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**CONSTITUTIONAL IRONY:
GONZALES V. RAICH, FEDERALISM AND
CONGRESSIONAL REGULATION OF INTRASTATE
ACTIVITIES UNDER THE COMMERCE CLAUSE**

Steven K. Balman*

[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

Abraham Lincoln¹

[I]t is not clear why one should take pride in the Court's failures in Commerce Clause cases, or in their frequency

Alexander Bickel²

I. INTRODUCTION

The United States Supreme Court currently divides its Commerce Clause cases into three categories: (1) cases involving the “channels of interstate commerce”;³ (2) cases involving the “instrumentalities of interstate commerce, and persons or things in interstate commerce”;⁴ and (3) cases involving “activities that substantially affect interstate commerce.”⁵

The first two categories—the “channels” cases and the “instrumentalities” cases—are not controversial and, by and large, do not present difficulties. The third category—the “substantial effect” cases—are very controversial. In those cases Congress uses its

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1 Abraham Lincoln, *First Inaugural Address* (D.C., Mar. 4, 1861), in *Abraham Lincoln: Complete Works: Speeches and Letters* vol. 2, at 1, 5 (John G. Nicolay & John Hay eds., Century Co. 1894).

2. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 231 (Bobbs-Merrill 1962).

3. *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005).

4. *Id.*

5. *Id.*

commerce power to regulate *intrastate* as opposed to *interstate* commerce.⁶

The intrastate Commerce Clause cases are controversial because they involve federal regulation of subject matter (e.g., criminal law) and geographical territories that are traditionally regulated by the states. Since 1942, the Court has, for the most part, acquiesced in these Congressional invasions of areas traditionally regulated by states. The opinions that justify and explain the incursions employ paradoxical,⁷ even ironic,⁸ interpretations of the Commerce Clause. In any given intrastate case, the Court may use one or more of the following interpretations of the express language in the Commerce Clause:

- (1) Interstate Paradox: Even though the Commerce Clause authorizes Congress to regulate commerce among the states—interstate commerce—Congress can regulate intrastate commerce—commerce that is confined to, or occurs within, a single state. “Interstate” means “intrastate.”
- (2) Commerce Paradox: Even though the Commerce Clause authorizes Congress to regulate commerce, the commerce power extends to noncommercial, noneconomic activities. The commerce power is about *power*, not commerce. The commerce power is a plenary, national “police power.”
- (3) Substantial Paradox: Even though cases hold that intrastate conduct that has a substantial effect on interstate commerce can be regulated, Congress can regulate conduct with a trivial and inconsequential effect on interstate commerce. “Substantial” means “trivial.”

The three Commerce Clause paradoxes are a form of constitutional irony. A question immediately arises: Is constitutional irony good or bad? This article answers that question by examining *Gonzales v. Raich*⁹—a case decided June 6, 2005, by a vote

6. Laurence H. Tribe, *American Constitutional Law* vol. 1, § 5-5, 825–28 (3d ed., Found. Press 2000).

7. “Paradox,” as used herein, means “a statement that is seemingly contradictory or opposed to common sense” *Merriam-Webster’s Collegiate Dictionary* 842 (10th ed., Merriam-Webster, Inc. 1999); see *A Companion to Epistemology* 324 (Jonathan Dancy & Ernest Sosa eds., Blackwell 1992).

8. “Ironic” refers to “irony,” i.e., the “use of words to express something other than and [especially] the opposite of the literal meaning.” *Id.* at 619. As a matter of rhetorical theory, irony is a trope—a “deviation from the ordinary and principal signification of a word.” Edward P. J. Corbett, *Classical Rhetoric for the Modern Student* 426 (3d ed., Oxford 1990). “Irony” is the “use of a word in such a way as to convey a meaning opposite the literal meaning of the word.” *Id.* at 454. An example can be found in William Shakespeare’s play *Julius Caesar*, in which Mark Antony in his “Friends, Romans, Countrymen” speech comments that “Brutus is an honourable man.” *Id.* (emphasis in original); see generally *The New Cambridge Shakespeare: Julius Caesar* 109 (Marvin Spevack ed., Cambridge U. Press 1988). Irony is “fashioned of falsehood by dint of a reflection which wears the mask of truth.” Brian Vickers, *In Defence of Rhetoric* 440 (Clarendon Press 1988) (internal quotation marks omitted).

9. 125 S. Ct. 2195 (2005). This article is a critique of the accounts of the Commerce Clause and federalism in the orthodox liberal constitutional theory taught in most law school Constitutional Law courses (i.e., “Living Constitution” theory). On many points, this article follows the analysis of Professor Randy E. Barnett in *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton U. Press 2004), and Professor Richard A. Epstein in *How Progressives Rewrote the Constitution* (Cato Inst. 2006). Professor Barnett was counsel for the respondents in *Raich*. *Raich*, 125 S. Ct. at 2198. Professor Epstein worked with the Institute for Justice in preparing an amicus brief in support of *Raich*. Br. Amicus Curiae of Inst. for Just. in Support of Respt., *Raich*, 125 S. Ct. 2195. In this article, the libertarian and classical liberal views held by Professors Barnett and Epstein, respectively, are balanced against and moderated by the conservative views of George F. Will, set forth in *Statecraft as Soulcraft: What Government Does* (Simon & Schuster, Inc. 1983), and *Abraham Lincoln: Complete Works: Speeches and Letters*, *supra* n. 1, and by the neo-Burkean views of Professor Bickel, *supra* n. 2. Although Richard Rorty is mentioned, this article does not address the views of postmodern jurisprudence. After the Sokal Affair and 9/11, postmodernism is dead. See e.g. Editors of *Lingua*

of six to three. *Raich* involved all three Commerce Clause paradoxes. The thesis of this article is that constitutional irony is bad—very bad.

In *Gonzales v. Raich*, the U.S. Supreme Court upheld a federal statute used to regulate a wholly intrastate activity—the cultivation and use of medical marijuana by two California women.¹⁰ The amount of marijuana involved was trivial; there were no sales, trades, or exchanges.¹¹ The federal statute was held to be a valid exercise of Congress's commerce power¹²—a power granted by the Commerce Clause of the United States Constitution. In permitting the Congressional regulation of an intrastate activity, the Court followed a 1942 decision of the “Roosevelt Justices”—the Justices that President Franklin D. Roosevelt appointed after the Constitutional Revolution of 1937. That decision, *Wickard v. Filburn*,¹³ upheld a New Deal statute that regulated the amount of wheat a farmer could produce for personal use—household consumption and chicken feed.¹⁴ *Wickard* represented the “outer limits of federal power.”¹⁵ Like *Raich*, *Wickard* involved all three Commerce Clause paradoxes.

Gonzales v. Raich represents a great leap backward in Commerce Clause doctrine and the jurisprudence of federalism. *Raich* casts doubt on two recent decisions of the Rehnquist Court—*United States v. Lopez*¹⁶ and *United States v. Morrison*¹⁷—that suggested the commerce power had limits and read the Commerce Clause in a common sense, non-ironic way. Significantly, *Lopez* and *Morrison* made only limited use of the Commerce Clause paradoxes.

Franca, The Sokal Hoax: The Sham That Shook the Academy 91–104 (U. Neb. Press 2000); Ophelia Benson & Jeremy Stangroom, *Why Truth Matters* 62 (Continuum 2006); Samuel R. Smith, *Postmodernism is Dead: Now What?* http://www.intelligentagent.com/archive/Vol3_No1_polisci_smith.html (accessed July 13, 2006).

10. *Raich*, 125 S. Ct. at 2199–200.

11. *Id.* at 2200, 2200 n. 8, 2207–09 (majority); *id.* at 2229 (O'Connor, J., dissenting).

12. *Id.* at 2205–09.

13. 317 U.S. 111 (1942).

14. *Id.*

15. Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, in *Cato Supreme Court Review, 2004–2005*, at 71, 72, 72 n. 10 (Mark K. Moller ed., Cato Inst. 2005) (citing *U.S. v. Lopez*, 514 U.S. 549, 560 (1995), as characterizing *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”); see Barnett, *supra* n. 9, at ix (commenting that *Wickard* drained the Commerce Clause of its meaning), 315 (arguing *Wickard* destroyed the distinction between interstate and intrastate commerce); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 56 (Free Press 1990); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 252, 254–55 (2d ed., Aspen 2002); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986*, at 238 (U. Chi. Press 1990); Epstein, *supra* n. 9, at 74 (“The language of the [Commerce Clause] is contorted so ‘commerce’ now includes . . . its verbal opposite.”); Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* 27, 29–30 (Harv. U. Press 2004); John W. Johnson, *Wickard v. Filburn*, in *The Oxford Companion to the Supreme Court of the United States* 1088 (Kermit L. Hall ed., 2d ed., Oxford U. Press 2005) [hereinafter *Oxford Companion*]; John W. Johnson, *Wickard v. Filburn*, in *The Oxford Guide to United States Supreme Court Decisions* 332 (Kermit L. Hall ed., Oxford U. Press 1999) [hereinafter *Oxford Guide*]; John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 181 (6th ed., West 2000) (discussing that with *Wickard* “the Court completed the move to recognizing a plenary commerce power based on economic theory”); Tribe, *supra* n. 6, at 813–14, 813 n. 22; G. Edward White, *The Constitution and the New Deal* 198 (Harv. U. Press 2000) (noting that in *Wickard* “the Court virtually abandoned the idea of federalism limitations on congressional legislation based on the commerce power”); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 82 (1999) (“*Wickard* enabled Congress to regulate whatever it pleased.”).

16. 514 U.S. 549 (1995); see generally *Oxford Companion*, *supra* n. 15, at 592; *Oxford Guide*, *supra* n. 15, at 164.

17. 529 U.S. 598 (2000); see generally *Oxford Companion*, *supra* n. 15, at 653.

By endorsing *Wickard v. Filburn*, the Court effectively recognizes a national police power. Such a broad power to conduct experiments in social engineering¹⁸ is completely repugnant to the fundamental premise of federalism—the notion that the federal government has limited, enumerated powers.¹⁹ The stretching of the commerce power, a limited legislative power, into an unlimited, plenary power is the ultimate constitutional irony.

II. *GONZALES V. RAICH*

The issue in *Raich* is whether the power granted to Congress by the Commerce Clause and the Necessary and Proper Clause includes the power to prohibit intrastate, noncommercial cultivation and possession of marijuana for personal-medical purposes, when the marijuana is recommended by a physician pursuant to valid state law.²⁰

The marijuana users are two citizens of California, Angel McClary Raich and Diane Monson.²¹ Raich and Monson suffer from severe medical conditions.²² Raich has “an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders”;²³ Monson has a degenerative disease of the spine, a disease that causes her “severe chronic back pain and constant, painful muscle spasms.”²⁴ Though serious, Monson’s condition is not life-threatening.²⁵

Traditional medicine has “utterly failed”²⁶ Raich and Monson.²⁷ “The only thing that has provided any relief from symptoms and/or improvement in their condition is medication with cannabis [i.e., marijuana].”²⁸ Both Raich and Monson have used marijuana for medicinal purposes for several years.²⁹

Raich and Monson use marijuana, on a doctor’s recommendation, on a daily basis.³⁰ They do not purchase or sell marijuana.³¹ Monson grows the marijuana she uses.³² Because *Raich* is unable to grow her own, her two caregivers cultivate several varieties of marijuana and provide them to her without charge.³³ Raich’s marijuana is supposedly cultivated using water, nutrients, equipment, supplies, and materials from California.³⁴

18. See Richard A. Posner, *The Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827, 837 (1988).

19. See Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* 39 (AEI Press 1999); *The Heritage Guide to the Constitution* 103–04 (Edwin Meese III, David F. Forte & Matthew Spalding eds., Regnery Publ. 2005).

20. 125 S. Ct. at 2198–99.

21. *Id.* at 2195, 2199.

22. *Id.* at 2199–200.

23. *Raich v. Ashcroft*, 352 F.3d 1222, 1225 (9th Cir. 2003).

24. *Id.*

25. See *id.* at 1225.

26. *Raich v. Ashcroft*, 248 F. Supp. 2d 918, 921 (N.D. Cal. 2003).

27. *Id.*

28. *Id.*

29. *Raich*, 125 S. Ct. at 2200.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Raich*, 352 F.3d at 1225.

The physicians that treat Raich and Monson prescribe marijuana pursuant to a California statute, the Compassionate Use Act of 1996.³⁵ That statute was enacted after the voters of California approved Proposition 215, a state-wide referendum on the propriety of medical marijuana.³⁶

On August 15, 2002, sheriff's deputies from Butte County, California and agents of the federal Drug Enforcement Agency ("DEA") came to Monson's home.³⁷ The deputies concluded that Monson's use of marijuana was permissible under California's Compassionate Use Act.³⁸ The DEA disagreed.³⁹ "[A]fter a three-hour standoff, including an unsuccessful intervention by the local District Attorney with the United States Attorney . . . , the DEA agents seized and destroyed [Monson's] six (6) marijuana plants."⁴⁰

The DEA acted under the authority of a federal statute, the Controlled Substances Act ("CSA").⁴¹ Raich, Monson, and Monson's caregivers sued the Attorney General of the United States (and other federal officers) for a preliminary injunction preventing the federal government from enforcing the CSA against them.⁴² In particular, Raich, Monson, and the other plaintiffs wanted the district court to declare that the provisions of the CSA, prohibiting the manufacture, distribution, or possession of marijuana, were unconstitutional as applied to them.⁴³

The district court refused to grant a preliminary injunction;⁴⁴ the United States Court of Appeals for the Ninth Circuit reversed.⁴⁵ The Supreme Court granted the government's petition for certiorari because of "[t]he obvious importance of the case."⁴⁶

The Court reversed the Ninth Circuit by a vote of six to three.⁴⁷ Five Justices joined in the majority opinion: Stevens, Kennedy, Souter, Ginsburg, and Breyer.⁴⁸ Stevens delivered the opinion of the Court.⁴⁹ Scalia concurred in the judgment.⁵⁰ Two Justices wrote dissenting opinions: O'Connor and Thomas.⁵¹ Chief Justice Rehnquist—the architect of the "New Federalism"⁵² and the author of *Lopez* and *Morrison*—and Thomas joined in all of O'Connor's dissent except Part III.⁵³

35. *Raich*, 125 S. Ct. at 2199–200, 2199 n. 3 (citing Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2005)).

