, 514 U.S. 549, 615-631 (1995) (Breyer, J., dissenting). The Breyer claim was not accurate—there had been no consistent support for 150 years—but it was not a rejection of 150 years of precedent.

169. *Id.* at 599.

170. Justice Thomas does not identify what case he considered to be a “wrong turn,” but it seems to be an obvious reference to *Jones & Laughlin*, which became the preeminent test for expanding federal commerce power.

171. *Lopez*, 514 U.S. at 601.

172. The first cite is in support of the uncontroversial statement that the federal government was intended by the Constitution to have limited powers. *Id.* at 584. The second cite is to language in *Jones & Laughlin* to the effect that any test for federal power should be one that does not “obliterate the distinction between what is national and what is local and create a completely centralized government.” *Id.* at 585.

173. *United States v. Lopez*, 514 U.S. 549, 599 (1995). His tone could charitably be

now repudiated *E.C. Knight*,<sup>174</sup> *Carter Coal*,<sup>175</sup> and *Schechter Poultry*.<sup>176</sup> Additionally, Thomas threw the textualist book at the substantial effects test: “Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation.”<sup>177</sup>

Further, according to Justice Thomas, the “substantial effects” test had an additional flaw: “Its ‘aggregation principle.’”<sup>178</sup> Under the class or aggregate impact logic, Congress considers whether the whole of a similar activity substantially affects interstate commerce, not whether the specific activity in the case affects interstate commerce.<sup>179</sup> Thomas has damned it with faint praise, writing that “[t]he aggregation principle is clever, but has no stopping point.”<sup>180</sup> He claimed that “[o]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce.”<sup>181</sup> And his slippery slope analogy was more like a runaway avalanche: “Under our jurisprudence, if Congress passed an omnibus ‘substantially affects interstate commerce’ statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.”<sup>182</sup>

Ultimately, Justice Thomas ended in the same seemingly

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called dismissive: “I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.” *United States v. Lopez*, 514 U.S. 549, 596 (1995).

174. *See id.* at 598 (“In *United States v. E.C. Knight Co.*, this Court held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the Commerce Clause.”) (citations omitted).

175. *See id.* at 599 (“As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States.” (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936))).

176. *See id.* (Thomas summarized the holding of *Schechter*: “[T]hat Congress may not regulate intrastate sales of sick chickens or the labor of employees involved in intrastate poultry sales” (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543-550 (1935))).

177. *Lopez*, 514 U.S. at 599-600.

178. *Id.* at 600.

179. *Id.*

180. *Id.*

181. *Id.*

182. *United States v. Lopez*, 514 U.S. 549, 600-01 (1995).

conciliatory tone that he began with: “The analysis also suggests that we ought to temper our Commerce Clause jurisprudence.”<sup>183</sup> No “wholesale abandonment” of recent decisions was required, he said, even though he claimed his analysis revealed “that our substantial effects test is far removed from both the Constitution and from our early case law.”<sup>184</sup> In a footnote, he reasserted his textualist credentials. “Although I might be willing to return to the original understanding,” he understood that “[c]onsideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.”<sup>185</sup> He could not resist calling the current approach “a blank check,” but in what seems to be a bit passive aggressive, concluded, “At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence.”<sup>186</sup>

Justice Thomas’s concurrence in *Morrison* was short and to the point. He repeated the main themes of his *Lopez* concurrence—that “the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress[s] powers and with this Court’s early Commerce Clause cases.”<sup>187</sup> He said that its “rootless and malleable standard”<sup>188</sup> just encouraged Congress’s view that its commerce power “has virtually no limits” and led to “Congress appropriating state police powers under the guise of regulating commerce.”<sup>189</sup> It is worth noting that the majority opinion by Chief Justice Rehnquist in *Morrison* gives “props” three times to Justice Thomas’s historical survey.<sup>190</sup> Without mentioning Justice Thomas by name, Justice Souter’s dissent objected twice to what he saw as the Court taking an unjustified new textual approach to traditional commerce power precedents: “Perhaps this explains why the majority is not content to rest on its cited precedent but

183. *United States v. Lopez*, 514 U.S. 549, 601 (1995).

184. *Id.*

185. *Id.* at 601 n.8. Respect for *stare decisis* ceases to be a concern in Thomas’s Dormant Commerce Clause attacks.

186. *Id.* at 602.

187. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

188. *Id.* Thomas in *Raich* ties “malleable” to the expansion of the “substantial effects” test by use of the class impact. See *Gonzales v. Raich*, 545 U.S. 1, 68 (2005) (“The majority’s treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market.”).

189. *Morrison*, 529 U.S. at 627.

190. *United States v. Lopez*, 514 U.S. 549, 601 n.8, 618-19 (1995).

claims a textual justification for moving toward its new system of congressional deference subject to selective discounts.”<sup>191</sup>

**D. GONZALEZ V. RAICH: THE ADVENT OF THE RATIONAL BASIS TEST DRAWS NOT A WHIMPER**

In *Gonzalez v. Raich*,<sup>192</sup> which upheld Congress’s commerce power to regulate state-grown and state-consumed marijuana, Justice Thomas’s dissent more fully addressed the necessary and proper clause of Article 1, Section 8, Clause 18. Obviously marijuana was not itself part of interstate commerce, but a more difficult issue was whether it bore some necessary and proper relationship to interstate commerce.<sup>193</sup> Thomas stated the extremes: the clause was “not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power,” but it also did not limit Congress “to enact only laws that are absolutely indispensable to the exercise of an enumerated power.”<sup>194</sup> Going back to *McCulloch*, Thomas quoted Chief Justice Marshall’s summary of the clause: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>195</sup> From this, Thomas

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191. *United States v. Morrison*, 529 U.S. 598, 638 (2000) (Souter, J., concurring).

192. *Gonzales v. Raich*, 545 U.S. 1 (2005).

193. As the Court notes the challenge to the federal law was limited to the law’s “categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes.” *Id.*

194. *Gonzales v. Raich*, 545 U.S. 1, 59-60 (2005).

195. *Id.* at 60. Justice Thomas addressed Marshall’s summary of the necessary and proper clause in his concurrence in *Sabri v. United States* to the Court’s holding that Congress’s spending power, the power to “provide for the general welfare” in Article I, Section 8, Clause 1, included the right to make a federal crime the bribery of any organization that had received more than \$10,000 from a federal program. *See* 541 U.S. 600, 611-14 (2004) (Thomas, J., concurring). The Court rejected the assertion that there had to be some connection between forbidden conduct and the federal funds. *Id.* at 605. The majority opinion of Justice Souter could not resist a catty reference to legislative intent: “For those of us who accept help from legislative history, it is worth noting that the legislative record confirms that [the law] is an instance of necessary and proper legislation.” *Id.* at 606. Justice Thomas rejected what he thought was the Court equating “necessary and proper” with the rational basis or “means-rationality” test: “To show that a statute is ‘plainly adapted’ to a legitimate end, then, one must seemingly show more than that a particular statute is a ‘rational means,’ to safeguard that end; rather, it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power.” *Id.* at 612-13 (citations omitted). Thomas acknowledged that the Court had done a “not-wholly-unconvincing job of tying the broad scope of [the law] to a federal interest in federal funds and programs, but he preferred to base his concurrence on Congress’[s] Commerce Clause

garnered four rules: (1) “appropriate,” (2) “plainly adapted,” (3) “not prohibited,” and (4) not inconsistent with “the letter and spirit of the constitution.”<sup>196</sup> Justice Thomas equated “proper” with these latter two requirements: “Even assuming the [law’s] ban on locally cultivated and consumed marijuana is ‘necessary,’ that does not mean it is also ‘proper.’ The means selected by Congress to regulate interstate commerce cannot be ‘prohibited’ by, or inconsistent with the ‘letter and spirit’ of, the Constitution.”<sup>197</sup>

Justice Thomas accepted that the federal ban “on intrastate cultivation, possession, and distribution of marijuana” might on its face “be plainly adapted to stopping the interstate flow of marijuana,” but not as applied to those exempted under California law for medical marijuana use.<sup>198</sup> He said that the government offered no “obvious reason why banning medical marijuana use was necessary to stem the tide of interstate drug trafficking.”<sup>199</sup> He could see no reason to apply the law to medical marijuana patients “unless Congress’[s] aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.”<sup>200</sup> For Congress to regulate intrastate use of marijuana, “plainly adapted” meant “there must be an “obvious, simple, and direct relation” between the intrastate ban and the regulation of interstate commerce.”<sup>201</sup>

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precedents, though continuing “to doubt that we have correctly interpreted the Commerce Clause.” *Sabri v. United States*, 541 U.S. 600, 611 (2004).

196. *Gonzales v. Raich*, 545 U.S. 1, 60 (2005). And extending the law to include strictly in state medical marijuana users would “confer on Congress a general ‘police power’ over the Nation.” *Id.* at 65. He said, “This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a “pretext . . . for the accomplishment of objects not intrusted to the government.” *Id.* at 66 (citations omitted).

197. *Id.* at 64-65.

198. *Id.* at 61.

199. *Id.* at 64.

200. *Id.*

201. *Gonzales v. Raich*, 545 U.S. 1, 61 (2005). For support, Thomas cited to his own concurrence in the judgment in *Sabri v. United States*, 541 U.S. 600, 613 (2004). He also cited his go-to case, *United States v. Dewitt*, which he described as “finding [a] ban on intrastate sale of lighting oils not ‘appropriate and plainly adapted means for carrying into execution’ Congress’[s] taxing power.” *Gonzales*, 545 U.S. at 61 (quoting *United States v. Dewitt*, 76 U.S. 41, 44 (1869) (parentheses deleted)). Justice Thomas found support in the writings of conservative scholar Randall Barnett. He says that Professor Barnett’s article, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 186 (2003), which details “statements by Founders that the Necessary and Proper Clause was not intended to expand the scope of Congress’[s] enumerated powers.” *Gonzales*, 545 U.S. at 65. Thomas also referenced Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826, 841 (2000), which argues that many of the federal crimes based upon the Commerce Clause are of recent vintage

Thomas said that the federal law must be “essential to the regulation of interstate commerce itself,” that the test was “not whether the legislation extends only to economic activities that substantially affect interstate commerce.”<sup>202</sup> Justice Thomas has particular disdain for expanding the class of activities that substantially affect interstate commerce to noneconomic effects: “If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the [fifty] States.”<sup>203</sup> Justice Thomas concluded with a traditional call for respect for our federalist system: “Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens.”<sup>204</sup>

Justice Thomas did not seem to acknowledge the Court’s expansion of the substantial effects test by including the rational basis test in determining Congress’s power. The *Raich* majority stated it plainly: “In assessing the scope of Congress’[s] authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>205</sup> Thomas mentioned the rational basis test only in passing. He said, “Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.”<sup>206</sup> But he did not tie that statement to the rational basis test. Justice Thomas even joined Justice Scalia’s dissent in *National Federation of Independent Business v. Sebelius*, where Justice Scalia seemingly accepted the validity of the rational basis test in defining substantial effects: “It is true enough that Congress needs only a ‘rational basis’ for concluding that the regulated activity substantially affects interstate commerce.”<sup>207</sup> True, in *Sebelius*, a

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and lack any actual relationship to interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 66 (2005).