36. *Id.* at 2199.

37. *Raich*, 352 F.3d at 1225.

38. *Raich*, 125 S. Ct. at 2200.

39. *Id.*

40. *Raich*, 248 F. Supp. 2d at 921.

41. *Raich*, 125 S. Ct. at 2200 (citing 21 U.S.C. §§ 801–890 (2000)).

42. *Raich*, 248 F. Supp. 2d at 921.

43. *Id.* at 922.

44. *Id.* at 931; *see Raich*, 125 S. Ct. at 2200.

45. *Raich*, 352 F.3d at 1235.

46. *Raich*, 125 S. Ct. at 2201.

47. *Id.* at 2198.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Raich*, 125 S. Ct. at 2198.

52. The "New Federalism" has become a code phrase for federal deference to state and local governments. *See Oxford Companion*, *supra* n. 15, at 677 ("This 'new federalism' is likely to be the principal legacy of William Rehnquist as Chief Justice, and as such has been applauded by those who maintain that the

In essence, the Court held the intrastate cultivation and use of marijuana in *Raich* was indistinguishable from the intrastate cultivation and use of wheat in *Wickard*.⁵⁴ The Court held that the medicinal use of marijuana had a substantial effect⁵⁵ on interstate commerce and that, as a consequence, regulation under the Commerce Clause was appropriate.⁵⁶ The actual amount of marijuana used by Raich and Monson, however, was trivial.⁵⁷ As a consequence, all three Commerce Clause paradoxes are involved in *Raich*. The relevant conduct is intrastate, not interstate—the Interstate Paradox. The conduct was private and personal; it was not commercial—the Commerce Paradox. The conduct has, at most, a remote and trivial effect on interstate commerce—the Substantial Paradox.

The Court distinguished *Lopez* and *Morrison*; it did not overrule them.⁵⁸ *Lopez* and *Morrison* involved discrete, limited purpose statutes—the Gun-Free School Zones Act of 1990⁵⁹ and the Violence Against Women Act of 1994.⁶⁰ *Raich*, in contrast, involved a comprehensive statute that regulated several drugs—not just marijuana.⁶¹ The broad remedial purpose of that comprehensive statute—the CSA—would be defeated if local cultivation and use of medical marijuana were permitted.⁶² The CSA was conceded to be *facially* valid; it was only alleged to be unconstitutional *as applied*.⁶³

Justice Scalia's concurrence provided an alternative basis for upholding the CSA.⁶⁴ According to Scalia, the regulation of intrastate activities was appropriate by virtue of the Necessary and Proper Clause.⁶⁵

Scalia is a textualist. He attempts to base his constitutional interpretations on the "original understanding"⁶⁶ of the Constitution as set forth in the written text.⁶⁷ He wrote

Constitution must be read and interpreted in the light of the original intentions and understandings of the founding generation."); Allison H. Eid, *Teaching New Federalism*, 49 St. Louis U. L.J. 875 (2005); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 Mich. L. Rev. 615, pt. II (1995); Randy Lee, *The New Federalism: Discerning Truth in American Myths and Legends*, 12 Widener L.J. 537 (2003); see also Symposium, *The Commerce Clause: Past, Present, and Future*, 55 Ark. L. Rev. 705 (2003) [hereinafter *Arkansas Symposium*].

53. *Raich*, 125 S. Ct. at 2198.

54. *Id.* at 2205–09.

55. *Id.* at 2205.

56. *Id.* at 2205–09.

57. *Id.* at 2207–09 (majority); *Raich*, 125 S. Ct. at 2229 (O'Connor, J., dissenting).

58. *Id.* at 2209–11; Kmiec, *supra* n. 15, at 72, 87–88.

59. *Raich*, 125 S. Ct. at 2210; *Lopez*, 514 U.S. 549; see Barnett, *supra* n. 9, at 317, 317 nn. 174–175.

60. *Raich*, 125 S. Ct. at 2210; *Morrison*, 529 U.S. 598; see Barnett, *supra* n. 9, at 317, 317 nn. 174–175.

61. *Raich*, 125 S. Ct. at 2210–11.

62. *Id.* The CSA is title II of the Comprehensive Drug Abuse Prevention and Control Act. *Id.* at 2203. It is "a comprehensive regime to combat the international and interstate traffic in illicit drugs." *Id.* The CSA categorizes all controlled substances into five schedules. *Id.* (citing 21 U.S.C. § 812(a)). The schedules are subject to varying levels of control and regulation. *Raich*, 125 S. Ct. at 2203–04 (citing 21 U.S.C. §§ 821–830). Marijuana is a Schedule I substance and is subject to strict control and regulation. *Id.* (citing 21 U.S.C. § 812(c)). See Judge James P. Gray, *Why Our Drug Laws Have Failed and What We Can Do About It: A Judicial Indictment of the War on Drugs* 27 (Temple U. Press 2001).

63. Kmiec, *supra* n. 15, at 72.

64. *Raich*, 125 S. Ct. at 2215–20 (Scalia, J., concurring).

65. *Id.* at 2216.

66. Kmiec, *supra* n. 15, at 73 (citing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press 1997)).

67. *Id.*

a separate concurrence in *Raich* in order to offer a more “nuanced” analysis.⁶⁸ According to Douglas Kmiec, Scalia failed: “[His concurrence] does not rely on original understanding, and it is not nuanced.”⁶⁹

Scalia concedes that intrastate, noncommercial marijuana use is not interstate commerce.⁷⁰ He argues, however, that such an intrastate activity can be regulated under the Necessary and Proper Clause, because it is necessary in order to make a valid regulation of interstate commerce (i.e., the CSA) effective.⁷¹ According to Scalia, the intrastate activity need not have a substantial affect on interstate commerce.⁷² The substantial effect test *understates* Congress’s authority.⁷³ “Purely local” activities can be reached by Congress if necessary to vindicate a “comprehensive scheme”⁷⁴ of regulation.⁷⁵

Justice O’Connor’s dissent was consistent with her position in *Lopez* and *Morrison*. According to O’Connor, *Raich* is indistinguishable from *Lopez* and *Morrison*.⁷⁶ The local, intrastate activity—cultivation and use of medicinal marijuana—did not have a substantial affect on interstate commerce.⁷⁷ As a result, O’Connor concluded that the use of the CSA to prohibit that intrastate activity was inappropriate.⁷⁸ In terms of the three-paradox model, O’Connor rejected the majority’s application of the Substantial Paradox.⁷⁹

In response to the Necessary and Proper Clause argument advanced in Scalia’s concurrence, O’Connor observed that

the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. . . . [S]omething more than mere assertion is required when Congress purports to have power over local activity whose connection to an int[er]state market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation.⁸⁰

68. *Id.* (referring to *Raich*, 125 S. Ct. at 2215).

69. *Id.* (footnote omitted).

70. *Id.* (citing *Raich*, 125 S. Ct. at 2215–20).

71. Kmiec, *supra* n. 15, at 73 (citing *Raich*, 125 S. Ct. at 2215–20).

72. *See id.* (citing *Raich*, 125 S. Ct. at 2216).

73. *Id.*

74. *Id.* (quoting *Raich*, 125 S. Ct. at 2218) (internal quotation marks omitted).

75. *Id.* (citing *Raich*, 125 S. Ct. at 2218).

76. *Raich*, 125 S. Ct. at 2220–29 (O’Connor, J., dissenting).

77. *Id.* at 2224.

78. *See id.* at 2220–29.

79. *See id.* at 2221 (noting that the *Raich* majority opinion is “irreconcilable” with the reasoning of *Lopez* and *Morrison*). O’Connor criticized the majority and Scalia for ignoring the four factors set forth in *Lopez* and *Morrison*:

[i] whether the regulation involves economic activity; [ii] whether the statute has a jurisdictional element requiring proof of a connection to interstate commerce; [iii] whether Congress made express legislative findings enabling the Court to understand the substantial effect of the regulated activity on interstate commerce; and [iv] whether in all events the purported regulatory authority was based on more than a mere inference that the national economy might be adversely affected.

Kmiec, *supra* n. 15, at 74, 74 nn. 23–24.

80. Kmiec, *supra* n. 15, at 74 (quoting *Raich*, 125 S. Ct. at 2226 (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 585 (1985))) (ellipses and brackets in original, footnote omitted).

Justice Thomas's dissent tracks his concurrence in *Lopez*.⁸¹ Thomas focused on the text of the commerce clause and the historical definition of "commerce." According to Thomas, the intrastate activity of growing and using medicinal marijuana did not involve commerce⁸² let alone interstate commerce.⁸³ For Thomas, commerce must involve trade or exchange—not all forms of economic activity are commerce.⁸⁴ Growing marijuana for personal use was not commerce.⁸⁵ As a consequence, the application of the CSA in the *Raich* case was—in Thomas's view—unconstitutional.⁸⁶ In terms of the three-paradox model, Thomas rejected the majority's use of the Interstate Paradox and the Commerce Paradox.⁸⁷

III. FEDERALISM

A. *Federalism in Theory*

In theory, federalism is "that form of government 'in which a union of states recognizes the sovereignty of a central authority while retaining certain residual powers of government.'"⁸⁸ Professor Edward Corwin has identified six features as intrinsic to American Constitutional federalism: (1) a union of autonomous states; (2) the division of powers between the federal government and the states; (3) the direct operation of each government, within its assigned sphere, on all persons and properly within its territorial limits; (4) the provision of each government with the complete apparatus of law enforcement; (5) federal supremacy over any conflicting assertion of state power; and (6) dual citizenship.⁸⁹

Two questions immediately arise: First, how much power should be vested in the "central authority"—the national or federal government? Second, how much power should the states retain? The Founders did not answer these questions precisely, but they did clearly identify the danger zones of extreme centralization/nationalization and extreme decentralization.⁹⁰ On a spectrum of centralized government, constitutional

81. *Raich*, 125 S. Ct. at 2229 (Thomas, J., dissenting); see *Lopez*, 514 U.S. 549.

82. Kmiec, *supra* n. 15, at 74 (citing *Raich*, 125 S. Ct. at 2230).

83. *Id.* (citing *Raich*, 125 S. Ct. at 2231).

84. *Id.* (citing *Raich*, 125 S. Ct. at 2230).

85. See *Raich*, 125 S. Ct. at 2230.

86. See *id.* at 2229–39.

87. According to Thomas, there must be an "obvious, simple, and direct relation between the intrastate ban and the regulation of interstate commerce." Kmiec, *supra* n. 15, at 74 (quoting *Raich*, 125 S. Ct. at 2231) (internal quotation marks and footnote omitted). In the case of the CSA, "Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power. Congress cannot define the scope of its own power merely by declaring the necessity of its enactments." *Id.* at 74–75 (quoting *Raich*, 125 S. Ct. at 2233) (internal quotation marks and footnote omitted).

88. William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 Duke L.J. 769, 770 (quoting *The American Heritage Dictionary* 494 (2d College ed., Houghton Mifflin Co. 1982)) (footnote omitted).

89. Norman Redlich, John Attanasio & Joel K. Goldstein, *Constitutional Law* 238 (4th ed., LexisNexis 2002) [hereinafter Redlich, Attanasio & Goldstein, *Constitutional Law*] (quoting Edward S. Corwin, *The Constitution of the United States of America: Analysis And Interpretation* xi–xii (U.S. Govt. Printing Off. 1953)); Norman Redlich, John Attanasio & Joel K. Goldstein, *Understanding Constitutional Law* 151 (3d ed., Matthew Bender & Co. 2005).

90. Van Alstyne, *supra* n. 88, at 770.

federalism stands approximately midway between the extremes of (1) a dangerously strong regime—the “national state”⁹¹ in which the paramount principle is democratic centralism, and (2) a dangerously weak regime—a “mere confederacy,”⁹² like the United States government under the Articles of Confederation.⁹³

The Founders’ best and most definitive thoughts about federalism—the balance of power between the federal governments and the states—are contained in the text of the Constitution. Great insight can be gathered, however, from *The Federalist Papers*, a series of op-ed pieces published by Alexander Hamilton, James Madison, and John Jay during the debate over the ratification of the Constitution.⁹⁴ In *Federalist No. 45*, James Madison wrote:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.⁹⁵

Two principles of federalism are announced in the quoted language. The first principle is that the states retain a general “police power”—the power to engage in what Blackstone called the

‘due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.’⁹⁶

Most assertions of governmental authority involve the police power.⁹⁷

91. *Id.*

92. *Id.*

93. *Id.* at 770 n. 2; see Akhil Reed Amar, *America’s Constitution: A Biography* 106 (Random House 2005). At the “nation state” extreme, the states are administrative units—or agents—of the national government; at the “mere confederacy” extreme, the national government is the agent of the sovereign states; in the “constitutional federalism” model, both the states and the national government are sovereign, they are largely independent of each other and they compete. See Fried, *supra* n. 15, at 13–19; Greve, *supra* n. 19, at 2. The federal system has been characterized as a dynamic system possessing physical properties—inertia, centrifugal (pro-state) force, centripetal (pro-central government) force. See *Duckworth v. Ark.*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring); Tribe, *supra* n. 6, at 1027, 1027 n. 26.

94. See Martin Diamond, *The Federalist on Federalism: “Neither a National Nor a Federal Constitution, But a Composition of Both,”* 86 Yale L.J. 1273, 1285 (1977) (“Publius (the pen name Hamilton, Madison, and Jay used in writing [*The Federalist Papers*]) remains our most instructive political thinker.”).