202. *Id.* at 67-68.

203. *Id.* at 69.

204. *Id.* at 74.

205. *Id.* at 22; see generally James M. McGoldrick, Jr., *The Commerce Clause, The Proposition, and the Rational Basis Test*, 14 U. MASS. L. REV. 182 (2019).

206. *Gonzales v. Raich*, 545 U.S. 1, 64 (2005).

207. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 657-58 (2012) (emphasis deleted). Why Justice Thomas would ignore both in *Raich* and *Sebellius* that the rational basis test expands Congress’s power to determine the substantial effect on commerce is a mystery. Perhaps it relates to his knowledge that that test was developed in two cases that expanded Congress’s power to address racism, something

majority of the Court had found that Congress did not have commerce power to impose an individual mandate on insurance coverage because lack of insurance was “inactivity.”<sup>208</sup> Since commerce did not include inactivity, there could be no way that Congress could rationally believe that there was a substantial impact on interstate commerce. The dissent’s assertion that the rational basis test played a rightful role in defining substantial effects was speculation at best.

### III. THE DORMANT COMMERCE CLAUSE’S LIMITATION ON STATE AND LOCAL POWER

Like Congress’s commerce power, the Dormant Commerce Clause<sup>209</sup>—or the flip side of the Commerce Clause—begins with *Gibbons v. Ogden*.<sup>210</sup> In *Gibbons v. Ogden*, Chief Justice Marshall

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that might have resonated with Justice Thomas. The rational basis test in *Heart of Atlanta Motel* and *McClung* were both important in reaching private racial discrimination something that would have been very important to Justice Thomas. See *supra* note 54. Justice Thomas does not support race-based affirmative action as to admissions in higher education. See *Fisher v. Univ. of Tex.*, 570 U.S. 297, 315 (2013) (“I write separately to explain that I would overrule *Grutter v. Bollinger* and hold that a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”). Nonetheless, his reaction to outright racism is visceral. See *Virginia v. Black*, 538 U.S. 343, 394 (2003) (“The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.”).

208. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 658 (2012) (“If all inactivity affecting commerce is commerce, commerce is everything. Ultimately, the dissent is driven to saying that there is really no difference between action and inaction, a proposition that has never recommended itself, neither to the law nor to common sense.”) (citations omitted).

209. Justice Thomas prefers the term “negative” Commerce Clause. See *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 609, n.1 (1997) (Thomas, J., dissenting) (“Although the terms ‘dormant’ and ‘negative’ have often been used interchangeably to describe our jurisprudence in this area, I believe ‘negative’ is the more appropriate term.”). Thomas claims, “There is, quite frankly, nothing ‘dormant’ about our jurisprudence in this area.” *Id.* He cites to Professor Julian N. Eule’s influential article, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 425, n.1 (1982). “Dormant” is the term that Marshall used for the implied limitations of the Commerce Clause, and for that reason I use it in this article. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829). The Court tends to use the terms “dormant” and “negative” interchangeably. See *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353, 359 (1992) (“As we have long recognized, the ‘negative’ or ‘dormant’ aspect of the Commerce Clause prohibits States from ‘advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.’”).

210. Dismissing *Gibbons* as dicta, Justice Scalia dated the Dormant Commerce

held that Congress had the commerce power to regulate steamboat traffic between New York and New Jersey and that pursuant to the Supremacy Clause,<sup>211</sup> the Federal Coastal Act of 1793's grant of a license to Gibbons preempted the state monopoly.<sup>212</sup> Given that holding, there was no need for Chief Justice Marshall to discuss whether the constitutional grant of commerce power to Congress all by itself prevented states from regulating interstate commerce, such as the monopoly given by New York to Ogden, but he did so anyway.<sup>213</sup> Even if there were no Federal Coastal Act of 1793, Congress's plenary commerce power, he suggested, meant that state and local governments could not regulate interstate commerce at all.<sup>214</sup>

Chief Justice Marshall summarized the great Daniel Webster's arguments on the implied limitations of the commerce power on state regulations: "It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing."<sup>215</sup> He also concisely expressed support for the argument: "There is great force in this argument, and the Court is not satisfied that it has been refuted."<sup>216</sup> But because the Federal Coastal Act of 1793 already preempted the state law, he did not have to follow through with any application of his famous dicta.<sup>217</sup>

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Clause from 1873 and stated that 114 years have passed since the negative Commerce Clause was formally recognized by the U.S. Supreme Court. *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring) (citations omitted). Whatever origins of the Dormant Commerce Clause, Justice Scalia is dismissive of the concept, saying that "our applications of the doctrine have, not to put too fine a point on the matter, made no sense." *Id.* at 260.

211. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

212. *Gibbons v. Ogden*, 22 U.S. 1, 211-22 (1824). The Court does not mention the Federal Coastal Act of 1793 by name, but the Court spent over ten pages explaining why the federal law preempted the state law. *See id.*

213. *Id.* at 208-09.

214. *Id.* at 209.

215. *Id.*

216. *Id.*

217. The concurring opinion by Justice Johnson held directly on Dormant Commerce Clause grounds that Congress had the exclusive power to regulate commerce: "[I]t follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State

In *Willson v. Black Bird Creek Marsh Co.*, Chief Justice Marshall's most famous case raising the Dormant Commerce Clause issue other than *Gibbons*, Marshall found that Delaware authorizing Black Bird Creek Marsh Company to construct a dam across a navigable interstate creek in order enhance the value of the adjoining property and to improve the health of the nearby inhabitants did not raise significant Dormant Commerce Clause issues.<sup>218</sup> The owner of a nearly 100-ton sloop who had been sued for damaging the dam challenged the right of the state to build the dam.<sup>219</sup> Chief Justice Marshall determined that

There were no federal laws restricting the building of the dam, and thus the only constitutional restriction would flow from the implicit in the commerce clause. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states.<sup>220</sup>

Without explanation, he concluded that there was no implicit dormant commerce limit in the case: "We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power *to regulate commerce in its dormant state*."<sup>221</sup>

And thus the Dormant Commerce Clause became part of the interpretation of the Commerce Clause.<sup>222</sup> As the Court said in

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to act upon." *Gibbons v. Ogden*, 22 U.S. 1, 227 (1824). The Court in a recent case attributes the modern approach to Justice Johnson's concurring opinion: "We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power." *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 571 (1997).

218. 27 U.S. 245, 252 (1829).

219. *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 251 (1829).

220. *Id.* at 252.

221. *Id.* (emphasis added).

222. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) ("The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose. That broad purpose was well expressed by Mr. Justice Jackson in his opinion for the Court in *H. P. Hood & Sons, Inc. v. Du Mond*, "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 'what is ultimate is the principle that one state in its dealings with

2018 in *South Dakota v. Wayfair*, “And so both a broad interpretation of interstate commerce and the concurrent regulatory power of the States can be traced to *Gibbons* and *Willson v. Black Bird Creek*.”<sup>223</sup> *Gibbons* and *Black Bird Creek* are the sum of Chief Justice Marshall’s legacy as to the Dormant Commerce Clause doctrine, and they reach different results.<sup>224</sup> *Gibbons* said that federal power was exclusive, and *Black Bird Creek* said that it was not applicable and allowed the state to dam an interstate river, albeit a minor one.

The modern approach to the Dormant Commerce Clause begins in 1851 with *Cooley v. Board of Wardens*.<sup>225</sup> The Court accepted the validity of the Dormant Commerce Clause doctrine, but not Chief Justice Marshall’s suggestion in *Gibbons* that there was some absolute prohibition on a state’s ability to regulate interstate commerce.<sup>226</sup> In *Cooley*, the Court reasoned that Congress’s power over interstate commerce was conclusive as to only those subjects of interstate commerce needing the uniformity of federal regulation.<sup>227</sup> As to other subjects in interstate

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another may not place itself in a position of economic isolation.”) (citations omitted). Professor Galle calls the Dormant Commerce Clause “a kind of judge-made free-trade zone. Absent contrary instructions from Congress, courts apply the DCC to strike down state laws that tend to favor in-state exchanges over cross-border trade.” Brian Galle, *Kill Quill, Keep the Dormant Commerce Clause: History’s Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158 (2018).

223. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018) (reversing the Court’s long-held view that states under the Dormant Commerce Clause could not impose sales or use taxes on companies that did not have a physical presence within the state).

224. After *Gibbons*, Marshall referred to the Dormant Commerce Clause in *Brown v. Maryland*, where it was an alternative holding. See 25 U.S. 419, 437 (1827). Marshall’s primary holding in *Brown* was that Maryland’s licensee fee of \$50 on foreign imports of various kinds of hard liquor was an invalid import tax on foreign commerce in violation of the Import-Export Clause of U.S. CONST. art. I, § 10, cl. 2. *Id.* at 448-49.

225. *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851). That *Cooley* was an important case cannot be doubted: “The *Cooley* test was destined to become one of the most significant readings of the dormant Commerce Clause.” Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 159 (1995).

226. Of course, Marshall himself in *Black Bird Creek* had not found the doctrine always controlling. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829).

227. See *Cooley*, 53 U.S. at 319 (“Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.”).

commerce that did not need the uniformity of regulation and might, in fact, need diversity of regulation, those subjects could be regulated concurrently by either the state or the federal government.<sup>228</sup> Steamboat traffic between New York and New Jersey might, for example, need uniformity of regulation while any interstate commerce on the little Black Bird Creek would be subject to concurrent state and federal regulation.

In *Cooley*, the Port of Philadelphia required that interstate barges using its port take on a Philadelphia-based pilot to guide the boat into and out of the port.<sup>229</sup> Those who did not comply would face a substantial pilotage fee.<sup>230</sup> Among other arguments<sup>231</sup> against the local pilotage law was the argument that it was contrary to Congress's power to regulate interstate commerce.<sup>232</sup> The alleged purpose of the law was to require that a pilot familiar with the intricacies of the Port of Philadelphia guide the barge into port.<sup>233</sup>

The *Cooley* Court confronted the issue head-on: Did the grant

228. See *California v. Thompson*, 313 U.S. 109, 113 (1941) (“Ever since [*Blackbird Creek Marsh Co.*] and [*Cooley*], it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause.”) (citations omitted).

229. *Cooley v. Bd. of Wardens*, 53 U.S. 299, 313 (1851).