95. James Madison, *Federalist No. 45*, in Alexander Hamilton, James Madison & John Jay, *The Federalist Papers* 277, 289 (Clinton Rossiter ed., Signet Classic 1961) (quoted in part in *Raich*, 125 S. Ct. at 2229 (O’Connor, J., dissenting); *Lopez*, 514 U.S. at 552). All citations hereinafter to *The Federalist Papers* are to this edition.

96. *Oxford Companion*, *supra* n. 15, at 741 (quoting *Blackstone’s Commentaries on the Laws of England* vol. 4, 127–28 (Wayne Morrison ed., Cavendish Publ. Ltd. 2001)). One classic definition of “police power” is “the power of promoting the public welfare by restraining and regulating the use of liberty and property.” Epstein, *supra* n. 9, at 44 (internal quotation marks and footnote omitted).

97. See Madison, *Federalist No. 45*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 289.

The second principle of federalism is that the powers of the federal government are limited and enumerated. In *Morrison*, Chief Justice Rehnquist wrote that “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”⁹⁸ In making that statement, Rehnquist relied on Chief Justice Marshall in *Marbury v. Madison*: “The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution is written.”⁹⁹

The powers of Congress are set forth in Article I, Section 8 of the Constitution. Those powers include the Commerce Clause, a provision that Professor Bernard Schwartz called “the most important substantive power vested in the Federal Government in time of peace.”¹⁰⁰ The Commerce Clause grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁰¹

The Constitutional Convention of 1787 was called in large part because of the need to assert national controls over interstate commerce.¹⁰² Under the Articles of Confederation, many states had erected barriers to interstate trade (e.g., protective tariffs).¹⁰³ Those state measures stifled trade and discouraged the development of a national economy.¹⁰⁴ “The Commerce Clause emerged as the Framers’ response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.”¹⁰⁵ In theory, the Commerce Clause granted Congress a limited power—the power to regulate interstate commerce.

98. 529 U.S. at 607. “Federalism’s core is the notion of enumerated powers granted to Congress under Article I of the Constitution.” Greve, *supra* n. 19, at 25.

99. *Morrison*, 529 U.S. at 607 (quoting 5 U.S. 137, 176 (1803)) (internal quotation marks omitted). The quotation from *Marbury* continues:

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.

Barnett, *supra* n. 9, at 1 (quoting *Marbury*, 5 U.S. at 176) (internal quotation marks and footnote omitted).

100. Bernard Schwartz, *A History of the Supreme Court* 47 (Oxford U. Press 1993); see William H. Rehnquist, *The Supreme Court* 36 (new ed., Alfred A. Knopf 2001) (suggesting the same).

101. U.S. Const. art. I, § 8(3); see Schwartz, *supra* n. 100, at 47.

102. Schwartz, *supra* n. 100, at 47 (“The need to federalize regulation of commerce was one of the principal needs that motivated the Constitutional Convention of 1787.”).

103. See Bickel, *supra* n. 2, at 229.

104. See *id.*

105. *Raich*, 125 S. Ct. at 2205 (footnote omitted); see Bickel, *supra* n. 2, at 229 (“The Court early formulated, and justly attributed to the Framers of the Constitution, the principled goal of an open national economy—a common market, to use the term now current in Europe. This is an extremely broad principle, excruciatingly difficult to apply.”); Schwartz, *supra* n. 100, at 47; Tribe, *supra* n. 6 at 1044 (discussing “the widely-held belief that the Articles of Confederation had failed in large part because the states had waged destructive trade wars against one another.”). In *Federalist No. 42*, Madison wrote:

The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. . . . [W]ithout this *supplemental provision*, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to *regulate the trade between State and State*, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.

B. *Federalism in Practice: The Winding Path to Wickard*

In practice, the Commerce Clause came to allow Congress to do much more than regulate interstate commerce. According to Felix Frankfurter, the Commerce Clause “has throughout the Court’s history been the chief source of its adjudications regarding federalism.”¹⁰⁶

Eventually—after decades of common law evolution and the Constitutional Revolution of 1937—the commerce power grew to be a “plenary national police power.” That power provided the foundation for the current national government—an institution that has been called the “Bureaucratic State,” the “Administrative State,” and the “Welfare State.”¹⁰⁷

The process of evolution was not smooth or continuous. The Court’s Commerce Clause decisions cannot be harmonized and synthesized into a grand unified theory; they conflict.¹⁰⁸ The three Commerce Clause paradoxes emerged gradually.

1. *Gibbons v. Ogden*

The Commerce Clause was construed and applied by the Court in *Gibbons v. Ogden*,¹⁰⁹ the steamboat monopoly case. Prior to *Gibbons*, “[t]he Commerce Clause . . . had received practically no judicial explication, and no one knew how far it reached.”¹¹⁰ In *Gibbons*, the State of New York granted the exclusive right to engage in steamboat navigation in the waters of New York to Robert Fulton and his partner, Robert Livingston.¹¹¹ Aaron Ogden held a license from Fulton and Livingston, and held a submonopoly on the route from Elizabeth Point, New Jersey to New York City.¹¹² Thomas Gibbons had a federal coasting license and also ran boats between New Jersey

James Madison, *Federalist No. 42*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 260, 263–64 (emphasis added); see also Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483, 513–15 (1997) (defining “free trade areas,” “customs unions,” and “common markets” and suggesting that the Constitution may have created a “customs union” but not a “common market”).

106. Felix Frankfurter, *The Commerce Clause: Under Marshall, Taney and Waite* 66–67 (UNC Press 1937) (quoted in *Lopez*, 514 U.S. at 579) (Kennedy & O’Connor, JJ., concurring). Interestingly, Frankfurter observed that “no other body of opinions affords a fairer or more revealing test of judicial qualities” than the Court’s Commerce Clause opinions. *Id.* at 67; see *The Heritage Guide to the Constitution*, *supra* n. 19, at 101 (“No clause in the 1787 Constitution has been more disputed, and it has generated more cases than any other.”).

107. See Friedrich A. Hayek, *The Constitution of Liberty* 253–66 (U. Chi. Press 1960); *Oxford Companion*, *supra* n. 15, at 12–18, 678; Gene Smiley, *Rethinking the Great Depression* 151–54 (Ivan R. Dee 2002) (discussing the regulatory state; social welfare programs); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1231, 1231 nn. 1–2 (1994); Cass R. Sunstein, *Constitutionalism After The New Deal*, 101 Harv. L. Rev. 421, 430, 447–48 (1987).

108. See Epstein, *supra* n. 9, at 1–3, 45; Edward H. Levi, *An Introduction to Legal Reasoning* 32–104 (U. Chi. Press 1948); *Arkansas Symposium*, *supra* n. 52; see also *The Heritage Guide to the Constitution*, *supra* n. 19, at 102; Scalia, *supra* n. 66, at 37–47 (criticizing the use of the common law methodology for constitutional adjudication).

109. 22 U.S. 1 (1824).

110. Melvin I. Urofsky & Paul Finkelman, *A March of Liberty: A Constitutional History of the United States* vol. 1, 224 (2d ed., Oxford U. Press 2002); see Epstein, *supra* n. 9, at 25.

111. *Gibbons*, 22 U.S. at 1; Redlich, Attanasio & Goldstein, *Constitutional Law*, *supra* n. 89, at 90; Urofsky & Finkelman, *supra* n. 110, at 223.

112. *Gibbons*, 22 U.S. at 1–2; Redlich, Attanasio & Goldstein, *Constitutional Law*, *supra* n. 89, at 90; Urofsky & Finkelman, *supra* n. 110, at 223–24.

and Manhattan.¹¹³ As a consequence, Gibbons was a competitor of Ogden. Ogden sued Gibbons for encroachment of the monopoly granted by the State of New York.¹¹⁴ Gibbons defended by saying the state-granted monopoly violated the Commerce Clause.¹¹⁵

The Court ruled for Gibbons.¹¹⁶ In an opinion by Chief Justice Marshall, the Court found that the federal statute governing the coasting trade, and Gibbons's license, was a valid exercise of Congressional power under the Commerce Clause.¹¹⁷ As a consequence, the federal statute was the supreme law of the land under the Supremacy Clause.¹¹⁸

In the course of the opinion, Marshall was required to construe the Commerce Clause. Marshall defined "commerce" as "intercourse,"¹¹⁹ and recognized that commerce extended into each state.¹²⁰ Congress had the power to regulate "that commerce which concerns more States than one."¹²¹ That power extended to commerce that occurred within a state.¹²²

Marshall stated that the judiciary should not interfere with Congress's exercise of its commerce power:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, 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, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.¹²³

The quoted passage has great significance for federalism. In the sphere of interstate commerce, the federal government has *almost* exclusive power. "The subject [of interstate commerce] is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."¹²⁴

113. *Gibbons*, 22 U.S. at 2; Redlich, Attanasio & Goldstein, *Constitutional Law*, *supra* n. 89, at 90; Urofsky & Finkelman, *supra* n. 110, at 223.

114. *Gibbons*, 22 U.S. at 1–2; Redlich, Attanasio & Goldstein, *Constitutional Law*, *supra* n. 89, at 90; Urofsky & Finkelman, *supra* n. 110, at 222–24.

115. *Gibbons*, 22 U.S. at 186. Gibbons was represented by Daniel Webster. Webster argued for two and a half days. *See* Rehnquist, *supra* n. 100, at 242.

116. *Gibbons*, 22 U.S. at 239–40.

117. *Id.*

118. *Id.* at 210–11. The Supremacy Clause is set forth in the U.S. Constitution, art. VI, and states:

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.

119. *Gibbons*, 22 U.S. at 193.

120. *Id.*; *see* Barnett, *supra* n. 9, at 291–94 ("Commerce" includes "navigation.").

121. *Gibbons*, 22 U.S. at 194.

122. *Id.* Marshall stated "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior." *Id.* Barnett is critical of Marshall's interpretation of the Commerce Clause language "among the states." Barnett, *supra* n. 9, at 301–02. Barnett believes that Marshall's formulation is too expansive: "Marshall's formulation has improperly permitted the expansion of the power to regulate commerce beyond that which actually crosses state lines." *Id.* at 302.

123. *Gibbons*, 22 U.S. at 197.

124. Paul Johnson, *A History of the American People* 238 (HarperPerennial 1997) (quoting Justice Marshall in *Gibbons*) (internal quotation marks and footnote omitted).

Significantly, Marshall acknowledged a limit to the commerce power. He said that Congress lacked authority to regulate the “internal”¹²⁵ commerce of a state.¹²⁶ Marshall said regulation of intrastate commerce would be repugnant to the “genius and character”¹²⁷ of the federal government:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.¹²⁸

Professor David Currie thinks the “genius and character” passage of *Gibbons* is significant: “It bears emphasizing that in *Gibbons* . . . the great exponent of national power [i.e., Chief Justice Marshall] expressly acknowledged significant limitations on the reach of federal legislation.”¹²⁹ According to Currie, “it was Marshall’s successors who were to expand the commerce power to cover virtually everything.”¹³⁰

As interpreted by Marshall in *Gibbons*, the Commerce Clause fulfilled and realized its vital but limited purpose—the creation of a free trade zone, a “common market”

125. *Gibbons*, 22 U.S. at 195.

126. *Id.*

127. *Id.*

128. *Id.*

129. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888*, at 170, 170 n. 88 (U. Chi. Press 1985) (footnote omitted).

130. *Id.* at 170, 170 n. 89 (citing *Wickard* as an example) (footnote omitted). Charles F. Hobson, editor of *The Papers of John Marshall*, has observed:

Marshall surely recognized the opportunity to give a broad scope to the positive powers of Congress. Yet this objective was subordinate to his judicial task of reaching a satisfactory resolution of the particular case. As a legal controversy *Gibbons* was less about defining the extent of federal power than about setting limits on state sovereignty. More precisely, it was an inquiry into how far an affirmative federal power operated as a negative upon state legislation. The case compelled the Court to confront the perplexing problem of American federalism: where to draw the line of demarcation between federal and state sovereignty. In this respect *Gibbons* has a studied ambiguity that made it an uncertain guide for subsequent cases arising under the commerce clause.

The opinion reflects a determined effort to avoid drawing a precise boundary between the federal commerce power and the permissible field of state legislation. Marshall implicitly acknowledged that this question must perpetually arise and could only be settled, more or less, over the course of many adjudications. In a single case there was no need to pursue this “delicate inquiry” any further than was necessary to decide the particular question before the Court. Whether intentionally or not, *Gibbons* opened the door to greater exercise of federal judicial power and enhanced the Supreme Court’s role as “final arbiter in federal-state relations.” The chief justice, of course, never doubted that the Constitution had “devolved this important duty” on the Supreme Court.

As an attempt to arbitrate between the competing claims of federal and state sovereignty, *Gibbons* by no means reflects an uncompromising nationalism. The opinion permitted an ample field for state legislative activity in the area of commerce and the economy. The scope given to Congress’s authority to regulate commerce, broad as it was, did not encompass intrastate commerce. Nor did it touch the mass of state powers grouped under the rubric of the “police power.” Moreover, the decision did not endorse the exclusive power theory, the notion that the commerce clause by itself operated as a general prohibition on the states.

Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* 145 (U. Press Kan. 1996) (footnotes omitted).

among the states. “The freedom of interstate commerce, guaranteed by the US Constitution, made America by the 1860s the largest free-trading area in the world.”¹³¹

2. 1829 to 1895

After *Gibbons*, the Commerce Clause was not read consistently. From 1829 until 1895, the Court read the Commerce Clause somewhat narrowly. Four early cases involved state statutes. In *Brown v. Maryland* (1827),¹³² the Court (per Chief Justice Marshall) struck down a Maryland statute that imposed a tax on importers of out-of-state goods.¹³³ In *Willson v. Black-Bird Creek Marsh Company* (1829),¹³⁴ the Court (per Chief Justice Marshall) upheld the constitutionality of a Delaware statute that permitted a company to build a dam across a minor navigable river.¹³⁵ In *Cooley v. Board of Wardens of the Port of Philadelphia* (1851),¹³⁶ the Court upheld a Pennsylvania statute that regulated pilotage into the port of Philadelphia on public safety grounds, using a doctrine called “selective exclusiveness.”¹³⁷ In *Veazie v. Moor* (1852),¹³⁸ the Court upheld a state-created monopoly because it involved regulation of wholly internal commerce—that is, intrastate commerce.¹³⁹

131. Johnson, *supra* n. 124, at 532; see Bickel, *supra* n. 2, at 229 (discussing the common market); Paul Kens, *Lochner v. New York: Economic Regulation on Trial* 96 (U. Press Kan. 1998) (“The goal of the commerce clause was the creation of a ‘common market’ under the protection of the national government.”). *Gibbons* has been described as “the emancipation proclamation of American commerce.” Jean Edward Smith, *John Marshall: Definer of a Nation* 473 (Henry Holt & Co. 1996) (citing Charles Warren, *A History of the American Bar* 396 (Little, Brown & Co. 1911)) (internal quotation marks omitted); see also Gardbaum, *supra* n. 105, at 513–15.

132. 25 U.S. 419 (1827).

133. *Id.* at 449; Urofsky & Finkelman, *supra* n. 110, at 225. The *Brown* Court announced the “original package” doctrine—“a doctrine that remained in effect for over a century.” Urofsky & Finkelman, *supra* n. 110, at 225; see Oxford Companion, *supra* n. 15, at 113–14. Under the original package doctrine, states could not tax or otherwise regulate goods that crossed state lines if they remained in their original packages. Oxford Companion, *supra* n. 15, at 113; Tribe, *supra* n. 6, at 1046, 1046 n. 2; Urofsky & Finkelman, *supra* n. 110, at 225; see Epstein, *supra* n. 9, at 26–27.

134. 27 U.S. 245 (1829).

135. *Id.* at 249–50; Epstein, *supra* n. 9, at 30; Oxford Companion, *supra* n. 15, at 1091; Schwartz, *supra* n. 100, at 81–82; Urofsky & Finkelman, *supra* n. 110, at 226.

136. 53 U.S. 299 (1851).

137. Oxford Companion, *supra* n. 15, at 899. The doctrine of “selective exclusiveness” held that the power to regulate interstate commerce was not vested exclusively in the federal/national government. *Id.* As a general rule, matters requiring uniform rules were to be regulated by the federal government, while matters in which diversity was desirable were regulated by the states. *Id.* In the latter case, a case-by-case assessment was required. *Id.* *Cooley* is an early example of the “balancing approach to law”; it “foreshadowed modern constitutional jurisprudence.” Schwartz, *supra* n. 100, at 88; see also Tribe, *supra* n. 6, at 1046–49.

[T]he enduring legacy of *Cooley* has been this basic theme: The validity of state action affecting interstate commerce must be judged in light of the desirability, in terms of the Constitution’s structure and goals, of permitting diverse responses to local needs and the undesirability, again evaluated by a constitutional metric, of permitting local interference with such uniformity as the unimpeded flow of interstate commerce may require.

Tribe, *supra* n. 6, at 1048; see Epstein, *supra* n. 9, at 31 (“[The] ostensible safety argument [for regulating pilotage] was just pretext for the usual local anticompetitive preferences.”).

138. 55 U.S. 568 (1852).

139. *Id.* at 573–75. *Veazie* is discussed in Lopez. Lopez, 514 U.S. at 553–54.

After the Civil War,¹⁴⁰ Congress exercised its power under the Commerce Clause in new and more expansive ways. Among other things, Congress enacted the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890.¹⁴¹ In time, the new federal statutes were challenged.

In *United States v. E.C. Knight Company* (1895),¹⁴²—the “Sugar Trust Case”—the Court held that the Sherman Antitrust Act did not apply to a manufacturing trust, because the commerce power did not extend to manufacturing—an activity that fell within the states’ police power.¹⁴³ *E.C. Knight* posited a manufacturing/commerce dichotomy and made a distinction between direct effects on commerce (proper subjects of the commerce power) and indirect effects on commerce (matters outside the scope of the commerce power).¹⁴⁴ In terms of the three-paradox model, the *E.C. Knight* Court rejected (or avoided) the Commerce Paradox.¹⁴⁵

140. The Civil War was, in many ways, a dispute over federalism. The Taney Court had rendered several decisions that were grounded in notions of decentralization and states’ rights. *E.g. Scott v. Sandford*, 60 U.S. 393 (1856). That approach to constitutional interpretation was discredited by, and as a result of, the Civil War. *See Oxford Companion*, *supra* n. 15, at 177–79; Urofsky & Finkelman, *supra* n. 110, at 320–450. To this day, some people equate federalism with slavery, nullification, and secession.

141. Kmiec, *supra* n. 15, at 75; *Oxford Companion*, *supra* n. 15, at 193. In 1886, the Court invalidated an Illinois statute that regulated long and short railway hauls that crossed state lines. *Wabash, St. Louis & P. Ry. Co. v. Ill.*, 118 U.S. 557, 565 (1886); Kmiec, *supra* n. 15, at 75. The Court observed that rates for hauls that were wholly within Illinois would be subject to state regulation. *Wabash*, 118 U.S. at 577; *see* Kmiec, *supra* n. 15, at 76–78; *The Heritage Guide to the Constitution*, *supra* n. 19, at 102.

142. 156 U.S. 1 (1895); *see generally The Heritage Guide to the Constitution*, *supra* n. 19, at 102–03.

143. *E.C. Knight*, 156 U.S. at 15–16.

144. *Id.* at 16; *see Lopez*, 514 U.S. at 570 (Kennedy & O’Connor, JJ., concurring); Barnett, *supra* n. 9, at 294–95. Chief Justice Fuller observed in *E.C. Knight*: “‘Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.’” Schwartz, *supra* n. 100, at 183 (quoting *E.C. Knight*, 156 U.S. at 16). Professor Schwartz protests that “[i]f the commerce power did not extend to manufacture, agriculture, mining, and other productive industries, comparatively little of business operations and affairs in this country would really be subject to federal control.” *Id.* It is unclear why additional federal control of commerce is (1) constitutional or (2) desirable. As previously indicated, the Commerce Clause had already achieved its purpose. It had created the largest free-trading area in the world. Bickel, *supra* n. 2, at 229; Johnson, *supra* n. 124, at 532. Schwartz appears to be advocating a version of the Commerce Paradox—that the Commerce Clause is about expanding and extending federal power, as opposed to interstate commerce.

Many commentators read *E.C. Knight* together with *Kidd v. Pearson*, 128 U.S. 1 (1888), a case upholding a state manufacture of intoxicating liquor. *Kidd*, 128 U.S. at 25–26; *see e.g. Schwartz*, *supra* n. 100, at 183 (criticizing *Kidd* and *E.C. Knight* as an “artificial and mechanical separation of ‘manufacturing’ from ‘commerce,’” and comparing that approach unfavorably to Marshall’s conception of commerce “as an organic whole”). *Kidd* followed Marshall’s opinion in *Gibbons* and held that the commerce power “does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State.” *Kidd*, 128 U.S. at 17, 20–22.

145. According to Kmiec, “*Knight* is often understood to have drawn a distinction between manufacturing and commerce, with the former outside federal power and the latter within it.” Kmiec, *supra* n. 15, at 78 (footnote omitted). “This is a misreading of *Knight*.” *Id.* Kmiec is impressed by Justice Harlan’s dissent. Harlan would have upheld the Sherman Act’s application under the Necessary and Proper Clause. *Id.* at 78–79; *see E.C. Knight Co.*, 156 U.S. at 35–37 (Harlan, J., dissenting). Harlan’s Necessary and Proper Clause argument is much more limited than Scalia’s Necessary and Proper Clause argument in *Raich*. Kmiec, *supra* n. 15, at 80–81. According to Kmiec, *Knight* created confusion by not taking Harlan’s Necessary and Proper Clause argument into account, and by placing disproportionate emphasis on the manufacturing/commerce distinction. *Id.* at 78–81; *see also Epstein*, *supra* n. 9, at 34 (noting that in *E.C. Knight*, the Court “rightly stated that manufacturing fell outside the scope of the commerce power but wrongly concluded that a merger of corporations that did business in New Jersey and Pennsylvania should be treated as manufacturing”).

3. 1902 to 1937

Between 1902 and 1937, the Court's reading of the Commerce Clause was subtle and varied.¹⁴⁶ In some cases the Court read the Commerce Clause expansively and creatively. For example, in *Swift and Company v. United States* (1905),¹⁴⁷ the Court (per Justice Holmes) found that a price-fixing arrangement among Chicago meat-packers was a restraint on trade even though it was done locally.¹⁴⁸ The distribution of meat involved the "stream of commerce," a metaphor that came, in many cases, to replace and supplant the more formalistic "commerce/manufacturing" distinction of *E.C. Knight*.¹⁴⁹

Champion v. Ames (1903),¹⁵⁰ "took the commerce power beyond commerce."¹⁵¹ In *Champion*, the Court held the power to regulate interstate commerce included the power to prohibit certain forms of commerce.¹⁵² By a vote of five to four, the Court upheld a federal statute prohibiting the interstate transportation of lottery tickets.¹⁵³ The Court held that the power to regulate commerce included the power to prohibit commerce.¹⁵⁴ *Champion*—the "Lottery Case"—is significant because it recognized a national "police power" that was analogous to the state "police power." Accordingly, the commerce power was not limited to statutes that advanced or protected interstate commerce; Congress could regulate and protect the public morality.¹⁵⁵ In terms of the

146. See Tribe, *supra* n. 6, at 810, 810 n. 8.

147. 196 U.S. 375 (1905).

148. *Id.* at 390–402.

149. See Nowak & Rotunda, *supra* n. 15, at 168 ("Although the stockyard activity took place within a single state, it was but a temporary stop in the interstate sale of cattle."); *Oxford Companion*, *supra* n. 15, at 157; *Oxford Guide*, *supra* n. 15, at 49–50; Tribe, *supra* n. 6, at 810, 810 n. 9. According to Kmiec, *Swift* resolves problems created by *Knight*:

Looked at formally, the slaughterhouse business in Chicago was completely *intrastate* and, under the *Knight* majority, might have been thought to be beyond the reach of Congress. But the Court took note of the fact that the slaughterhouse business was just one way station in an interstate industry that encompassed everything from ranching to the retailing of beef.

Kmiec, *supra* n. 15, at 82 (emphasis in original, footnote omitted). *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342, 353–54 (1914), is the Court's ruling on what is known as the "Shreveport Rate Cases." The Shreveport Rate Cases involved an Interstate Commerce Commission regulation of rates for an intrastate haul. *Id.* at 345–46. The regulation was upheld because it had a substantial economic effect on interstate commerce and it vindicated the text of the Commerce Clause: The regulation prevented the balkanization of the national market. *Id.* at 359. Epstein is very critical of the *Shreveport Rate Cases*:

The key move in *Shreveport* was to commandeer the very broad definition of "injury" and "harm"—which now covered competitive losses—to expand the scope of the Commerce Clause so that the purely interior traffic of any state was no longer beyond the reach of federal power. The upshot was that the federal power now gobbled up huge portions of the transportation grid that once lay beyond it.

Epstein, *supra* n. 9, at 57–58.

150. 188 U.S. 321 (1903); see generally Barnett, *supra* n. 9, at 310–12, 324; *The Heritage Guide to the Constitution*, *supra* n. 19, at 103.

151. See Kmiec, *supra* n. 15, at 83.

152. *Champion*, 188 U.S. at 363–64.

153. *Id.*

154. *Id.* at 355. The four *Champion* dissenters objected that the power to regulate commerce did not include the power to absolutely prohibit commerce. *Id.* at 364–75 (Fuller, C.J. & Brewer, Shiras & Peckham, JJ. dissenting). The states did not cede that power to the federal government in the Constitution. *Id.* at 371; see Barnett, *supra* n. 9, at 311.

155. *Champion*, 188 U.S. at 356–65. Following the Court's decision in *Champion*, Congress exercised its "police power" and enacted several statutes intended to protect the public morality. *Oxford Guide*, *supra* n. 15,

three-paradox model, *Champion* relied on the Commerce Paradox: The Commerce Clause is not about interstate commerce; it is about expanding Congressional power.¹⁵⁶

According to Professors Nowak and Rotunda, “[t]he year 1905 marks the point at which a majority of the Justices had enough of what they considered to be unjustified tampering with the economic and social order.”¹⁵⁷ The Court decided *Lochner v. New York*,¹⁵⁸ holding a state law setting maximum hours for bakers to be unconstitutional.¹⁵⁹ *Lochner* relied on the due process clause.¹⁶⁰ Other cases relied on the Commerce Clause. In the next six years the *Lochner* Justices invalidated statutes regulating the sale of intoxicating beverages to Indians,¹⁶¹ the quarantine of diseased animals,¹⁶² the imposition of liability on employers for employee injuries,¹⁶³ and the prohibition of harboring alien women.¹⁶⁴

In *Hammer v. Dagenhart* (1918),¹⁶⁵—the “Child Labor Case”—the Court read the Commerce Clause narrowly.¹⁶⁶ The Court held, five-to-four, that a federal statute—the Keating-Owen Child Labor Act of 1916—was unconstitutional.¹⁶⁷ The Act prohibited the interstate transportation of goods made in factories or mines by children under certain ages.¹⁶⁸ Its passage has been called “the climax of the Progressive movement.”¹⁶⁹

at 49–50. “[T]he Mann Act of 1910 . . . made it a crime to transport women across state lines for immoral purposes.” *Oxford Companion*, *supra* n. 15, at 194. The Mann Act was upheld in *Hoke v. United States*, 227 U.S. 308 (1913). See *Levi*, *supra* n. 108, at 33–57; *Oxford Companion*, *supra* n. 15, at 194. The Automobile Theft Act of 1915 made it a federal offense to knowingly drive a stolen car across a state line. *Oxford Companion*, *supra* n. 15, at 194. It was upheld in *Brooks v. United States*, 267 U.S. 432 (1925). See *Oxford Companion*, *supra* n. 15, at 194.