230. *Id.*

231. The Court rejected the claims that the pilotage requirements and the sanctions for not obeying them were imposts and duties in violation of Article I, Section 10, Clause 2 of the U.S. Constitution or a tonnage charge in violation of Clause 3 of the same section. *Id.* at 314. The Court said that it well understood by the Framers of the Constitution that “[i]mposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage.” *Id.*

232. Congress in 1789 provided “[t]hat all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States.” *Id.* at 315. The fact that Congress allowed for such laws did not at the time diminish the constitutional issue. See *id.* at 318 (“If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power.”). If, as Marshall said, the Commerce Clause in the Constitution all by itself prevented states from regulating interstate commerce, then Congress by passing legislation could not change the constitutional limitation. The Court later reasoned that Congress could permit state regulations on interstate commerce without violating the Constitution. See *Wilkerson v. Rahrer*, 140 U.S. 545, 562-64 (1891).

233. *Cooley*, 53 U.S. at 311-12.

of commerce power to Congress “per se deprive the states of all power to regulate pilots?”<sup>234</sup> The Court said that there were no express exclusions of state power in the Constitution,<sup>235</sup> nor was the grant of power so all-encompassing that by implication state power was excluded.<sup>236</sup> For example, the Court said the Commerce Clause did nothing similar to Article I, Section 8, Clause 17 which gave Congress the power “[t]o exercise exclusive Legislation”<sup>237</sup> as to the federal seat of government, which necessarily excluded the states from regulating Washington D.C.<sup>238</sup> On the other hand, commerce power was not like taxing power, which everyone agreed could be jointly exercised by both the central government and the states.<sup>239</sup> Commerce power came somewhere in between. The need for uniformity was implied from the nature of the power. It was not like Congress’s power to regulate Washington, D.C., where the word “exclusive” would be viewed as “imperatively demanding a single uniform rule.” On the other hand, it was not like taxing power, which all conceded could be exercised concurrently by the state and federal governments. Some subjects required that only Congress had the commerce power to regulate them, while other subjects like pilotage laws would be viewed “as imperatively demanding that diversity, which alone can meet the local necessities of navigation.”<sup>240</sup>

The resulting *Cooley* test is sometimes called “the doctrine of selective exclusivity.”<sup>241</sup> I prefer to call it the subject test, since it varies depending upon whether the subject in interstate commerce needs uniformity or diversity of regulation. The *Cooley* subject test ultimately proved too simplistic. The modern test evolved into two main concerns, state laws that discriminated against interstate commerce and state laws that, although even-handed and not

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234. *Cooley v. Bd. of Wardens*, 53 U.S. 299, 317 (1851).

235. Article I, Section 10 has a comprehensive list of things that states cannot do, none of which disqualify the states from regulating interstate commerce. One of the prohibitions is the Contract Clause: “No state shall . . . impair obligations of Contract.” U.S. CONST. art. I, § 10, cl. 1.

236. *Cooley*, 53 U.S. at 318-19.

237. U.S. CONST., art. I, § 8, cl. 17.

238. Pursuant to the power given to Congress to create a seat of federal government, Washington, D.C. became the permanent seat of government beginning in 1800. See *Phillips v. Payne*, 92 U.S. 130 (1875).

239. The Court cited to *Federalist*, No. 32. *Cooley v. Bd. of Wardens*, 53 U.S. 299, 318 (1851).

240. *Id.* at 319.

241. See Douglas R. Williams, *Trash, Trains, Trucks, Taxes—and Theory*, 49 ST. LOUIS U. L.J. 835, 841-42 (2005).

discriminatory, imposed an unreasonable burden on interstate commerce.

#### A. THE MODERN TEST FOR THE DORMANT COMMERCE CLAUSE

In 2018, the Supreme Court summarized its Dormant Commerce Clause rules:

Modern precedents rest upon two primary principles that mark the boundaries of a State’s authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face “a virtually *per se* rule of invalidity.” State laws that “regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>242</sup>

##### 1. DISCRIMINATION AGAINST INTERSTATE COMMERCE: (VIRTUALLY) PER SE INVALID

As for discrimination, the Court concisely summarized its rule against discrimination in 2007: “To determine whether a law violates this so-called ‘dormant’ aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce . . . . In this context, ‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>243</sup> The Court in *New Energy Co. of Indiana v. Limbach*<sup>244</sup> equated discrimination with “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors,” and concluded that “state

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242. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-91 (2018) (citations omitted).

243. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citations omitted) (internal quotations omitted).

244. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). Even a relatively straightforward discrimination case such as *Limbach* has its critics. See Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 32-33 (2002) (“No decision of the Supreme Court better exemplifies the doctrinal problems of the Dormant Commerce Clause nondiscrimination principle than *New Energy Company of Indiana v. Limbach*.”). Professor Zelinsky is primarily concerned with the Court’s different treatment of discriminatory taxes versus its treatment of discriminatory subsidies.

statutes that clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”<sup>245</sup>

It is my view that the Court’s approach manages to complicate what would be simple rules against local discrimination.<sup>246</sup> First, it seems to me that the Court seems to have lost sight of just how simple this rule should be. Discrimination is classification based upon origin. It is contrary to the Dormant Commerce Clause as racism and sexism are to the Equal Protection Clause. Discrimination based upon origin means treating in-state commerce differently than out-of-state commerce because it is in-state. It is economic protectionism designed to benefit in-state economic interest over out-of-state economic interests. The Court has made a basic mistake in construing discrimination, leading to the introduction of the adverb “virtually.” There is no part of the “per se” test that needs a modifier, let alone one as imprecise as “virtually.”

The Court has made a simple test<sup>247</sup> difficult by letting claims

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245. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988).

246. Only partially compounding the Court’s difficulty with its Dormant Commerce Clause rules against discrimination are the Court’s two exceptions: (1) If the state or local government is a Market Participant, then it can prefer in-state to out-of-state businesses and persons. *See generally* David S. Bogen, *The Market Participant Doctrine and the Clear Statement Rule*, 29 SEATTLE U. L. REV. 543 (2006). Market Participant is defined as the state being a seller, a purchaser, or an employer. *See Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (selling cement); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (purchasing auto hulks); *White v. Mass. Council of Constr. Emp’rs, Inc.*, 460 U.S. 204 (1983) (hiring contractors). The exception is generally clear enough, but a couple of recent cases have raised questions about the scope of the exception as to the state’s preference for itself. *See generally* Bradford C. Mank, *Are Public Facilities Different from Private Ones?: Adopting A New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157 (2007). (2) Congress can always use its Commerce Power to permit discrimination against interstate commerce. Both exceptions also apply to the Undue Burdens line of cases. *See generally* Richard A. Paschal, *Congressional Power to Change Constitutional Law: Three Lacunae*, 77 U. CIN. L. REV. 1053, 1103-26 (2009). *But see* Professor Williams’s objection to the exception: “The Court’s willingness to allow Congress to overrule the Dormant Commerce Clause’s limitation on state authority is fundamentally inconsistent with the Court’s declared view that Congress may not authorize the states to violate the Constitution. That is bad enough, but, even worse, the Court has failed to provide a cogent explanation for this anomalous exception.” Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 156 (2005).

247. The real difficulty with the discrimination test is a factual one, not a legal one. As obvious as the discrimination was in *Dean Milk*, in other cases, such as *Mintz v. Baldwin*, 289 U.S. 346 (1933), it was hard to know whether the state had a legitimate concern for diseased cattle or whether it was protecting local dairy farmers from additional competition. In *Mintz v. Baldwin*, the Court allowed New York to ban out

of valid state interests distract it from discrimination. *Dean Milk v. Madison*<sup>248</sup> is the best example of the Court becoming distracted by this slight of hand. In *Dean Milk*, a local statute limited milk sold for human consumption in Madison, Wisconsin to milk from cows within twenty-five miles of Madison and pasteurized milk within thirty miles of Madison.<sup>249</sup> The end result was that Dean Milk's Illinois dairy herds were excluded from the Madison market.<sup>250</sup> Madison claimed that its purpose was to protect the quality of milk sold to Madison consumers. The Court recognized that this was a fallacious claim because Illinois herds were subject to federal inspections that were as strenuous as Madison's.<sup>251</sup>

Instead of a simple “per se” finding, the Court bounced around like a pinball machine. It said that the law “in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois” and that, in “erecting an economic barrier” against out-of-state dairies, Madison “plainly discriminates against interstate commerce.”<sup>252</sup> But then, to mix my metaphor, the Court pulled its punch: “This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, *if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.*”<sup>253</sup> Suddenly, in the middle of a straightforward finding of per se

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of state cattle with Bang's disease out of concern for the spread of a disease of dairy cattle that affected the quality of their milk. See *Mintz v. Baldwin*, 289 U.S. 346 (1933). Since 90% of New York cattle already had Bang's disease, it is likely that the real purpose of the law was to lessen the level of competition in the dairy business by excluding additional out of state cattle. See also *Maine v. Taylor*, 477 U.S. 131 (1986). In *Taylor*, Justice Stevens seems convincing in claiming that there were no real environmental concerns for preventing the importation of out of state bait fish. Justice Stephens was full in on the discrimination: “There is something fishy about this case.” *Maine v. Taylor*, 477 U.S. 131, 152 (1986) (Stephens, J., dissenting). The majority accepted that there was a legitimate environmental concern that outweighed the harm to interstate commerce. *Id.*

248. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

249. “One section in issue makes it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison.” See *id.* at 350. The other section essentially required that the herds not be from “farms located beyond twenty-five miles from the center of the city.” *Id.* at 350-351.

250. So were herds from in state regions such as Milwaukee, Wisconsin, but discrimination against other in state economic interest has never been thought by the Court to present a Dormant Commerce Clause issues.

251. See *Dean Milk Co.*, 340 U.S. at 356 (“The [Madison] Commissioner testified that Madison consumers ‘would be safeguarded adequately’ under either [federal] proposal and that he had expressed no preference.”).

252. *Id.* at 354.

253. *Id.* (emphasis added).

discrimination, the Court inserted an “if” and, to mix my metaphors again, that conjunction was the acorn that grew into the oak that is the adverb “virtually.” The Court said that discrimination was not limited to “the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods,” but because Madison had claimed a valid health reason, the Court reframed the issue to an undue burdens issue.<sup>254</sup> “Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them.”<sup>255</sup> In part because of the presence of reasonable and adequate alternatives, the Court easily found that city rules imposed an undue burden on interstate commerce.<sup>256</sup> It was too late; the Court had introduced a note of ambiguity into what should have been a per se finding. Even the Court’s strong conclusion did not undo the damage: “To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.”<sup>257</sup>

States almost always have some good reason for discriminating against interstate commerce, which partially shields its economic protectionism. But if the reason does not go to some difference between in-state and out-of-state, it should be nonetheless per se invalid. Sometimes the Court recognizes this. In *Philadelphia v. New Jersey*, New Jersey excluded out-of-state garbage from its in-state landfills in order to protect its environment.<sup>258</sup> The Court recognized that protecting the environment was a valid state interest, but that interest did not relate to any difference between in-state and out-of-state

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254. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951). The Court undertakes a balancing approach to determine the validity of the city law. An important part of that balance is whether there were “reasonable and adequate alternatives” available. *Id.* at 354.