156. *Champion* may use a fourth Commerce Clause paradox: “Regulate means prohibit.” Upon consideration, however, the equation of regulation and prohibition appears to be an aspect of the Commerce Paradox. Prohibition is a form of power; the “commerce power” is about power. See *Barnett*, *supra* n. 9, at 310–12.

According to Kmiec:

[T]he real significance of *Champion* was not its distinction between regulatory promotion or restriction but an unfortunate acceptance of judicial abdication—the notion that the Court had no duty to inquire whether either means, promotion, or restriction, was legitimately aimed at the subject matter of interstate commerce.

By this judicial complacency, the commerce power was extended to non-commerce purposes in the early twentieth century. Mistakenly, the constitutionality of the question became popularly inseparable from the underlying policy issues.

Kmiec, *supra* n. 15, at 83; see Epstein, *supra* n. 9, at 71 (“[N]o one at the time supposed that this decision [i.e., *Champion*] allowed Congress to regulate the manufacture of those [lottery] tickets or even their local use.”).

157. Nowak & Rotunda, *supra* n. 15, at 168–69 (footnote omitted); compare Tribe, *supra* n. 6, at 810, 810 n. 8.

158. 198 U.S. 45 (1905).

159. *Id.* at 46, 64–65; Nowak & Rotunda, *supra* n. 15, at 169.

160. *Lochner*, 198 U.S. at 53; Nowak & Rotunda, *supra* n. 15, at 169.

161. *In re Heff*, 197 U.S. 488 (1905), overruled, *U.S. v. Nice*, 241 U.S. 591 (1916); Nowak & Rotunda, *supra* n. 15, at 169–70.

162. *Ill. C. R.R. Co. v. McKendree*, 203 U.S. 514 (1906); Nowak & Rotunda, *supra* n. 15, at 169.

163. *Howard v. Ill. C. R.R. Co.*, 207 U.S. 463 (1908); Nowak & Rotunda, *supra* n. 15, at 169.

164. *Keller v. U.S.*, 213 U.S. 138 (1909); Nowak & Rotunda, *supra* n. 15, at 169.

165. 247 U.S. 251 (1918).

166. See *Oxford Companion*, *supra* n. 15, at 417–18; *Oxford Guide*, *supra* n. 15, at 122–23.

167. *Hammer*, 247 U.S. at 268, 281; *Oxford Companion*, *supra* n. 15, at 417–18.

168. *Hammer*, 247 U.S. at 269; *Oxford Companion*, *supra* n. 15, at 417–18.

The Court found the Act was not a valid exercise of the commerce power.¹⁷⁰ The Act violated the Commerce Clause because it regulated the conditions of production (i.e., the use of child labor).¹⁷¹ There was nothing objectionable about the goods produced by child labor, or about the introduction of those goods into interstate commerce. The harm addressed by the Act was a local activity—an activity that could be addressed by state police power.¹⁷² “The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states.”¹⁷³ In terms of the three-paradox model, *Hammer* rejected the Commerce Paradox—it read “commerce” to read “commerce.”

According to the government, the Act was necessary to eliminate unfair competition against states that prohibited child welfare.¹⁷⁴ Justice William Day and the majority found that “Congress had no power to equalize market conditions that were not a part of interstate commerce.”¹⁷⁵

In an obscure passage in the *Hammer* opinion, Justice Day suggested that the state’s right to exercise its police power was protected by the Tenth Amendment.¹⁷⁶ The Tenth Amendment provides that: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁷⁷ According to Day, the Tenth Amendment reserved the regulation of some activities for the states and the regulation of other activities for federal government.¹⁷⁸ Day suggested in *Hammer* that there are some significant powers that Congress cannot exercise.¹⁷⁹ “[I]f Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, . . . the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.”¹⁸⁰

169. *Oxford Guide*, *supra* n. 15, at 122 (citing Stephen B. Wood, *Constitutional Politics in the Progressive Era: Child Labor and the Law* (U. Chi. Press 1968)); *see* Kmiec, *supra* n. 15, at 83–84; *Oxford Companion*, *supra* n. 15, at 194.

170. *Hammer*, 247 U.S. at 277.

171. *Id.* at 272; Nowak & Rotunda, *supra* n. 15, at 170.

172. *Hammer*, 247 U.S. at 273–74; Nowak & Rotunda, *supra* n. 15, at 170.

173. *Hammer*, 247 U.S. at 271–72.

174. *Id.* at 273; Nowak & Rotunda, *supra* n. 15, at 170.

175. Nowak & Rotunda, *supra* n. 15, at 170; *see Hammer*, 247 U.S. at 273–74.

176. *Hammer*, 247 U.S. at 274; Currie, *supra* n. 15, at 97; *see* Kmiec, *supra* n. 15, at 84; Nowak & Rotunda, *supra* n. 15, at 170.

177. U.S. Const. amend. X.

178. Currie, *supra* n. 15, at 97.

179. *Id.* (discussing *Hammer*, 247 U.S. at 274–76).

180. *Id.* at 97 n. 43 (quoting *Hammer*, 247 U.S. at 276) (bracket in original, ellipses in original). Liberal commentators have condemned *Hammer*. *See* Schwartz, *supra* n. 100, at 212 (“Most commentators today place [*Hammer*] with *Lochner* on the list of discredited Supreme Court decisions.”). Some libertarian commentators believe that *Hammer* was correctly decided. *See e.g.* Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* 126–27, 278 n. 42 (U. Chi. Press 2003). Epstein observes that there is no reason to believe that state child labor statutes were inadequate—that they did not protect children. *See* Epstein, *supra* n. 9, at 61. Progressives—the advocates of a federal statute—assumed that the states were engaged in a “race to the bottom.” *Id.* According to Epstein, “the percentage of children in the workforce declined consistently throughout the period before federal regulation of child labor.” *Id.* at 62. Epstein presents data showing that the percentage of the workforce between the ages of ten and fifteen decreased from 6.02% in 1900 to 3.34% in 1920. *Id.* at 5–6.

4. The Constitutional Crisis of 1937

Hammer was the law when Franklin D. Roosevelt became President of the United States in 1933. Elected on the promise of a “New Deal”—immediate action to end the Great Depression—Roosevelt proposed a number of new federal statutes, and Congress passed many of them.¹⁸¹ “New Deal” measures included the National Industrial Recovery Act of 1933, the Agricultural Adjustment Act of 1933, the Railroad Retirement Act of 1934, and the Bituminous Coal Conservation Act of 1935.¹⁸² In 1935 and 1936, the Court found all of these New Deal statutes to be unconstitutional. In so ruling, the Court commonly and frequently relied on the restrictive view of the Commerce Clause announced in *Hammer* and *E.C. Knight*.¹⁸³

Roosevelt responded to the Court’s attack on the New Deal by denouncing its “horse-and-buggy definition of interstate commerce.”¹⁸⁴ In 1937, one year after his landslide re-election, Roosevelt proposed what has become known as the “court-packing plan.”¹⁸⁵ Under that plan, Roosevelt would have been able to name one additional Justice to the Court for each Justice over the age of seventy.¹⁸⁶ At that time, there were six Justices over seventy and the Court was known as the “Nine Old Men.”¹⁸⁷ The idea was to obtain a majority that could be relied upon to uphold New Deal legislation.¹⁸⁸ The stalemate between Roosevelt and the Court has been called the “Constitutional Revolution of 1937.”¹⁸⁹

Before the plan was voted upon by Congress, Justice Owen Roberts—the first Justice Roberts—broke the stalemate and ended the constitutional crisis. Roberts shifted

181. See Barnett, *supra* n. 9, at 219; Hayek, *supra* n. 107, at 190; Johnson, *supra* n. 124, at 747–68; Nowak & Rotunda, *supra* n. 15, at 172; Rehnquist, *supra* n. 100, at 116–17.

182. Nowak & Rotunda, *supra* n. 15, at 172–75; see generally Jim Powell, *FDR’s Folly: How Roosevelt and His New Deal Prolonged The Great Depression* (Crown Forum 2003); White, *supra* n. 15, at 13–14.

183. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (overruling the Bituminous Coal Conservation Act of 1935); *U.S. v. Butler*, 297 U.S. 1 (1936) (overruling the Agricultural Adjustment Act of 1933); *A.L.A. Schechter Poultry Co. v. U.S.*, 295 U.S. 495 (1935) (overruling the National Industrial Recovery Act of 1933); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (overruling the National Industrial Recovery Act of 1933); *U.S. v. Butler*, 297 U.S. 1 (1936) (overruling the Agricultural Adjustment Act of 1933); see Nowak & Rotunda, *supra* n. 15, at 172–75; *Oxford Companion*, *supra* n. 15, at 453–54, 678; Schwartz, *supra* n. 100, at 231–33. The New Deal cases made a number of interesting points. Barnett states that the U.S. Supreme Court, in *A.L.A. Schechter*, found the National Recovery Act to be unconstitutional because it “permitted the regulation of commerce wholly within a state.” Barnett, *supra* n. 9, at 221; Epstein, *supra* n. 9, at 64–66. *Carter* defined “commerce” as “the equivalent of the phrase ‘intercourse for the purpose of trade.’” 298 U.S. at 298; see Barnett, *supra* n. 9, at 295.

184. *Oxford Companion*, *supra* n. 15, at 233 (internal quotation marks omitted).

185. *Id.*

186. *Id.*

187. Nowak & Rotunda, *supra* n. 15, at 175; *Oxford Companion*, *supra* n. 15, at 233

188. *Oxford Companion*, *supra* n. 15, at 233.

189. See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution 4* (Oxford U. Press 1998); Hayek, *supra* n. 107, at 190–92; Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 311 (Alfred A. Knopf 1955); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 213 (Oxford U. Press 1995); Cass R. Sunstein, *The Partial Constitution* 41, 51 (Harv. U. Press 1993) (“We should understand the revolution of 1937 as the vindication of the New Deal in the Supreme Court.”); White, *supra* n. 15, at 13–14, 198–236.

his vote in two key cases.¹⁹⁰ Roberts's shift—called the “switch in time that saved nine”¹⁹¹—and the retirement of Justice Van Devanter, gave Roosevelt a majority.¹⁹² Over the next four years, Roosevelt was able to appoint seven new Justices—Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge.¹⁹³

The Roosevelt Justices adopted an expansive view of the Commerce Clause. In *National Labor Relations Board v. Jones and Laughlin Steel Corp.* (1937),¹⁹⁴ the Court upheld the National Labor Relations Act of 1935—a statute that guaranteed collective bargaining to all employees engaged in the production of goods for interstate commerce.¹⁹⁵ In *United States v. Darby* (1941),¹⁹⁶ the Court upheld the Fair Labor Standards Act of 1938—a statute that imposed wage and hour regulations on goods sold in interstate commerce.¹⁹⁷ *Darby* expressly overruled *Hammer*.¹⁹⁸ The Court held that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.”¹⁹⁹ After *Darby*, the Tenth Amendment was not seen as a basis for invalidating federal laws.²⁰⁰ That view of the Tenth Amendment survived for many years.

190. *Oxford Companion*, *supra* n. 15, at 234. Justice Roberts had been a successful practitioner in Philadelphia prior to his appointment to the Court by President Herbert Hoover. He attracted national attention as a special prosecutor in the Teapot Dome Scandals. *Id.* at 860; Schwartz, *supra* n. 100, at 228.

191. Epstein, *supra* n. 9, at 1 (footnote omitted); *Oxford Companion*, *supra* n. 15, at 234.

192. *Oxford Companion*, *supra* n. 15, at 233; see Nowak & Rotunda, *supra* n. 15, at 175–76.

193. *Oxford Companion*, *supra* n. 15, at 454.

194. 301 U.S. 1 (1937).

195. *Id.* at 36–38, 49. In a later decision, the Court noted the decision in *Jones & Laughlin* “departed from the [old] distinction between ‘direct’ and ‘indirect’ effects on interstate commerce.” *Lopez*, 514 U.S. at 555; Fried, *supra* n. 15, at 26.

196. 312 U.S. 100 (1941).

197. *Id.* at 125–26; *Oxford Companion*, *supra* n. 15, at 249.

198. *Darby*, 312 U.S. at 116–17. Justice Stone justified the regulation of intrastate commerce by referring to the Necessary and Proper Clause:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Id. at 118; Barnett, *supra* n. 9, at 227; see Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Tex. L. Rev.* 795, 807, 810–14 (1996). In *Darby*, “the Court ceased holding Congress to its enumerated Commerce Power.” Barnett, *supra* n. 9, at 229.

199. *Darby*, 312 U.S. at 124.

200. Chemerinsky, *supra* n. 15, at 254; Kmiec, *supra* n. 15, at 85. For many years, the Tenth Amendment was regarded as a truism. In the mid-1970s, the Tenth Amendment became an important limitation on federal power. See *Natl. League of Cities v. Usery*, 426 U.S. 833 (1976); *Fry v. U.S.*, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting); Currie, *supra* n. 15, at 564–67; *Oxford Companion*, *supra* n. 15, at 1008.

Two observations must be made about the Constitutional Revolution of 1937. First, it is not clear whether the Roosevelt “court-packing plan” was a symptom or a cause of the constitutional crisis. See White, *supra* n. 15, at 234, 305. Second, Roberts and others occasionally expressed doubts about the new orthodoxy—the post-*Darby* view of the Commerce Clause. See Cushman, *supra* n. 189, at 222–23.

5. *Wickard v. Filburn*

*The decision[*Wickard v. Filburn*,] cannot pass the “giggle test.”*

Richard A. Epstein²⁰¹

*Wickard v. Filburn*²⁰² was acknowledged as the “epitaph for federalism.”²⁰³ According to the *Oxford Companion to the Supreme Court of the United States*, *Wickard* is “[p]erhaps the decision that best indicated how completely the Supreme Court had come in acquiescing to the nationalist economic philosophy of President Franklin Roosevelt and the Democratic majorities in both houses of Congress.”²⁰⁴ After *Wickard*, Congress had *carte blanche* to regulate intrastate conduct (even neighborhood lemonade stands).²⁰⁵ *Wickard* was “a judicial endorsement of congressional omnipotence.”²⁰⁶

The Agricultural Adjustment Act (“AAA”) authorized the Secretary of Agriculture to set a quota for wheat production.²⁰⁷ Each farmer was given an allotment.²⁰⁸ Roscoe Filburn, a dairy farmer in Ohio, grew wheat primarily for personal home consumption and to feed his livestock.²⁰⁹ He only intended to sell a small portion of the wheat, well below his allotment.²¹⁰ Filburn’s allotment in 1941 was 222 bushels of wheat.²¹¹ Filburn grew 461 bushels of wheat and was fined \$117.²¹² Filburn claimed the AAA was not constitutional as applied because his wheat was not part of interstate commerce.²¹³

The farmer lost. The Court (per Justice Jackson) upheld the AAA and ruled against Filburn. Rejecting distinctions between direct and indirect effects on commerce, and between manufacture/production and commerce, Jackson found that homegrown wheat could be regulated because it had a substantial effect on interstate commerce.²¹⁴

201. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 173 (1996).

202. 317 U.S. 111 (1942).

203. *Jones & Laughlin and Darby* may have been the death of federalism; *Wickard* was its epitaph. See Bork, *supra* n. 15, at 56; Currie, *supra* n. 15, at 238.

204. *Oxford Companion*, *supra* n. 15, at 1088.

205. See Redlich, Attanasio & Goldstein, *Constitutional Law*, *supra* n. 89, at 132. “Two children, Rachel and Josh, set up a neighborhood lemonade stand. After *Wickard*, could Congress regulate their prices? Does it matter that their stand has, at most, a trivial effect on the economy?” *Id.*

206. Greve, *supra* n. 19, at 39.

207. *Wickard*, 317 U.S. at 115. According to Epstein, the purpose of the wheat quotas permitted by/established under the AAA was to “set and maintain prices for farmers well above the world level.” Epstein, *supra* n. 9, at 66.

208. *Wickard*, 317 U.S. at 115.

209. *Id.* at 114.

210. *Id.*

211. *Id.*

212. *Id.* at 114–15.

213. *Wickard*, 317 U.S. at 113–14; see Cushman, *supra* n. 189, at 216–24. It is interesting to compare *Wickard* with *Mulford v. Smith*, 307 U.S. 38 (1939). *Mulford* upheld the tobacco quota provisions of the AAA. *Mulford*, 307 U.S. at 41, 51. In *Mulford*, there was ample evidence that the tobacco at issue was sold in interstate commerce. *Id.* at 47–48. Justice Jackson (then Solicitor General Jackson) argued the case for the United States Government. *Id.* at 41.

214. *Wickard*, 317 U.S. at 128–29; Kmiec, *supra* n. 15, at 85.

Even though Filburn's "own contribution to the demand for wheat may be trivial by itself [it] 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."²¹⁵ According to the *Wickard* Court, homegrown wheat could account for more than twenty percent of annual wheat production.²¹⁶

Five significant points must be made about *Wickard*. First, *Wickard* is a political case—a case decided along party lines *and* a case about the distribution of political power between branches of the federal government and between the state and federal government. *Wickard* sends a clear signal that the Court will not review Congressional exercises of the commerce power. Congress is given a free hand to determine the scope and limits of the commerce power.²¹⁷

Second, *Wickard* utilizes a substantial effect test.²¹⁸ A regulation is a valid exercise of the commerce power if it has a substantial effect on commerce.²¹⁹ This test is a judicial construct—a matter of interpretation. It is not found in the Constitution.²²⁰ Significantly, *Congress* decides when a regulation has a substantial effect on commerce.²²¹

Third, *Wickard* looks at the aggregate effect of the intrastate conduct or activity. In his *Wickard* opinion, Justice Jackson acknowledges that the amount of wheat grown by Filburn is insignificant.²²² To find a substantial effect on interstate commerce, Jackson aggregates Filburn's wheat with all the other wheat grown for home consumption.²²³ In terms of the three-paradox model, Jackson relies on the Substantial Paradox.

Fourth, *Wickard* invokes Chief Justice Marshall's opinion in *Gibbons v. Ogden*: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."²²⁴ Marshall wrote:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

215. *Wickard*, 317 U.S. at 127–28.

216. *Id.* at 127.

217. See White, *supra* n. 15, at 230–33, 231 nn. 95–96.

218. *Wickard*, 317 U.S. at 128–29.

219. See *id.*

220. White traces the substantial effect test to *Darby*. See White, *supra* n. 15, at 228. At one point, the *Wickard* Court thought about remanding the case for a determination of whether a substantial effect existed. *Id.*; see Cushman, *supra* n. 189, 212–24; Hayek, *supra* n. 107, at 192 (“[I]n some respects the unwritten parts of the Constitution are more instructive than its text.”).

221. See e.g. White, *supra* n. 15, at 230–33.

222. *Wickard*, 317 U.S. at 127.

223. *Id.* at 127–28.

224. *Id.* at 120 (citing *Gibbons*, 22 U.S. at 194–95). Professor Bruce Ackerman has observed that the Roosevelt Justices commonly portrayed and characterized constitutional innovations as restatements of the jurisprudence of Chief Justice Marshall. Bruce Ackerman, *We The People: Foundations* vol. 1, 42–43 (Belknap Press 1991); see Epstein, *supra* n. 9, at 69–70 (arguing that Jackson mischaracterized Marshall's opinion in *Gibbons*).

Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.²²⁵

Marshall’s successor Justices expanded the commerce power.²²⁶ Jackson stretches and expands Marshall’s definition of “commerce” to include homegrown wheat that is never sold, traded, or exchanged. Jackson uses the Commerce Paradox.²²⁷

Fifth, *Wickard* does not simply rely on an expansive construction of the Commerce Clause. It also makes use of the Necessary and Proper Clause.²²⁸ This use is not warranted. The Necessary and Proper Clause does not grant Congress a license to intrude upon intrastate activities. In other words, Jackson uses the Interstate Paradox.²²⁹

Professor Barry Cushman offers the following observations about the Constitutional Revolution of 1937 and the innovative Commerce Clause jurisprudence represented by *Wickard*:

The fact that such a transformation of commerce clause jurisprudence coincided with Roosevelt’s bevy of new appointments to the Court brings to mind Max Planck’s remark in his *Scientific Autobiography*: “a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.” It was the replacement of the Nine Old Men with younger men who had more recently come to legal maturity—men who, though not without difficulty, were able to break free of an older constitutional vocabulary and embrace a new conception of the judicial function—that brought forth a new paradigm for commerce clause jurisprudence. *This*—not the plot of the conventional story of capitulation to external political pressure—was the “structure” of the constitutional revolution.²³⁰

225. *Gibbons*, 22 U.S. at 194–95. This same passage was later quoted in *Lopez*. *Lopez*, 514 U.S. at 553.

226. *Currie*, *supra* n. 129, at 170 (“[I]t was Marshall’s successors who were to expand the commerce power to cover virtually everything.” (footnote omitted)).

227. According to Professors Nelson and Pushaw, *Wickard*

transformed the Commerce Clause by declaring that it not only included “commerce” (i.e., market-oriented activities), but also “economics” (i.e., anything that affects the quantity or price of goods and services). Because virtually everything has an economic effect, *Wickard* enabled Congress to regulate whatever it pleased—a point well understood by Justice Jackson, who wrote the Court’s opinion.

Nelson & Pushaw, *supra* n. 15, at 82, 82 nn. 382–383 (footnotes omitted).

228. See *Wickard*, 317 U.S. at 119.

229. See *id.*; Barnett, *supra* n. 9, at 315. In *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981), then-Justice Rehnquist explained the rationale of *Wickard* as follows:

[T]he Court expanded the scope of the Commerce Clause to include the regulation of acts which taken alone might not have a substantial economic effect on interstate commerce, such as a wheat farmer’s own production, but which might reasonably be deemed nationally significant in their cumulative effect, such as altering the supply-and-demand relationships in the interstate commodity market.

Id. at 308 (Rehnquist, J., concurring). According to Professor Barnett, “[b]y this rationale the distinction between interstate and intrastate commerce is destroyed.” Barnett, *supra* n. 9, at 315; see also Epstein, *supra* n. 9, at 70–71 (suggesting the same).

230. Cushman, *supra* n. 189, at 224 (footnote omitted, emphasis in original).

The Roosevelt Justices used a new vocabulary, or a new dictionary, to read the Constitution. That vocabulary included the three Commerce Clause paradoxes—a sort of Orwellian double-speak: “Peace is War,” “Black is White,” “Interstate is Intrastate,” “Substantial is Trivial,” and “Commerce is Not Commerce.”²³¹

In conventional accounts of constitutional history, this is the “happy ending.”²³² The “good” Justices—the Roosevelt Justices—substituted a New Deal Commerce Clause for the “horse-and-buggy” Commerce Clause vocabulary of the Nine Old Men,²³³ and constitutional law emerged from the Dark Age of *Lochner*.²³⁴ The problem with the conventional account is that it neglects the function and purpose of the Commerce Clause. The Commerce Clause was intended to facilitate economic growth, and it did just that. During the watch of the Nine Old Men, the United States experienced an economic miracle—“stupendous growth”²³⁵ and, and after the publication of the

231. See George Orwell, *Nineteen Eighty-Four* 27 (Centennial ed., Plume 2003) (this text was originally published in 1949). “The purpose of Newspeak was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc [i.e., English Socialism], but to make all other modes of thought impossible.” *Id.* at 309–10; see Posner, *supra* n. 18, at 834 (referring to the “lexicographical dictator” in *Nineteen Eighty-Four*—the character called “O’Brien”).

232. Barnett, *supra* n. 9, at 354, 354 n. 1 (“Almost all constitutional analysts, as a matter of brute fact, seem committed to a de facto theory of ‘happy endings,’ whereby one’s skills as a rhetorical manipulator . . . are devoted to achieving satisfying results.” (internal quotation marks and footnote omitted)).

233. See Schwartz, *supra* n. 100, at 231–45. Professor Schwartz saw *Darby*, rather than *Wickard*, as the crucial Commerce Clause case. *Id.* at 243 (“The *Darby* decision marks the culmination in the development of the Commerce Clause as the source of a [national] police power. . . . Under *Darby*, Congress can utilize its commerce power to suppress any commerce contrary to its broad conception of public interest.”). According to Schwartz, “[t]he national police power (as this aspect of the commerce power may be termed) is the plenary power to secure any social, economic, or moral ends, so far as they may be obtained by the regulation of commerce.” *Id.* Professor Epstein identifies *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), as an important precursor of *Wickard*. Epstein, *supra* n. 9, at 67. In *Wrightwood Dairy* the Court held that “Congress could restrict the sale of dairy products in intrastate commerce because of the obvious effect that the sales would have on the price of goods in interstate commerce.” *Id.* (citing *Wrightwood Dairy Co.*, 315 U.S. at 125–26) (emphasis added).

234. See *Oxford Companion*, *supra* n. 15, at 588–91. In *Lochner*, the Court applied the doctrine of substantive due process. *Lochner* symbolizes the Court’s commitment to laissez-faire economics and gives its name to an entire era of constitutional history. See Chemerinsky, *supra* n. 15, at 590–94, 592 n. 48; Fried, *supra* n. 15, at 173–74, 182–83; Schwartz, *supra* n. 100, at 190 (“Aside from *Dred Scott* itself, *Lochner v. New York* is now considered the most discredited decision in Supreme Court history.” (footnote omitted)); Sunstein, *supra* n. 189, at 50; Gardbaum, *supra* n. 105, at 493.

The Roosevelt Justices fundamentally changed directions in the meaning of the Constitution. In effect, the Roosevelt Justices amended the Constitution. Their interpretation of the Commerce Clause legitimized the New Deal administrative agencies and allowed the development of the Bureaucratic State. If the Roosevelt Justices were wrong, the New Deal agencies and their modern successor bureaucracies are unconstitutional. See Ackerman, *supra* n. 224, at 44; Barnett, *supra* n. 9, at 108–10; Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 280–81 (Harv. 1985); Sunstein, *supra* n. 107, at 447–48 (arguing the New Deal “altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place.” (footnote omitted)); Tribe, *supra* n. 6, at 108 (describing Ackerman’s theories); Lawson, *supra* n. 107, at 1231 (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” (footnotes omitted) (quoted in Paul Edward Gottfried, *After Liberalism: Mass Democracy in the Managerial State* 67 (Princeton U. Press 1999))). Roosevelt considered using a formal constitutional amendment to legitimize the New Deal. He rejected the idea because he did not think the amendment would be approved. See Ackerman, *supra* n. 224, at 320–22; Barnett, *supra* n. 9, at 109; James MacGregor Burns, *Roosevelt, 1882–1940: The Lion and the Fox* 295 (Harcourt 1956).

235. Liah Greenfeld, *The Spirit of Capitalism: Nationalism and Economic Growth* 428 (Harvard U. Press 2001). The “economic miracle” is a miracle in a loose sense—the same sense as the post-war economic miracle in Japan. The economic miracle is associated with the laissez-faire capitalism that prevailed prior to 1937 and “made America by the 1860s the largest free-trading area in the world.” Johnson, *supra* n. 124,

revisionist histories that are now the conventional account of the “*Lochner* era” and the New Deal, “speedy and irreversible industrialization.”²³⁶ The so-called “*Lochner* era” was not a “Dark Age” until the victors in the Constitutional Revolution of 1937—the proponents of New Deal reforms—wrote their revisionist history and called the era a “Dark Age.”²³⁷ After *Wickard*, federalism seemed dead.