255. *Id.* at 354.

256. *Id.* at 354-55.

257. *Id.* at 356. The Court made the problem worse by calling this approach “strict scrutiny,” inviting comparisons with the compelling state interest test used in due process and equal protection cases involving fundamental rights or suspect classifications. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (“At a minimum such facial discrimination invokes the *strictest scrutiny* of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”) (emphasis added). *Hughes* involved an obviously discriminatory Oklahoma law that forbade the sale of Oklahoma minnows to out of state users.

258. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 618-19 (1978).

garbage.<sup>259</sup> The state, the Court said, cannot impose a disproportionate burden on an out-of-state interest even in the pursuit of an otherwise valid interest.<sup>260</sup> Out-of-state interests bore a disproportionate burden in advancing a New Jersey interest. That is the very essence of economic protectionism, no matter the validity of the underlying environmental interest. In many other cases, the Court will undertake an undue burdens balancing approach, which only confuses the issue.<sup>261</sup> Another way of putting it is that discriminatory state laws are per se invalid, unless interstate commerce is different in some way that justifies the discrimination, in which case the law is not in fact discriminatory. In those cases, interstate commerce is being discriminated against, not because it is interstate, but because it is different. As the Court put it in *Limbach*: “Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down,<sup>262</sup> unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”<sup>263</sup>

## 2. UNDUE BURDENS ON INTERSTATE COMMERCE: BURDEN IMPOSED VERSUS LOCAL BENEFIT

As for undue burdens, *Gibbons*, *Black Bird Creek*, and *Cooley* all mulled about for over a hundred years<sup>264</sup> before the Court

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259. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (“But whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the law] violates this principle of nondiscrimination.”).

260. *Id.*

261. While normally this will lead to the same result as the “virtually per se” test, that is not always the case. See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986). *Taylor* upheld an absolute ban on the importation of baitfish into Maine, but perhaps for what the majority believed to be valid non-discriminatory environmental reasons. See *id.*

262. The Court in *Limbach* cited to *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *Lewis v. BT Investment Managers, Inc.*, 444 U.S. 822 (1979); and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). Not a one of those three cases is a pure discrimination case “routinely struck down.”

263. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988). For this proposition, the Court cited to *Taylor*, 477 U.S. 131, which is anything but an example of discrimination “demonstrably justified.” Justice Stevens in a dissenting opinion in the case called the state’s justification fishy. *Taylor*, 477 U.S. at 153.

264. As the Court put it in *South Dakota v. Wayfair, Inc.*, “Though considerable uncertainties were yet to be overcome, these precedents [*Gibbons*, *Black Bird Creek*, and *Cooley*] still laid the groundwork for the analytical framework that now prevails for Commerce Clause cases.” 138 S. Ct. 2080, 2090-91 (2018). For a history of the Dormant Commerce Clause, see James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the “Considerable Uncertainties”—1824 to 1945*, 52

summarized what it viewed as the then current state of the Dormant Commerce Clause in 1945 in *Southern Pacific v. Arizona*.<sup>265</sup> “Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation.”<sup>266</sup> *Southern Pacific* undertook a straightforward balancing of competing interests between the harm to interstate commerce and the importance of the state interest.<sup>267</sup> The Court said that it had to determine “the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce” and “the relative weights of the state and national interests involved.”<sup>268</sup> *Southern Pacific* largely replaced *Cooley*’s subject test for the more sophisticated balancing of competing interest approach.<sup>269</sup>

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265. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945). *Southern Pacific* accepts as a given the Dormant Commerce Clause based upon past precedents: “For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.” *Id.* at 769. Professor Redish and his student co-author Nugent seem to overstate their hand in comparing the end of slavery and the reversal of *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954), as examples of old precedents in need of reversal: “But the fact that a practice has lasted long enough that it could be described as a ‘tradition’ surely has not in the past prevented us from challenging the practice’s normative basis, as is clearly demonstrated by our rejection of such long-established practices as slavery and the ‘separate-but-equal’ doctrine. Similarly, our allocation of governmental authority is established to a large extent by the text and textual structure of the Constitution, and a clear departure from that structure does not attain legitimacy merely because of the length of its existence.” Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 604-05 (1987).

266. S. Pac. Co., 325 U.S. at 766. The Court in 1938 in *South Carolina State Highway Department v. Barnwell Brothers* had also upheld a state regulation of interstate highways that it acknowledged “involves a burden on interstate commerce.” 303 U.S. 177, 189 (1938). The Court in *Barnwell* applied a rational basis test in upholding the non-discriminatory burden on local highways. *Id.* at 192.

267. See S. Pac. Co., 325 U.S. at 770 (The Court referenced “the relative weights of the state and national interests involved.”).

268. *Id.*

269. Professor Regan prefers to emphasize *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), as the beginning of the balancing test: “The Court announced a balancing test for dormant commerce clause cases in *Pike v. Bruce Church, Inc.* in 1970, and the Court has repeated the *Pike* test in virtually every dormant commerce clause case since.” Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1866-67 (1987). But see Brannon P. Denning, *Reconstructing the*

The undue burdens test has many moving parts, but at bottom it is a simple balancing test between the local interests and the harm to interstate commerce. The Court in *Southern Pacific* nicely illustrated the approach. The Arizona Train Limit Law of 1912 made it unlawful to operate within the state a railroad train of more than fourteen passenger cars or seventy freight cars.<sup>270</sup> On the one hand, Arizona may have had a legitimate local interest in 1912 in preventing injury to railroad employees by something called “slack action,” whereby the free movement of the coupled cars transferred energy back.<sup>271</sup> This is one of Newton’s laws—for every action there is an opposite and equal reaction. Because of the give between train cars, the longer the train, the more injury was transferred back. The end result was that railroad employees working towards the caboose were in danger of being tossed around. This was particularly important in the early days of trains when train employees had to run across the top of the railroad cars to do and undo the various couplings holding the cars together and to set the brakes.<sup>272</sup> Whatever the safety advantages of shorter trains to railroad employees in 1945, once running across the top of railroad cars was no longer required, the advantages were largely offset by the increase in accidents involving cars and pedestrians as the result of thirty percent more freight trains crossing the state, “all tending to increase the number of accidents not only to train operatives and other railroad employees, but to passengers and members of the public exposed to danger by train operations.”<sup>273</sup> On the legitimate local interest side of the scale, the Court found “at most slight and dubious advantage.”<sup>274</sup> As for the harm to interstate commerce, the Court found “a serious burden on interstate commerce” that “materially impede[d]”

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*Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 516 n.8 (2008) (“The test is now known eponymously as the ‘Pike balancing’ test, though balancing was employed by the Court prior to Pike.”).

270. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763 (1945). The Railroad Safety Appliance Act of 1893 required improved brakes and couplers making it less necessary for railroad employees to run across the tops of railroad cars. Safety Appliance Act, 49 U.S.C. § 20302 (2012).

271. *S. Pac. Co.*, 325 U.S. at 776-77.

272. See James H. Wettermark, *The Federal Safety Appliance Acts and the “In Use” Issue—Debunking Phillips v. CSX Transportation, Inc.*, in 2 American Association for Justice, Annual Convention Reference Materials (2007) (“Thus, a railroad brakeman would run along the top of the rail cars, often jumping from one car to the next, to apply individual handbrakes on the cars. This practice was followed rain or shine, day or night, ice or snow, slow speed and high speed. Needless to say, it is not surprising that the life expectancy of a railroad brakeman was not very long.”).

273. *S. Pac. Co.*, 325 U.S. at 777-78.

274. *Id.* at 779.

interstate trains, and impacted train traffic “all the way from Los Angeles to El Paso”<sup>275</sup> As a result of its careful balancing, the Court concluded that “all the relevant factors make[] it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service.”<sup>276</sup>

The key to applying the balancing test is to be aware of all the possible considerations in a modern balancing approach. *Southern Pacific* anticipated many of the factors involved in a modern balancing test. Among the important factors are the following: (1) What is the “nature and extent of the burden” on interstate commerce?<sup>277</sup> The “extent” of the burden on interstate commerce is a practical factual evaluation.<sup>278</sup> In *Southern Pacific*, the interstate impact on interstate commerce was obvious and far-reaching. (2) What is the nature and extent of the state and local interests burdening interstate commerce? The “extent” of the local interests, like the extent of the burden on interstate commerce, also involves a practical factual evaluation.<sup>279</sup> In *Southern Pacific*, the state’s safety interests were at best problematic. The protection of railroad employees was largely offset by the incremental danger to employees and the public from the increased number of trains crossing public roads within the state. The “nature” of the state interest, while not entirely clear, seems to suggest that certain interests are accorded more weight than others. The Court has said that local safety matters, particularly related to roads,<sup>280</sup> weighed heavily in favor of the state in justifying a burden on interstate commerce. On the other hand, a

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275. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 774-75 (1945).

276. *Id.* at 783-84.

277. *See id.* at 770 (“Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce . . .”).

278. The Court has not attempted to define what it means by “extent,” but its use in *Southern Pacific* seems to equate with the practical impact of a particular law. *See id.* at 766-67.

279. *See Underhill Assocs. v. Bradshaw*, 674 F.2d 293, 295 (4<sup>th</sup> Cir. 1982) (“To determine Virginia’s power to regulate the activities of nonresidents, we must look to the extent of these nonresidents’ contacts with Virginia and to the nature and extent of the state’s interest in exercising its authority.”) (citations omitted). *Underhill* cited to *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950), which does not actually use the compound phrase “nature and extent” but does discuss “nature” and “extent” separately a number of times.

280. *See S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 187 (1938) (“Few subjects of state regulation are so peculiarly of local concern as is the use of state highways.”).

state's concern over too much competition might be given lesser weight based upon the nature of that interest and the danger of it being misused.<sup>281</sup> (3) Are state and local laws politically self-correcting?<sup>282</sup> This is determined by the degree to which the burden of any particular local law falls on interstate commerce. The Court said in *Southern Pacific* "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."<sup>283</sup> (4) Is there a significant danger of multiplicity of inconsistent local regulations?<sup>284</sup> In *Southern Pacific*, many other states had considered or passed maximum train lengths and the Court recognized the issues that may arise due to inconsistent regulations across state lines: "The confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident."<sup>285</sup> (5) Is there a need for uniformity versus a need for diversity?<sup>286</sup> Although *Cooley* is no longer the primary test, the need for uniformity versus diversity is still very much a part of the modern balancing test. The need for uniformity as to train lengths was a major point of emphasis of the *Southern Pacific* Court.<sup>287</sup> (6) Is the impact on interstate commerce

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281. Two early interstate trucking cases seem to illustrate a concern for the nature of the harm. In one, *Bradley v. Public Utilities Commission*, 289 U.S. 92 (1933), Ohio expressed a concern for traffic congestion in denying a certificate of convenience to an out of state trucking company, which seemed to be important in the court finding no Dormant Commerce Clause violation. In the other, *Buck v. Kuykendall*, 267 U.S. 307 (1925), the state of Washington denied a certificate of convenience to an out of state company because of a concern for destructive competition. Although a concern for competition is not a per se violation of the Dormant Commerce Clause, see *Parker v. Brown*, 317 U.S. 341, 346 (1943), the Court would seem to be more accepting of a safety rationale than a competition rationale for burdens on interstate commerce.