6. The “New Federalism”

[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.

Justice William Rehnquist²³⁸

Wickard’s “epitaph of federalism” was premature. *Wickard* was called into question by three decisions in the modern era. In *National League of Cities v. Usery*,²³⁹ the Court invalidated a federal wage and hour statute on federalism grounds. In particular, the Court held that the federal statute violated an essential attribute of state sovereignty protected by the Tenth Amendment.²⁴⁰ *Usery* was reversed by *Garcia v. San Antonio Metropolitan Transit Authority*.²⁴¹

The leading cases of the “New Federalism”—*Lopez* and *Morrison*—also called *Wickard* into question. By a five-to-four vote, *Lopez* struck down a federal statute that made it a crime to possess a firearm in a school zone.²⁴² *Lopez* marked the first time the Court had invalidated a federal statute on Commerce Clause grounds in over fifty years.²⁴³ By another five-to-four vote, *Morrison* struck a federal statute that

at 532. But this laissez-faire system was not pure. It was accompanied by high external tariffs and by government subsidies to railroads. *Id.* at 532–34. Epstein speaks of the “Progressive caricature” of the Nine Old Men as a laissez-faire court. Epstein, *supra* n. 9, at 12. The Great Depression, of course, also occurred during the watch of the Nine Old Men. Any credit they are due for the economic miracle must be offset by blame for the Great Depression. According to the conventional account of the constitutional history of the New Deal, the Court collectively experienced some sort of enlightenment or awakening (e.g., nirvana, satori) at the time of the “switch in time that saved nine.” See e.g. Schwartz, *supra* n. 100, at 231–39. The conventional account has been criticized. See Cushman, *supra* n. 189, at chs. 1–2, 12; White, *supra* n. 15, at chs. 7, 10. White and Cushman argue that the Court would have changed its jurisprudential approach from laissez-faire formalism to Legal Realism even without the incentive provided by Roosevelt’s Court-packing plan. Cushman, *supra* n. 189, at chs. 1–2, 12; White, *supra* n. 15, at chs. 7, 10. The White-Cushman thesis is not new. See Hofstadter, *supra* n. 189, at 311–12.

236. Greenfeld, *supra* n. 235, at 428.

237. See *id.* at 428–72; Epstein, *supra* n. 9, at 6. The progress during the *Lochner* era was not exclusively material. The average work week for manufacturing industries shrank from fifty-nine hours in 1900 to just over fifty hours in 1926. Epstein, *supra* n. 9, at 6. The hourly wage for workers in the manufacturing industries increased from \$0.21 to just over \$0.64 in the same period. *Id.* Life expectancy increased from forty-seven years in 1900 to nearly sixty in 1930. *Id.*

238. Tribe, *supra* n. 6 at 817 (quoting *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)) (bracket added, internal quotation marks and footnote omitted).

239. 426 U.S. 833 (1976).

240. *Id.* at pt. II; see Barnett, *supra* n. 9, at 317; Fried, *supra* n. 15, at 34; *Oxford Companion*, *supra* n. 15, at 665; Tribe, *supra* n. 6, at 863–68.

241. 469 U.S. 528 (1985).

242. 514 U.S. at 551.

243. Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court*, in Martin H. Belsky, *The Rehnquist Court: A Retrospective* 195, 197 (Oxford U. Press 2002) (arguing that for the “first time in sixty years” the Court held a federal law as exceeding Congress’s Commerce Clause authority); Chemerinsky,

criminalized acts of violence against or upon a female victim.²⁴⁴ The two statutes violated the Commerce Clause because they regulated activities that did not have substantial effect on interstate commerce. Although *Lopez* and *Morrison* nominally adhered to the substantial effect test of *Wickard*, these decisions modified the *Wickard* test in two ways. First, the *Lopez-Morrison* Courts did not defer to Congress. By actually overturning federal statutes on Commerce Clause grounds, the Courts departed from the *Wickard* approach of extreme deference to Congress.²⁴⁵

Second, the *Lopez-Morrison* Courts applied the substantial effect test literally.²⁴⁶ A substantial effect had to be *substantial*. The Court rejected the reasoning of cases decided between 1937 and 1994 that “allow[ed] Congress to regulate a class of intrastate activities that had only an insignificant, or trivial, effect on interstate commerce.”²⁴⁷

Chief Justice Rehnquist criticized *Wickard* Justice William O. Douglas for accepting trivial conduct as an excuse for regulation—for reading *Wickard* too broadly.²⁴⁸ Rehnquist clearly rejected the Substantial Paradox.

In his *Lopez* concurrence, Justice Thomas criticized *Wickard* for misreading John Marshall’s opinion in *Gibbons*.²⁴⁹ According to Thomas, Marshall understood that intrastate commerce would be regulated by states, not the federal government. Thomas rejected the Interstate Paradox.

Significantly, *Lopez* and *Morrison* did not expressly overrule *Wickard* in the way that *Darby* overruled *Hammer v. Dagenhart* (or the way *Garcia* overruled *Usery*). The cases raised questions about *Wickard*. When *Raich* came on for decision by the Court, *Wickard* was still the law.

IV. RAICH AND WICKARD WERE DECIDED INCORRECTLY: THE COMMERCE CLAUSE DOES NOT REACH INTRASTATE NONCOMMERCIAL TRANSACTIONS

A. *Wickard and Raich Use an Overly Expansive Definition of “Commerce”: The Commerce Paradox*

Both *Wickard* and *Raich* were decided incorrectly. Neither case involved “commerce” as that term is used in the text of the Commerce Clause. Both cases used the Commerce Paradox (“commerce is not commerce”) to misinterpret the Constitution.

supra n. 15, at 239; Greve, *supra* n. 19, at 19 (arguing that for the “first time in six decades” the Court held a federal law as exceeding Congress’s Commerce Clause authority); *The Heritage Guide to the Constitution*, *supra* n. 19, at 104; see Epstein, *supra* n. 9, at 75.

244. 529 U.S. at 601–02; see Epstein, *supra* n. 9, at 75.

245. See *Morrison*, 529 U.S. at 607–27; *Lopez*, 514 U.S. 549 (majority); Fried, *supra* n. 15, at 30–32; Nowak & Rotunda, *supra* n. 15, at 177; Tribe, *supra* n. 6, at 817–24.

246. E.g. *Lopez*, 514 U.S. at 565–66.

247. Nowak & Rotunda, *supra* n. 15, at 177. The “insignificant/trivial” approach to the substantial effect test is captured in a remark of Justice Robert Jackson’s: “If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” *U.S. v. Women’s Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949).

248. *Lopez*, 514 U.S. at 558, 560–61.

249. See *id.* at 594 (Thomas, J., concurring); but see *id.* at 568–83 (Kennedy & O’Connor, JJ., concurring) (saying that *Wickard* and its progeny are not called into question). *Lopez* says the test is whether the regulated activity substantially effects interstate commerce, but that the test is an actual test to be applied by courts, not a *pro forma* test to be applied by Congress. *Id.* at 559, 565.

Both cases interpreted commerce in a manner that is so broad and expansive that it included all economic activity, and perhaps all “intercourse.”²⁵⁰ *Raich* involved the personal and private use of marijuana; there were no purchases or sales of marijuana.

The argument that commerce is limited to “trade or exchange” is amply supported by a number of sources. Those sources include (1) modern and eighteenth century dictionary definitions, (2) other provisions of the text of the Constitution, (3) *The Federalist Papers*, (4) George Washington’s Farewell Address, (5) the correspondence of John Adams, (6) the essays of David Hume, and (7) the works of Edmond Burke. Each of these sources is examined in turn.

1. Dictionary Definitions

In contemporary usage, the primary meaning of “commerce” is “[t]he exchange of goods and services, [especially] on a large scale involving transportation between cities, states, and nations.”²⁵¹ The same definition was used at the time the Constitution was drafted and ratified. Eighteenth-century dictionaries (e.g., Samuel Johnson’s dictionary) also defined commerce in terms of exchange.²⁵²

2. Other Provisions of the Text of the Constitution

According to Barnett, “[t]he first place to look for the original meaning of the text is the text itself, both the immediate text at issue and any other text in the Constitution that may shed light on the meaning of the relevant portion.”²⁵³ The Constitution can serve as “its own dictionary”²⁵⁴ on the meaning of particular terms.²⁵⁵

The Commerce Clause at issue in *Wickard* and *Raich* is the Interstate Commerce Clause.²⁵⁶ It is part of article I, section 8, clause 3 of the Constitution:

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

The Interstate Commerce Clause, then, is not the only Commerce Clause. There is also an Indian Commerce Clause²⁵⁷ and a Foreign Commerce Clause.²⁵⁸ There is no

250. Barnett, *supra* n. 9, at 295, 312–17; *The Heritage Guide to the Constitution*, *supra* n. 19, at 102. Professor Amar proposes that “commerce” may have a “broader meaning” that embraces “all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets.” Amar, *supra* n. 93, at 107. Without such a broad definition, it is not clear—to Professor Amar—where “the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states.” *Id.* at 108 (footnote omitted).

251. *Black’s Law Dictionary* 285 (Bryan A. Garner ed., 8th ed., West 2004); see *Merriam-Webster’s Collegiate Dictionary*, *supra* n. 7, at 231.

252. *Lopez*, 514 U.S. at 585–86; see Barnett, *supra* n. 9, at 280; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1395 (1987).

253. Barnett, *supra* n. 9, at 278–79.

254. *Id.* at 279.

255. *Id.* at 278–79.

256. See e.g. Keith E. Whittington, “Clothed with the Legitimate Authority of the People,” 91 Va. L. Rev. 2023, 2045 (2005).

257. See e.g. Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 441–42, 471 (2005).

258. See e.g. William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455, 521 (2005).

reason to believe that “commerce” means something different in the Indian Commerce Clause and/or the Foreign Commerce Clause.²⁵⁹ If commerce has a broad and expansive meaning (e.g., “intercourse” or “all gainful activity”) then the Foreign Commerce Clause and the Indian Commerce Clause would, in theory, authorize Congress to interfere with the intercourse or economic activity of other sovereign nations (e.g., Great Britain or the Cherokee Nation). That sort of broad power could never have been intended. The narrower construction of “commerce” as “trade or exchange” does not invite or authorize interference with the sovereignty of other nations, and seems a more natural and reasonable reading of the Indian Commerce Clause and the Foreign Commerce Clause.

Another part of article I—the “Port Preference Clause”—provides in pertinent part that: “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”²⁶⁰ As used in the Port Preference Clause, “commerce” clearly means trade or exchange. The broad and expansive meanings (e.g., “intercourse,” “economic activity”) would include “revenue” and make it unnecessary to reference revenue separately.²⁶¹

3. *The Federalist Papers*

The Federalist Papers were written by Alexander Hamilton, James Madison, and John Jay in 1787 and 1788 to build support for the Constitution during the ratification debates.²⁶² Jefferson called *The Federalist* “the best commentary on the principles of government, which was ever written.”²⁶³ Churchill called *The Federalist* “brilliant propaganda.”²⁶⁴

The Federalist uses a narrow definition of “commerce.” In *Federalist No. 11*, Hamilton equates “commerce” with the “carrying trade”²⁶⁵—“transportation of goods

259. See Barnett, *supra* n. 9, at 279. Indeed, Chief Justice Marshall thought that “the word ‘commerce’ as applied to commerce among the several states had to have the same meaning as the word ‘commerce’ as applied to foreign commerce.” Epstein, *supra* n. 9, at 26; see *id.* at 29 (discussing *Gibbons*, 22 U.S. at 190, 193–94).

260. U.S. Const. art. I, § 9, cl. 6. The approach to interpretation that focuses on uses of the same term in different provisions of the same document is called “intratextualism.” See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 748, 789–92 (1999). Justice Thomas discusses the Port Preference Clause in his *Lopez* concurrence. See *Lopez*, 514 U.S. at 587 (Thomas, J., concurring).

261. Barnett, *supra* n. 9, at 279; Epstein, *supra* n. 252, at 1395 (“The term ‘commerce’ is used in opposition to the term ‘revenue,’ and seems clearly to refer to shipping and its incidental activities; this much seems evident from the use of the term ‘port.’”).

262. Charles R. Kesler, *Introduction*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at viii.

263. *Id.* at ix (internal quotation marks omitted); Gottfried Dietze, *The Federalist: A Classic on Federalism and Free Government* 5, 5 n. 5 (John Hopkins U. Press 1960).

264. Winston S. Churchill, *A History of the English-Speaking Peoples: The Age of Revolution* 257 (Barnes & Noble Bks. 1956). *The Federalist Papers* have been cited by the Supreme Court approximately three-hundred times. See e.g. Ron Chernow, *Alexander Hamilton* 260 (Penguin Press 2004) (“By the year 2000, it [i.e., *The Federalist Papers*] had been quoted no fewer than 291 times in Supreme Court opinions, with the frequency of citations rising with the years.”).

265. Alexander Hamilton, *Federalist No. 11*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 79.

from one country to another.”²⁶⁶ Hamilton also equates commerce to the sale of commodities and to trade.²⁶⁷ In *Federalist No. 12*, he distinguishes between commerce and agriculture.²⁶⁸ It is true that Hamilton sometimes uses “commerce” and “intercourse” interchangeably.²⁶⁹ When he does it, it is always clear that he means “trade.”²⁷⁰ Madison discusses the Commerce Clause specifically in *Federalist No. 42*.²⁷¹ It is plain that he understands “commerce” to mean “trade.”²⁷² In fact, according to Barnett, “[i]n none of the sixty-three appearances of the term ‘commerce’ in *The Federalist* is it ever used to refer unambiguously to any activity beyond trade or exchange.”²⁷³

4. George Washington’s Farewell Address

Churchill called George Washington’s Farewell Address “one of the most celebrated [documents] in American history.”²⁷⁴ In his Farewell Address, Washington recognized “commerce” as a kind of “intercourse,” but drew distinctions between commerce and manufacturing:

266. *Id.* at 571 (emphasis added); see also *id.* at 41. Barnett quotes the following excerpt from *Federalist No. 11*:

An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope from the diversity in the productions of different States.