282. See *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945).

283. *Id.* at 771-72. In *Southern Pacific*, the burden fell primarily on interstate commerce: "[A]pproximately 93% of the freight traffic and 95% of the passenger traffic [was] interstate." There was little in-state political incentive to revive a 1912 law to lessen this impact. *Id.*

284. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959).

285. *S. Pac. Co.*, 325 U.S. at 774. The Court said if these various laws had passed a freight train travelling from Nebraska to California would have been subjected to up to six different length regulations, "a sixty, seventy-five or eighty-five maximum in Nebraska, to a limit fixed by commission in Kansas, to a sixty-five car limit in Colorado, to a seventy-five car limit in New Mexico, to a seventy car limit in Arizona, and to a seventy-four car limit in California." *Id.* at 774 n.4.

286. See *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851), *abrogated by Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

287. See *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773 (1945)

direct or indirect?<sup>288</sup> While direct/indirect is at best an ambiguous concept, it may have some usefulness as part of the balancing test. A local law intending to regulate a local matter, such as the swamp lands in *Black Bird Creek*, which indirectly or incidentally impacts interstate commerce, might be presumptively less harmful to interstate commerce than a local law that intends to directly regulate commerce in another state.<sup>289</sup> *Southern Pacific* did not use the term “direct” or “indirect,” but it seemed to refer to this concern:

When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.<sup>290</sup>

(7) Is there any federal legislation indicating Congress’s desire?<sup>291</sup> In *Huron Portland Cement Co. v. City of Detroit, Michigan*, the

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(“Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application.”). Justice Thomas seems to overstate the Court’s replacement of the *Cooley* test. He says in a 2007 case that the Court’s reliance on *Cooley* and another case with a similar holding “is curious because the Court has abandoned the reasoning of those cases in its more recent jurisprudence.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 350 (2007). He later double downs and says the cases have “been rejected entirely.” *Id.* at 351. *Southern Pacific* is more of an evolution than an abandonment and it hardly seems a rejection in its entirety.

288. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, as was the case in *Southern Pacific*, but more frequently it has spoken in terms of ‘direct’ and ‘indirect’ effects and burdens.” *Id.*

289. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986). In *Brown-Forman*, the Court struck down a New York law that required liquor distributors throughout the United States to sell to New York wholesalers at the lowest price that the liquor was sold anywhere in the United States (New York had a fixed price at which liquor had to be sold in New York and it did not want distributors gaming the system with unfair profits.) *See id.* The Court accepted the argument of Brown-Forman, a distiller of liquor, that the law was a direct burden on interstate commerce because it “effectively regulates the price at which liquor is sold in other States.” *Id.* at 579. *See also Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), which has one of the Court’s most careful discussions of what the modern meaning of “direct” is. *Id.* at 336-37. For “direct” the Court in *Healy* used the term “extraterritorial effects of state economic regulation.” *Id.* at 336.

290. *S. Pac. Co.*, 325 U.S. at 767.

291. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

Court considered the 1955 Clean Air Act<sup>292</sup> in deciding that Detroit's interest in air pollution was a weighty local interest.<sup>293</sup> As the Court put it, "[c]ongressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in this legislation."<sup>294</sup> The Clean Air Act neither preempted the Detroit Anti-Pollution Act nor did it specifically permit Detroit to impose undue burdens on interstate commerce,<sup>295</sup> but it was still a factor in the Court's balancing of interests. (8) Even if the law validly impacts out-of-state commerce differently than in-state, the difference in treatment must be the least discriminatory alternative.<sup>296</sup> If out-of-state commerce presents a greater source of the evil than in-state commerce, the state is allowed to treat them differently.<sup>297</sup> But this does not allow the state to treat out-of-state commerce differently out of discriminatory motives or economic protectionism.<sup>298</sup>

Of all the balancing factors, the fourth is particularly significant: the danger of multiplicity of inconsistent state

292. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 445-46 (1960) (Where the Court viewed a 1955 federal law as supporting eliminating air pollution as an important local state interest. The Court cites the 1955 act but does not call it by its common name, the Clean Air Act.).

293. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) ("In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.").

294. *Huron Portland Cement Co.*, 362 U.S. at 446.

295. Ultimately, Congress has full control over commerce, either preempting state laws or permitting state burdens on interstate commerce. *See S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945) ("Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.").

296. The Court in *Dean Milk* in referring to the discriminatory nature of the Madison, Wisconsin law said, "This [Madison, Wisconsin] cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Dean Milk Co.*, 340 U.S. at 354.

297. *See Mintz v. Baldwin*, 289 U.S. 346 (1933) (the Court believed that out-of-state cattle was a greater source for Bang's disease.); *Maine v. Taylor*, 277 U.S. 131 (1986) (the Court believed that out-of-state golden shiners were a greater source of parasites and invasive non-native species).

298. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093-94 (2018) ("The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units.").

burdens. Justice Douglas dissented from the Court's balancing approach in *Southern Pacific*:

I have expressed my doubts whether the courts should intervene in situations like the present and strike down state legislation on the grounds that it burdens interstate commerce. My view has been that the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted.<sup>299</sup>

But even Justice Douglas struck down an Illinois law in *Bibb v. Navajo* requiring curved mud flaps on trucks.<sup>300</sup> An Arkansas law required straight mud flaps, and because of the practice of interlining, or the practice of trading of truck trailers between trucks licensed in different jurisdictions, the same trailers might be used in both states.<sup>301</sup> The Illinois law was non-discriminatory, but because of the danger of inconsistent state laws on interstate commerce, Justice Douglas thought that it hurt interstate commerce too much. "This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce. This conclusion is especially underlined by the deleterious effect which the Illinois law will have on the 'interline' operation of interstate motor carriers."<sup>302</sup>

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299. *S. Pac. Co. v. State of Arizona ex rel. Sullivan*, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting).

300. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

301. *Id.* at 527.

302. *Id.* at 529. Compare *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), with *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (Justice White's plurality opinion struck down on direct/indirect Dormant Commerce Clause grounds an Illinois law that regulated hostile takeovers in any attempt that involved a target company where 10% of the target company's shares were owned by shareholders located in Illinois: "The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited." *Edgar*, 457 U.S. at 640. Justice White concluded the Illinois law was a direct regulation because of its "sweeping extraterritorial effect." *Id.* at 642. A majority of the Court agreed that the law violated the Dormant Commerce Clause, but based upon the balancing test, "for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute." *Id.* at 643. In *CTS Corp.*, the Court upheld an Indiana regulation of hostile takeovers that applied only to companies incorporated in Indiana. Although a plurality emphasized direct versus indirect burden, MITE presented a real danger of inconsistent state regulations while CTS presented none.).

## B. JUSTICE THOMAS HATES THE DORMANT “NEGATIVE” COMMERCE CLAUSE

Justice Thomas does not necessarily hate the term “dormant,” but he prefers the term “negative” Commerce Clause.<sup>303</sup> Whatever the doctrine is called, he certainly hates it, and he expressed this hatred expansively in his dissenting opinion in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*. According to Justice Thomas, the Dormant Commerce Clause is “overbroad and unnecessary,” “unmoored from any constitutional text,” “the morass of our negative Commerce Clause case law,” what he calls “that failed jurisprudence,” and has “*no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.*”<sup>304</sup> He also says that it has “no textual

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303. See *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 609 n.1 (1997) (Thomas, J., dissenting). Justice Scalia explains his own view of the term “negative” in a concurring opinion, which found that a state sales tax did not facially discriminate against interstate commerce: “That seems to me the most we can demand to certify compliance with the ‘negative Commerce Clause’—which is ‘negative’ not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution.” *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Scalia, J., concurring with whom Thomas, J., joined).

304. *Camps Newfound*, 520 U.S. at 610 (emphasis added). I have italicized this language just to point out that it is Justice Thomas’s go-to criticism of the Dormant Commerce Clause. See *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring); *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part); *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 439 (2005) (Thomas, J., concurring in the judgment); *Dep’t of Revenue v. Davis*, 553 U.S. 328, 361 (2008) (Thomas, J., concurring in the judgment); *McBurney v. Young*, 569 U.S. 221, 237 (2013) (Thomas, J., concurring); *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting). Justice Thomas is joined in his dissent in *Camps Newfound* by Justice Scalia, though specifically not the paragraph with this language. Nonetheless, it is likely Justice Thomas’s rejection of all use of the Dormant Commerce Clause not this phrase that led Justice Scalia to not join the paragraph. The only other court cite to this language is in *United States v. Greenwood*, 405 F. Supp. 2d 673, 679 (E.D. Va. 2005), a Fourth Amendment District Court case totally unrelated to any Dormant Commerce Clause issue. But the then-Dean of Pepperdine School of Law does cite to the language in a speech on e-commerce at the George Mason School of Law. Kenneth W. Starr, *Transcript of Ken Starr Speech on the Commerce Clause*, 3 J.L. ECON. & POLY 127, 130 (2007). There may be some irony in Dean Starr’s quote in view of his successful challenge on Dormant Commerce Clause grounds of Michigan and New York laws discriminating against out of state wineries as to delivery to in state customers. See *Granholt v. Heald*, 544 U.S. 460 (2005). Justice Thomas’s dissenting opinion in *Granholt*, joined by Justices Scalia, Stevens, and O’Connor, relied on the federal Webb-Kenyon Act, that Justice Thomas said immunized the states’ liquor laws “from negative Commerce Clause review.” *Id.* at 498. Independent of the Webb-Kenyon Act, Justice Thomas also argued that the state laws were “lawful under the plain meaning of § 2 of the Twenty-First Amendment.” *Id.*

basis,”<sup>305</sup> that it is “policy-laden decision-making”<sup>306</sup> “without the proper textual roots,”<sup>307</sup> and that it fails to articulate a “coherent rationale”<sup>308</sup> or “workable test.”<sup>309</sup> Furthermore, he claims it is unworkable and “not entitled to the weight of *stare decisis*.”<sup>310</sup> Given his well-earned reputation as a “textualist,” it is no surprise that his dissent includes some version of the word “text” fourteen times.<sup>311</sup>

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305. See *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting). Thomas said that there are two rationales for the doctrine and has disdain for both rationales: “[T]he exclusivity rationale [which] has moved from untenable to absurd,” and “the ‘pre-emption-by-silence’ rationale [that] virtually amounts to legislation by default, in apparent violation of the constitutional requirements of bicameralism and presentment.” *Id.* at 614-17. Professor Jacob praises Thomas’s opinion: “This is an excellent example of original-meaning textualism in a judicial decision.” Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 615 (2007).

306. *Camps Newfound*, 520 U.S. at 618.

307. *Id.* at 636.

308. *Id.*

309. *Id.*

310. *Id.* at 637.

311. Professor Redish calls arguments in favor of the Dormant Commerce Clause as “reminiscent of an argument over the proper lapel widths to be placed on the emperor’s new clothes.” Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571 (1987). He anticipates Justice Thomas’s concern for a lack of textualism: “With limited exceptions, the recent literature expends relatively little effort attempting either to find the textual source or to prove the legitimacy of the Dormant Commerce Clause. Our position is that no such legitimate constitutional source exists: the simple fact is that there is no dormant commerce clause to be found within the text or textual structure of the Constitution.” *Id.* Professor Redish is as unequivocal as Justice Thomas in the importance of the lack of textualism: “Absent textual foundation, the dormant clause cannot stand, regardless of whatever valuable social, economic or political policies the concept might be thought to foster.” *Id.* at 572. In 1992, Justice Thomas joined Justice Scalia’s dissenting opinion where Justice Scalia referred to “the nontextual elements of the Commerce Clause.” *Wyoming v. Oklahoma*, 502 U.S. 437, 462 (1992). An amusing article by Professor Jacob compared the originalist views of Justice Scalia and Justice Thomas: “Justice Antonin Scalia is widely recognized as the preeminent judicial proponent of the ‘original meaning,’ textualist approach to interpreting the United States Constitution. Supporters and opponents of originalism alike credit him as the contemporary Godfather of the originalist movement. But there is another Justice on the Supreme Court, a quiet Justice who rarely speaks during oral argument and is not famous for his lectures or books on this topic, who may be as much or more committed to the principles of originalism as Justice Scalia. That Justice, of course, is Clarence Thomas.” Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 595-96 (2007). Professor Kannar describes Scalia’s approach: “Scalia uses the term original meaning to describe his approach to constitutional adjudication, and at his Senate confirmation hearings he took pains to distinguish it from popular notions of original intent. While suggesting that there was not a big difference between the two in practice, he made clear that the text of the document and what it meant to the society that adopted it

Justice Scalia, like Justice Thomas, did not seem a big fan of the Dormant Commerce Clause, but he was a bit more reserved in his criticism. In *Camps Newfound/Owatonna, Inc.*, his criticism was understated in his summary: “Our cases have struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States’ police powers, each exercise of which no doubt has some effect on the commerce of the Nation.”<sup>312</sup> However, Justice Scalia’s opening sentence in his dissent was more a criticism of the way the majority applied the doctrine rather than a criticism of the doctrine itself: “The Court’s negative Commerce Clause jurisprudence has drifted far from its moorings.”<sup>313</sup> Without fully addressing the merits of the *Camps Newfound/Owatonna* case, it is hardly a striking example of discrimination or harm to interstate commerce. The majority struck down a Maine property tax deduction for charitable groups on discrimination grounds, but only if the majority of beneficiaries were residents of Maine.<sup>314</sup> The charity in that case, a church camp, provided a retreat for inner-city kids, primarily from out-of-state cities.<sup>315</sup> Whether right or wrong, to say that in *Camps Newfound/Owatonna*, the Court had drifted far from its primary concerns in *Gibbons* and *Cooley* is indeed “to put it nicely.”

In addition to Justice Scalia, Justice Thomas finds support for his dislike of the Dormant Commerce Clause from many of the recent and current justices. He has a comprehensive list.<sup>316</sup> Justice O’Connor, for example, observed that “[t]he scope of the

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would always be for him the starting point and the beginning of wisdom.” George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1306-07 (1990) (internal quotation marks omitted).

312. *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 596 (1997) (Scalia, J., dissenting opinion joined by Roberts, C. J., Thomas, J., and Ginsburg, J.).

313. *Id.* at 595. As Justice Scalia explained, “Originally designed to create a national market for commercial activity, it is today invoked to prevent a State from giving a tax break to charities that benefit the State’s inhabitants.” *Id.*

314. *See id.* at 568 (“The Maine statute at issue provides a general exemption from real estate and personal property taxes for ‘benevolent and charitable institutions incorporated’ in the State. With respect to institutions that are ‘in fact conducted or operated principally for the benefit of persons who are not residents of Maine,’ however, a charity may only qualify for a more limited tax benefit, and then only if the weekly charge for services provided does not exceed \$30 per person.”).

315. *See id.* at 568-69 (“Because most of the campers come from out of State, [*Camps Newfound*] could not qualify for a complete exemption.”).

316. *Id.* at 611-12. Justice Thomas’s list included, “[i]n one fashion or another, every Member of the current Court and a goodly number of our predecessors have at least recognized these problems, if not been troubled by them.” *Id.* at 611.

dormant Commerce Clause is a judicial creation.”<sup>317</sup> For a unanimous Court, Justice Stevens said that the Commerce Clause “says nothing about the protection of interstate commerce in the absence of any action by Congress.”<sup>318</sup> In a dissenting opinion, Justice Rehnquist said, “[T]he jurisprudence of the ‘negative side’ of the Commerce Clause remains hopelessly confused.”<sup>319</sup> Chief Justice Burger referred to “the cloudy waters” of the Dormant Commerce Clause;<sup>320</sup> Justice Stewart said that the doctrine “appear[s] nowhere in the words of the Commerce Clause;”<sup>321</sup> Justice Clark referred to the Dormant Commerce Clause as a “tangled underbrush” and a “quagmire”;<sup>322</sup> and finally Justice Black, joined by Justices Frankfurter and Douglas in a dissenting opinion, criticized the doctrine as “[s]pasmodic” and not “an adequate basis for the creation of integrated national rules that Congress alone is positioned to develop.”<sup>323</sup>

Justice Thomas would prefer that the Court “shed ourselves of our nontextual negative Commerce Clause and all the

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317. *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 611 (1997) (citing *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 401 (1994) (O’Connor, J., concurring in judgment)).

318. *Id.* (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1994)). As Justice Thomas pointed out, Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, had acknowledged that “the Constitution is clearly silent on the subject of state legislation that discriminates against interstate commerce.” *Id.* (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 797 n.12 (1995)).

319. *Id.* (citing *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 706 (1981)).

320. *Id.* (citing *Wardair Can. Inc. v. Fla. Dept. of Revenue*, 477 U.S. 1, 17 (1986) (Burger, C. J., concurring in part and concurring in judgment)).

321. *Id.* (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978)).

322. *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 611 n.3 (1997) (citing *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959)).

323. *Id.* at 611 (citing *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 189 (1940) (internal quotation marks omitted)). Justice Thomas and his crack team of Supreme Court law clerks even referenced Chief Justice Taney opinion in 1847, *id.*, though they did not cite Taney nor his language: “[I]t appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States.” *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. 504, 579 (1847). Chief Justice Taney was doing more than just criticizing the *Gibbons*’s exclusivity view of the Dormant Commerce Clause: “[If the Commerce Clause] was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded.” *Id.* Perhaps Justice Thomas can be forgiven for not directly mentioning Chief Justice Taney, the author of the odious *Dred Scott* decision.

accompanying multifactor balancing tests we have employed.”<sup>324</sup> He would instead determine if the state law was a discriminatory tax in violation of not the Dormant Commerce Clause but the Import-Export Clause of Article 1, Section 10, which, as Justice Thomas describes it, prevents “States from levying ‘duties’ and ‘imposts.’”<sup>325</sup> The difficulty in Justice Thomas’s emphasis on the Import-Export Clause is that since *Woodruff v. Parham* in 1869, it has been limited to foreign trade, not interstate commerce.<sup>326</sup> Notwithstanding, Thomas argues for a reconsideration of this 100-year-old precedent just as blithely as he rejects *stare decisis* for the 170-year-old precedent of *Gibbons v. Ogden*.<sup>327</sup>

Other than his argument as to the Import-Export Clause specifically being textually-based—and one cannot overstate the importance of this to Justice Thomas—even Justice Thomas does not think that if the Dormant Commerce Clause was construed to strike down only discriminatory taxes, that there would be any great harm. If the Dormant Commerce Clause was so limited, it would work in exactly the same way at the Import-Export Clause. Justice Thomas concedes, “Indeed, our rule that state taxes that discriminate against interstate commerce are virtually *per se* invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself.”<sup>328</sup> Still, he argues:

[W]ithout the proper textual roots, our negative Commerce Clause has gone far afield of its core—and we have yet to articulate either a coherent rationale for permitting the courts effectively to legislate in this field, or a workable test for assessing which state laws pass negative Commerce Clause muster.<sup>329</sup>

“Precedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of *stare decisis*.”<sup>330</sup>

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324. *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 618 (1997) (Thomas, J., dissenting).

325. *Id.* at 637.

326. *See id.* at 624 (“Our Civil War era decision in *Woodruff v. Parham*, of course, held that the Import-Export Clause applied only to foreign trade.”).

327. *See id.* at 640 (“Thus, were we to overrule *Woodruff* and apply the Import-Export Clause to this case, I would in all likelihood sustain this tax under that Clause as well.”).

328. *Id.* at 636.

329. *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 636 (1997).

330. *Id.* In *Direct Marketing Ass’n v. Brohl*, 135 S. Ct. 1124 (2015), Justice Thomas

Other than *Camps Newfound/Owatonna, Inc.*, Justice Thomas's most comprehensive attack on the Dormant Commerce Clause can be found in his concurring opinion in a 2007 case, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,<sup>331</sup> where Justice Thomas rejected the test in its entirety.<sup>332</sup> "As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence."<sup>333</sup> Again, he comes back to his holy grail: "And with no text to construe, the Court cannot take into account the Founders' 'deliberate choice of words' or 'their natural meaning.'"<sup>334</sup>

As for Justice Scalia and the Dormant Commerce Clause, the gloves came off in the 2015 case, *Comptroller of Treasury of Maryland v. Wynne*.<sup>335</sup> He started gently enough: "The

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for the Court rejected a procedural challenge to a Dormant Commerce Clause issue but did not address the merits of the Dormant Commerce Clause issue. For a general discussion of the *stare decisis* issues in Dormant Commerce Clause cases, see *Article I—Stare Decisis for Constitutional Default Rules—Dormant Commerce Clause—South Dakota v. Wayfair, Inc.*, 132 HARV. L. REV. 277 (2018).

331. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007). Like in *Camps Newfound*, Justice Thomas is astute in picking a good case to attack the application of the Dormant Commerce Clause test. In *United Haulers*, the Court seems to invent a new exception to the rule against discrimination, contrary to an earlier case as to which Justice Thomas said, "Although I joined *C & A Carbone, Inc. v. Clarkstown*, I no longer believe it was correctly decided." *Id.* at 349.

332. *Id.* ("As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.") (Thomas, J., concurring opinion).

333. *Id.*

334. *Id.* at 353. Justice Thomas later somewhat unconvincingly compared the Dormant Commerce Clause to the Court's infamous decision in *Lochner v. New York*, 198 U.S. 45 (1905) in its New Deal cases: "In *Lochner*, the Court located a 'right of free contract' in a constitutional provision that says nothing of the sort." *United Haulers Ass'n*, 550 U.S. at 349. Likewise, his analogy goes, "The Court's negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the 'right' it vindicated in *Lochner*." *Id.*

335. *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787 (2015). In *Wynne*, as a student note points out, "Justice Scalia took his last stand against the doctrine in this dissent, as he passed away shortly thereafter." Alexander G. Andrews, *Lessons from Wynne: Why New York City's Internally Consistent Income Tax Nonetheless Violates the Dormant Commerce Clause*, 50 CONN. L. REV. 1077, 1102-03 (2018). In *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100-01 (2018), the Court's 2018 Dormant Commerce Clause case, reversing its past precedents banning sales and use taxes on catalog and internet sales, Justice Thomas concurred but said only that "this Court's

fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause.”<sup>336</sup> But Justice Scalia was soon in full battle mode. He called it “a judicial fraud” and “utterly illogical.”<sup>337</sup> And he went for the kidneys, challenging a long-held fiction: if the Dormant Commerce Clause is required by the Constitution, how can Congress permit the states to enact laws contrary to it?<sup>338</sup> The fact that the Dormant Commerce Clause “has

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entire negative Commerce Clause jurisprudence” could no longer be “rationally justified.” *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018). Justice Gorsuch, appointed after Justice Scalia’s untimely death, suggests in *Wayfair* that he might be willing take up Justice Scalia’s cudgel against the Dormant Commerce Clause, though not necessarily Justice Thomas’s visceral hatred. *See id.* (Gorsuch, J., concurring) (“My agreement with the Court’s discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine.”).

336. *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting). Scalia has acknowledged the claim of historical support for the Dormant Commerce Clause from founder James Madison but says “that Madison’s assumption of exclusivity of the federal commerce power was ill considered and not generally shared.” *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 263-64 (1987). Given Justice Scalia’s earlier objection in *Tyler* to Madison’s opinion, Scalia can be excused for joining Justice Stevens opinion for the Court in *West Lynn Creamery, Inc. v. Healy*, which traced the provenance of the Dormant Commerce Clause back to James Madison. Justice Stevens said, “The ‘negative’ aspect of the Commerce Clause was considered the more important by the ‘father of the Constitution,’ James Madison.” 512 U.S. 186, 193 n.9 (1994). In one of his letters, Madison wrote that the Commerce Clause “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.” 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (New Haven: Yale University Press, 1911). Indeed, Professor McGinley gives Madison top billing in referring to *Gibbons* as the “Madisonian-Marshall approach.” Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 413 (1992). Whatever Madison’s position, Professor Redish questions its relevancy: “Since it is impossible to construe the text of the commerce clause to justify the dormant commerce clause concept, the clause’s advocates have instead attempted to find support in various contemporaneous statements of the framers. Of course as an initial objection, we seriously question the relevance of any framers’ understandings not manifested in the text of the Constitution; for it was the text, not some unstated understanding, that was ratified into law.” Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 585 (1987).

337. *Wynne*, 135 S. Ct. at 1808.

338. Justice Scalia asks rhetorically: “How could congressional consent lift a constitutional prohibition?” *Id.* Justice Scalia challenged the fiction that Congress could overturn a constitutional decision as to the Dormant Commerce Clause shortly after being appointed to the Court in 1986: “The least plausible theoretical justification of all is the idea that in enforcing the negative Commerce Clause the Court is not applying a constitutional command at all, but is merely interpreting the will of

deep roots,”<sup>339</sup> as claimed by the Court, did not impress him. He counterpunched, “So it does, like many weeds. But age alone does not make up for brazen invention.”<sup>340</sup> Beyond the doctrine’s lack of a constitutional foundation “is its lack of governing principle.”<sup>341</sup> Justice Scalia argued that there is no way to determine improper state interference with commerce from permissible state taxations and regulations: “So we must make the rules up as we go along. That is how we ended up with the bestiary<sup>342</sup> of ad hoc tests and ad

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Congress, whose silence in certain fields of interstate commerce (but not in others) is to be taken as a prohibition of regulation.” *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part). It is of little surprise that Justice Scalia in one of his early opinions might have challenged this famous fiction. One can imagine that as a law professor at University of Chicago or at the University of Virginia, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1308 n.53 (1990), it might have been a target of his famous wit. Compare with Judge Wald’s reference to then Professor Scalia’s withering reference to the Freedom of Information Act (FOIA): “Before he joined the court of appeals, my colleague Antonin Scalia referred to the FOIA as ‘the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored.’” Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 664 (1984) (citing Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, March/April 1982 at 14, 15). Professor McGinley quotes Professor Powell’s brilliant critique of interpreting Congress’s silence: “Now congress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent. Congress can regulate interstate commerce just by not doing anything about it. Of course, when congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that congress by keeping silent sometimes means that it is speaking. If congress keeps silent about interstate commerce that this not national in character and that may be just as well regulated by the states, then congress is silently silent, and the states may regulate. But if congress keeps silent about the kind of commerce that is national in character and ought to be regulated only by congress, then congress is silently vocal and says that commerce must be free from state regulation.” Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 417 n.39 (1992) (quoting Thomas R. Powell, *The Still Small Voice of the Commerce Clause*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW, 931, 932 (1938)).

339. The majority reference is found at *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015); see *Article I—Stare Decisis for Constitutional Default Rules—Dormant Commerce Clause—South Dakota v. Wayfair, Inc.*, 132 HARV. L. REV. 277, 284 (2018) (“The Court has allowed Congress to overturn its dormant commerce clause cases since 1891.”).

340. *Wynne*, 135 S. Ct. at 1808.

341. *Id.* at 1809.

342. Bestiary is defined as a “book written in the Middle Ages containing descriptions of real and imaginary animals, intended to teach morals and to entertain.” *Bestiary*, CAMBRIDGE DICTIONARY (2019), <https://dictionary.cambridge.org/us/dictionary/english/bestiary>.

hoc exceptions that we apply nowadays.”<sup>343</sup> Still unlike Justice Thomas, Justice Scalia felt bound by *stare decisis* to strike down taxes clearly contrary to precedent.<sup>344</sup>

Justice Thomas’s heart has been so hardened against the Dormant Commerce Clause that he argued in 2003 that it “cannot serve as a basis for striking down a state statute.”<sup>345</sup> He repeated this assertion in 2013<sup>346</sup> and again in 2015 in *Wynne*.<sup>347</sup> His assertion in *Wynne* went too far for Justice Scalia, who joined Thomas’s dissenting opinion except for the paragraph where Justice Thomas made this assertion.<sup>348</sup> Other than his criticism of the actual majority decision in *Wynne*, Justice Thomas did not add to his attack on the Dormant Commerce Clause cases.<sup>349</sup> But *Wynne* itself is perhaps the best criticism of all. That it divided the

343. *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1809 (2015). Justice Scalia’s remarkable vocabulary and phrasings—“the bestiary of ad hoc tests” indeed—seemed particularly directed at *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Complete Auto Transit’s* four-part test is as unhelpful as it is widely quoted: “These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with [1] a substantial nexus with the taxing State, is [2] fairly apportioned, [3] does not discriminate against interstate commerce, and is [4] fairly related to the services provided by the State.” 430 U.S. at 279 (brackets added). *Complete Auto Transit* should be viewed more as a summary of past holdings as to various types of taxes on interstate commerce than as a test itself for any one type of tax.

344. *See Wynne*, 135 S. Ct. at 1811 (Scalia, J., dissenting opinion) (“For reasons of *stare decisis*, I will vote to set aside a tax under the negative Commerce Clause if (but only if) it discriminates on its face against interstate commerce or cannot be distinguished from a tax this Court has already held unconstitutional.”).

345. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting); *see Dep’t of Revenue v. Davis*, 553 U.S. 328, 361 (2008) (Thomas, J., concurring) (“I would entirely “discard the Court’s negative Commerce Clause jurisprudence.”). Professor Redish is also doubtful of the legitimacy of precedents: “Instead, the Court continues to employ the dormant commerce clause, regardless of its constitutional justification, by summarily adhering to precedent.” Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 581 (1987).

346. *McBurney v. Young*, 569 U.S. 221, 237 (2013).

347. *Wynne*, 135 S. Ct. at 1811.

348. *See United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., dissenting). He calls it “an unjustified judicial invention,” but only pledges not to expand it “beyond its existing domain.” Specifically, he said, “I have been willing to enforce on *stare decisis* grounds a ‘negative’ self-executing Commerce Clause in two situations: ‘(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.’” *Id.* (Scalia, J., dissenting).

349. *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1811 (2015).

Court is obvious from its 5-4 holding striking down a Maryland income tax that did not give full credit for taxes paid in other states.<sup>350</sup> Additionally, that Justices Ginsburg and Kagan joined Justices Scalia and Thomas in dissent, though not in the reasons for the dissent, further evidences the confusion among the Dormant Commerce Clause tax precedents.<sup>351</sup> Indeed, *Wynne* presented a tricky balance between the Court's precedent stating that interstate income should not be subject to double taxation and its precedent stating that residents were largely not protected from taxation by their own state.<sup>352</sup>

Overall, Justice Thomas believes that Congress, not the Court, should be in charge of protecting interstate commerce.<sup>353</sup> As

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350. See *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1792 (2015) (“Like many other States, Maryland taxes the income its residents earn both within and outside the State, as well as the income that nonresidents earn from sources within Maryland. But unlike most other States, Maryland does not offer its residents a full credit against the income taxes that they pay to other States.”).

351. Justice Ginsburg also joined Justice Thomas's dissenting opinions in *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 306 (2011) and *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 306 (2011), both cases involving discriminatory state legislation but both involving more a matter of statutory construction than a Dormant Commerce Clause issue. Ginsburg dissented on narrow grounds: “Residents, moreover, possess political means, not shared by outsiders, to ensure that the power to tax their income is not abused. ‘It is not,’ this Court has observed, ‘a purpose of the Commerce Clause to protect state residents from their own state taxes.’” *Wynne*, 135 S. Ct. at 1814 (Ginsburg, J. dissenting).

352. See *Wynne*, 135 S. Ct. at 1811 (Ginsburg, J., dissenting, joined by Scalia, J., and Kagan, J.) (“Today’s decision veers from a principle of interstate and international taxation repeatedly acknowledged by this Court: A nation or State ‘may tax *all* the income of its residents, even income earned outside the taxing jurisdiction.”) (citations omitted). Professors Knoll and Mason who submitted amici briefs in *Wynne* say, “Commentators hailed *Wynne* as the most important state tax decision in decades.” Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309, 310-11 (2017). But see Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 291-92 (2017). Professor Francis who is dismissive of *Wynne*, calling it “small and likely irrelevant” at least in terms of his overall thesis that the Dormant Commerce Clause was in decline. *Id.* at 291-92. Professor Selinsky summarized the *Wynne* holding as follows: “A decision as enigmatic as it is important, *Wynne* raises as many questions as it answers.” Edward A. Zelinsky, *The Enigma of Wynne*, 7 WM. & MARY BUS. L. REV. 797, 800 (2016). A student note nicely critiques the case: “*Wynne* presented the Court with the opportunity to clarify a historically confusing and ambiguous area of dormant Commerce Clause doctrine, but the Court’s opinion in *Wynne* failed to meet this challenge.” Mackenzie Catherine Schott, *Inconsistency with the Internal Consistency Test*, 77 LA. L. REV. 947, 948 (2017). The note states that the case led to the state refunding \$200,000,000 in back taxes and an annual loss of \$40,000,000 a year going forward to the state’s revenue stream. *Id.*

353. See *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 620 (1997) (Thomas, J., dissenting) (“Rather, the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more

many have pointed out, there is little chance that Congress would actually undertake to protect interstate commerce, especially as to interests that are primarily local in nature.<sup>354</sup> And maybe that is Thomas's point, that if the Court stays out of the Dormant Commerce Clause battle then the states will be left alone to do their own thing.<sup>355</sup>

#### IV. CONCLUSION: WHY DOES JUSTICE THOMAS HATE THE COMMERCE CLAUSE?

As for Commerce Clause power, it is hard to take seriously Justice Thomas's claim of a lack of textualism as the grounds for his hatred of the Court's use of the substantial effects to determine federal commerce power. True, the Commerce Clause does not refer to Congress having any power over local activity having a substantial impact on interstate commerce, but can Justice Thomas actually be objecting to Chief Justice Marshall's assertion in *McCulloch* that every one of the enumerated powers includes the implied power to pick means appropriately related to the enumerated ends? As Marshall said, "[T]here is no phrase in the

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egregious state taxes on interstate commerce described above, and leaves to Congress the policy choices necessary for any further regulation of interstate commerce.").

354. See Brian Galle, *Kill Quill, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158, 159 (2018) ("Although the DCC has been around since 1829, in recent years some justices—Justice Thomas in particular—have urged the Court to discard it. They argue that regulating interstate commerce should be left to Congress. What I show is that Congress is not a trustworthy guardian of state fiscal power, making continuing judicial involvement a more appealing prospect."). Professor Galle explains this counter-intuitive failure of Congress as a product of special interest controlling over general interests: "The difficulty with this approach is that Congress is not necessarily a nationally representative body. Instead, its members serve a regional constituency, and its outcomes approximate some national interest only through bargaining, log-rolling, and other coordination mechanisms. As a result, basic collective-action theory suggests that issues of general importance to the States will not garner a devoted congressional following, while issues that disproportionately affect one or a few regions will have strong self-interested supporters." *Id.* at 160; see also Richard A. Paschal, *Congressional Power to Change Constitutional Law: Three Lacunae*, 77 U. CIN. L. REV. 1053, 1112 (2009) ("Congress simply does not have the capacity to monitor the innumerable state laws which touch upon commerce, hold hearings and debate which of those laws impermissibly interfere with interstate interests, and then legislate so as to preempt each of those state regulations.").

355. In this he would be joined by Professor Redish who counts the unlikelyhood of Congress correcting a state burden on interstate commerce as a plus: "Thus, the most obvious reason that states would prefer congressional to judicial oversight of their regulation of interstate commerce is the considerably greater likelihood of congressional inaction than of congressional action." Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 593 (1987).

instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.”<sup>356</sup> Marshall continued, “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”<sup>357</sup> Surely even a baptized textualist must concede Marshall’s foundational point that “[i]n considering this question . . . we must never forget that it is a *constitution* we are expounding.”<sup>358</sup>

Marshall himself conceded that Congress did not have the unlimited discretion to pick whatever means it wanted to advance enumerated powers,

[B]ut the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making “all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.”<sup>359</sup>

Even Justice Thomas must admire Chief Justice Marshall’s use of textualism to reject that “necessary” meant “absolutely necessary.”<sup>360</sup> As Chief Justice Marshall argued, if the framers meant “absolutely necessary,” they knew how to say that as they did in Article One, Section Ten, when the framers prevented states from passing all “imposts, or duties on imports or exports” except for those “*absolutely* necessary for executing its inspection laws.”<sup>361</sup>

As noted before, Justice Thomas’s principal objection to Congress’s commerce power is the Court’s use of the substantial effects test from *Jones & Laughlin*. He does not object to Congress’s power to regulate channels and instrumentalities of interstate commerce, which he likely views as examples of the

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356. *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819).

357. *Id.* at 407.

358. *Id.*

359. *Id.* at 411-12.

360. *Id.* at 414-15.

361. *McCulloch v. Maryland*, 17 U.S. 316, 414 (1819).

textual grant of power.<sup>362</sup> Whether textual or not—and it is not clear that they are textual—the power to regulate things crossing state lines is at least as broad in allowing federal regulations as is the close and substantial test, even as to local crimes such as kidnapping<sup>363</sup> or the sale of lottery tickets.<sup>364</sup> And even as to the “close and substantial” test, Thomas seems to accede to the use of the rational basis test in Congress defining for itself what “close and substantial” means.

Of all the tests for defining Congress’s enumerated powers, attacking the “close and substantial test” hardly seems like the place to start. It is a test based upon the practical impact on interstate commerce. Whether any particular justice agrees with the outcome of the test, it suggests an approach with real limits on federal power, though perhaps not with the precision that Justice Thomas prefers. It is particularly difficult to take seriously Justice Thomas’s claim that *E.C. Knight’s* distinction between manufacturing and commerce is the key to the commerce power.<sup>365</sup> Even if there was a logical distinction between the two, it is hard to accept any test that would deny the enforcement of federal antitrust laws to a monopoly with almost total control of all sugar in the United States. Additionally, Justice Thomas says the Court took a “wrong turn” when it decided *Jones & Laughlin*; the majority of the Court says that the “wrong turn” was *Hammer*. Surely Justice Thomas is on the wrong side of history.

To be fair, Justice Thomas does not hate Congress’s commerce power as much as he hates the Dormant Commerce Clause. His call is a moderate one—that the Court “temper our Commerce Clause jurisprudence,” not a “wholesale abandonment” of recent decisions, even though he claimed his analysis revealed “that our substantial effects test is far removed from both the Constitution and from our early case law.”<sup>366</sup>

As for the Dormant Commerce Clause, there is no way to

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362. Justice Thomas never specifically says that he accepts Congress’s ability to regulate things crossing state lines, but that is never the focus of his criticism of Congress’s commerce power.

363. See 18 U.S.C. § 1201 (2006) (making kidnapping a federal crime if it involves the crossing of interstate or national borders).

364. See *Champion v. Ames*, 188 U.S. 321 (1903).

365. Whether manufacturing is part of commerce or not, Chief Justice Marshall said in *Gibbons* that Congress could regulate it if it affected interstate commerce. See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

366. *United States v. Lopez*, 514 U.S. 549, 601 (1995).

temper it. Justice Thomas hates the Dormant Commerce Clause. There is no mystery about why he hates it. The Dormant Commerce Clause is not in the text of the Commerce Clause; therefore, it is dead to him. Like removing a television show from a DVR recorded list, that television show no longer exists. Thomas rejects all the Dormant Commerce Clause precedents and refuses to engage in future cases. He has taken his prodigious legal research and gone home. He believes its precedents are “unworkable” and therefore “simply not entitled to the weight of *stare decisis*,”<sup>367</sup> and that the doctrine “cannot serve as a basis for striking down a state statute.”<sup>368</sup>

Given Justice Thomas’s total recusal on the issue, it may seem a little churlish to point out that the Dormant Commerce Clause has at least some implied historical support—and from a figure as legendary in conservative circles as James Madison.<sup>369</sup> That a grant of power might imply the absence of power is certainly not unheard of, even from a strict textual point of view. The seminal *Marbury v. Madison*<sup>370</sup> allowed the listing of the types of cases within the Supreme Court’s original jurisdiction to support its holding that Congress could not implicitly expand the Court’s original jurisdiction. Perhaps it is worth pointing out that the Dormant Commerce Clause’s effort at leveling the national playing field for primarily economic interest is more protective of state and individual rights than aggrandizement of either judicial power or federal power. It is easy to believe that the primary result of abandoning the Dormant Commerce Clause would not be Congress’s stepping in to fill the void left by the absence of judicial restrictions on discriminatory and undue burdens on economic interest, but a void left to be filled by the most parochial of state and local legislation in advancement of private special interest.

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367. *Camps Newfound v. Town of Harrison*, 520 U.S. 564, 636 (1997) (Thomas, J., dissenting).

368. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting).

369. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).

370. See *Marbury v. Madison*, 5 U.S. 137, 174 (1803):

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States . . . . Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

*Id.*

It is not that Justice Thomas does not have a valid point; the Court has had a difficult time for almost two hundred years in deciding the proper parameters of the implied limitations of the Dormant Commerce Clause. And most of Thomas's harshest criticism for the doctrine comes from the cases closest to the margins of the doctrine. But the inconsistencies of the precedents are more than matched by the consistencies from *Cooley*, *Jones & Laughlin*, and even *Raich*. Although *Raich* moving the Court one step back from the analysis by implementing a rational basis test was unfortunate, it is likely that there was some substantial impact in most Dormant Commerce Clause cases, which makes the rational basis level of review, at worst, a redundancy.

The major problem with Justice Thomas's wholesale rejection of the Dormant Commerce Clause precedents is that he has removed himself as part of the solution. Certainly, Justice Scalia did not go that far, and there is nothing insinuating that other justices—let alone four others—are going to step forward to totally reject the historical or logical underpinnings of the Dormant Commerce Clause. It is unfortunate that Justice Thomas does not see himself as part of the solution in bringing order to the morass he claims is the Dormant Commerce Clause. Justice Thomas sees his withdrawal of all consideration of the issue as the only remedy for what he considers to be the doctrine's betrayal of his beloved textualism. He has used his considerable skills as a purveyor of the historical records to challenge again and again conventional wisdom as to the legitimacy of the Dormant Commerce Clause. It is unfortunate that he has sidelined himself from that continued battle.