Barnett, *supra* n. 9, at 281 (internal quotation marks and footnote omitted).

267. Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 83.

268. Alexander Hamilton, *Federalist No. 12*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 86–91; see Barnett, *supra* n. 9, at 281.

269. Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 139–40.

270. *Id.* Professor Barnett comments:

In *Federalist 21*, Hamilton maintained that causes of the wealth of nations were of “an infinite variety,” including “[s]ituation, soil, climate, the nature of the productions, the nature of the government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry.”

Barnett, *supra* n. 9, at 281 (bracket in original, emphasis added, footnote omitted). In *Federalist No. 35*, Hamilton asked: “Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?” *Id.* (footnote omitted). Barnett finds Hamilton’s use of “commerce” in a narrow, restrictive sense to be especially significant because Hamilton was a “proponent of broad national powers.” *Id.*

271. Madison, *Federalist No. 42*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 260.

272. *Id.* at 264. On this, Madison remarks, *id.*:

To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade.

273. Barnett, *supra* n. 9, at 281.

274. Churchill, *supra* n. 264, at 346–47. Alexander Hamilton helped Washington with the text—“The result is an encapsulation of what the first President thought America was, or ought to be, about.” Johnson, *supra* n. 124, at 228; see Chernow, *supra* n. 264, at 505–08; Stanley Elkins & Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788–1800*, at 490–97 (Oxford U. Press 1993) (discussing Washington’s Farewell Address).

The *North*, in an unrestrained intercourse with the *South*, protected by the equal Laws of a common government, finds in the productions of the latter, great additional resources of Maritime and commercial enterprise and precious materials of manufacturing industry. The *South* in the same Intercourse, benefiting by the Agency of the *North*, sees its agriculture grow and its commerce expand. Turning partly into its own channels the seamen of the *North*, it finds its particular navigation invigorated; and while it contributes, in different ways, to nourish and increase the general mass of the National navigation, it looks forward to the protection of a Maritime strength, to which itself is unequally adapted. The *East*, in a like intercourse with the *West*, already finds, and in the progressive improvement of interior communications, by land and water, will more and more find a valuable vent for the commodities which it brings from abroad, or manufactures at home. The *West* derives from the *East* supplies requisite to its growth and comfort, and what is perhaps of still greater consequence, it must of necessity owe the *secure* enjoyment of indispensable *outlets* for its own productions to the weight, influence, and the future Maritime strength of the Atlantic side of the Union, directed by an indissoluble community of Interest as *one Nation*. Any other tenure by which the *West* can hold this essential advantage, whether derived from its own separate strength, or from an apostate and unnatural connection with any foreign Power, must be intrinsically precarious.²⁷⁵

Washington also distinguished between “commercial relations” and “political connections”: “The Great rule of conduct for us, in regard to foreign Nations is in extending our commercial relations to have with them as little *political* connection as possible.”²⁷⁶

Washington saw “commercial policy” as the regulation of “merchants”:

Harmony, liberal intercourse with all Nations, are recommended by policy, humanity and interest. But even our Commercial policy should hold an equal and impartial hand: neither seeking nor granting exclusive favours or preferences; consulting the natural course of things; diffusing and deversifying by gentle means the streams of Commerce, but forcing nothing; establishing with Powers so disposed[,] in order to give to trade a stable course, to define the rights of our Merchants, and to enable the Government to support them; conventional rules of intercourse, the best that present circumstances and mutual opinion will permit, but temporary, and liable to be from time to time abandoned or varied, as experience and circumstances shall dictate; constantly keeping in view, that ‘tis folly in one Nation to look for disinterested favours from another; that it must pay with a portion of its Independence for whatever it may accept under that character; that by such acceptance, it may place itself in the condition of having given equivalents for nominal favours and yet of being reproached with ingratitude for not giving more. There can be no greater error than to expect, or calculate upon real favours from Nation to Nation. ‘Tis an illusion which

275. George Washington, *Farewell Address*, in John Marshall, *The Life of George Washington* 487, 490 (Robert Faulkner & Paul Carrese eds., spec. ed., Liberty Fund, Inc. 2000) (emphasis in original). Chernow summarizes the quoted passage as follows: “Agriculture and commerce were mutually beneficial. North and south, the western frontier and the eastern seaboard, enjoyed complementary economies.” Chernow, *supra* n. 264, at 507.

276. Marshall, *supra* n. 275, at 498 (emphasis in original). This “rule,” of course, is a variant of Washington’s advice to avoid foreign entanglements.

experience must cure, which a just pride ought to discard.²⁷⁷

Clearly, Washington saw “commerce” as “trade or exchange.”

5. The Correspondence of John Adams

On May 12, 1780, John Adams wrote his wife Abigail from Paris.²⁷⁸ The letter is justly famous for a single line: “I must study Politicks and War that my sons may have liberty to study Mathematicks and Philosophy.”²⁷⁹ The passage in which that line appears makes it clear that Adams understood commerce in a narrow sense, and distinguished between commerce and agriculture. Adams wrote:

To take a Walk in the Gardens of the Palace of the Tuilleries, and describe the Statues there, all in marble, in which the ancient Divinities and Heroes are represented with exquisite Art, would be a very pleasant Amusement, and instructive Entertainment, improving in History, Mythology, Poetry, as well as in Statuary. Another Walk in the Gardens of Versailles, would be usefull and agreable.—But to observe these Objects with Taste and describe them so as to be understood, would require more time and thought than I can possibly Spare. It is not indeed the fine Arts, which our Country requires. The Usefull, the mechanic Arts, are those which We have occasion for in a young Country, as yet simple and not far advanced in Luxury, altho perhaps much too far for her Age and Character.

I could fill Volumes with Descriptions of Temples and Palaces, Paintings, Sculptures, Tapestry, Porcelaine, &c. &c. &c.—if I could have time. But I could not do this without neglecting my duty.—The Science of Government it is my Duty to study, more than all other Sciences: the Art of Legislation and Administration and Negotiation, ought to take Place, indeed to exclude in a manner all other Arts.—I must study Politicks and War that my sons may have liberty to study Mathematicks and Philosophy. My sons ought to study Mathematicks and Philosophy, Geography, natural History, Naval Architecture, navigation, Commerce and Agriculture, in order to give their Children a right to study Painting, Poetry, Musick, Architecture, Statuary, Tapestry and Porcelaine.²⁸⁰

6. The Essays of David Hume

The Scottish philosopher and historian David Hume wrote a popular series of essays in the mid-1700s. The essays were read and appreciated by educated men on both sides of the Atlantic.²⁸¹

277. *Id.* at 498–99 (bracket in original). On December 7, 1796, Washington made his final speech to Congress. In that speech, Washington expressed the following thought: “To an active external commerce, the protection of a naval force is indispensable.” *Id.* at 450 (internal quotation marks omitted).

278. Ltr. from John Adams to Abigail Adams, in *Adams Family Correspondence* vol. 3, 341 (L. H. Butterfield & Marc Friedlaender eds., Belknap Press 1973).

279. *Id.* at 342.

280. *Id.* (quoted in Will, *supra* n. 9, at 36). Adam’s biographer, David McCullough, describes the quoted passage as a “prophetic paragraph that would be quoted for generations within the Adams family and beyond.” David McCullough, *John Adams* 236 (Simon & Schuster 2001).

281. See e.g. Alexander Hamilton, *Federalist No. 85*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 520, 526; McCullough, *supra* n. 280, at 121, 377; Paul A. Rahe, *Republics Ancient & Modern: Inventions of Prudence: Constituting the American Regime* vol. 3 (UNC Press 1994); Gordon S. Wood, *The*

Hume understood the term “commerce” to mean “trade or exchange.” In his essay *Of Commerce*, Hume wrote:

The greatness of a state, and the happiness of its subjects, how independent soever they may be supposed in some respects, are commonly allowed to be inseparable with regard to commerce; and as private men receive greater security, in the possession of their trade and riches, from the power of the public, so the public becomes powerful in proportion to the opulence and extensive commerce of private men. This maxim is true in general; though I cannot forbear thinking, that it may possibly admit of exceptions, and that we often establish it with too little reserve and limitation. There may be some circumstances, where the commerce and riches and luxury of individuals, instead of adding strength to the public, will serve only to thin its armies, and diminish its authority among the neighbouring nations.²⁸²

Hume continued:

If we consult history, we shall find, that, in most nations, foreign trade has preceded any refinement in home manufactures, and given birth to domestic luxury. The temptation is stronger to make use of foreign commodities, which are ready for use, and which are entirely new to us, than to make improvements on any domestic commodity, which always advance by slow degrees, and never affect us by their novelty. The profit is also very great, in exporting what is superfluous at home, and what bears no price, to foreign nations, whose soil or climate is not favourable to that commodity. Thus men become acquainted with the *pleasures* of luxury and the *profits* of commerce; and their *delicacy* and *industry*, being once awakened, carry them on to farther improvements, in every branch of domestic as well as foreign trade. And this perhaps is the chief advantage which arises from a commerce with strangers. It rouses men from their indolence; and presenting the gayer and more opulent part of the nation with objects of luxury, which they never before dreamed of, raises in them a desire of a more splendid way of life than what their ancestors enjoyed.²⁸³

7. The Works of Edmund Burke

The founders—both Federalists and Anti-Federalists—were Whigs. Edmund Burke, the most famous British parliamentarian of the eighteenth century, was the intellectual leader of the Whigs. According to Churchill, Burke was a “great political

Creation of the American Republic, 1776–1787, at 14 (UNC 1998); see also *A Companion to Epistemology*, supra n. 7, at 182–84 (describing Hume’s epistemology).

282. David Hume, *Essays: Moral, Political, and Literary* 255 (Eugene F. Miller ed., rev. ed., Liberty Fund, Inc. 1985).

283. *Id.* at 263–64 (emphasis in original). J.G.A. Pocock explains Hume’s theory regarding commerce as follows:

Commerce and learning . . . had effected more than a trivial transition from the superstition of medieval Christians to the fanaticism of the Puritans. They had enlarged men’s ideas by giving them more objects to feed upon, more concepts to entertain and more values to express [and] had facilitated a growth in the rational capacities.

J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 494 (Princeton U. Press 1975); see Peter Gay, *The Enlightenment: An Interpretation: The Science of Freedom* 357–59 (W.W. Norton & Co. 1969). Hume’s fellow Scot, Adam Smith, called Hume “by far the most illustrious philosopher and historian of the present age.” *Id.* at 359 (internal quotation marks and footnote omitted).

thinker,” “[a]n orator to be named with the ancients,” who might have been “Britain’s greatest statesman” (but was not).²⁸⁴ Significantly, Burke was one of the great writers and conversationalists of the late 1700s; his use of language was exemplary. Chief Justice Marshall was a particular admirer of Burke’s.²⁸⁵

Burke used “commerce” in the narrow sense of “trade or exchange.” Burke wrote:

Even commerce, and trade, and manufacture, the gods of our economic politicians, are themselves perhaps but creatures; are themselves but effects, which, as first causes, we choose to worship. They certainly grew under the same shade in which learning flourished. They too may decay with their natural protecting principles. With you, for the present at least, they all threaten to disappear together. Where trade and manufactures are wanting to a people, and the spirit of nobility and religion remains, sentiment supplies, and not always ill supplies, their place; but if commerce and the arts should be lost in an experiment to try how well a state may stand without these old fundamental principles, what sort of a thing must be a nation of gross, stupid, ferocious, and, at the same time, poor and sordid, barbarians, destitute of religion, honour, or manly pride, possessing nothing at present, and hoping for nothing hereafter?²⁸⁶

284. Churchill, *supra* n. 264, at 173–74. Jacques Barzun called Burke “[t]he greatest political thinker of the late [eighteenth century].” Jacques Barzun, *From Dawn To Decadence: 500 Years of Western Cultural Life, 1500 to the Present* 520 (Perennial 2000); Johnson, *supra* n. 124, at 157 (“Edmund Burke, the greatest statesman in Britain at that time, and the only one fit to rank with Franklin, Jefferson, Washington, Adams, and Madison.”).

285. According to “The Club”—the men of letters who dined together at the Turk’s Head in Soho—Burke was the only person who could match Samuel Johnson as a brilliant conversationalist. See Conor Cruise O’Brien, *The Great Melody: A Thematic Biography and Commented Anthology of Edmund Burke* xxxv, 101 (U. Chi. Press 1992). The title of O’Connor’s book, *The Great Melody*, comes from a line in a poem called “The Seven Stages” by W.B. Yeats:

American colonies, Ireland, France and India, Harried, and Burke’s great melody against it.

O’Brien, *supra*, at xix. The great causes and issues of Burke’s parliamentary eloquence and political career were American independence, Irish liberty, the French Revolution, and the colonial administration of India. *Id.* at 96. The “it” that was the subject of Burke’s “Great Melody” was “abuse of power,” or tyranny. *Id.*; see Johnson, *supra* n. 124, at 157 (noting Burke’s “public life was devoted to essentially a single theme—the exposure and castigation of the abuse of power.”). Samuel Johnson stood “in awe” of Burke. O’Brien, *supra*, at 101. Johnson admired Burke “intellectually more than any other he knew.” W. Jackson Bate, *Samuel Johnson* 447 (Counterpoint 1998). Johnson called Burke “the first man everywhere” and “a great man by nature.” *Id.* (internal quotation marks omitted). Edward Gibbon, author of *The History of The Decline and Fall of the Roman Empire* (Harper & Bros. 1905), professed the highest admiration for Burke: “I admire his eloquence, I approve his politics, I adore his chivalry, and I can almost excuse his reverence for church establishments.” Gertrude Himmelfarb, *The Roads to Modernity: The British, French, and American Enlightenments* 72 (Alfred A. Knopf 2004) (internal quotation marks omitted). Adam Smith, the founder of the discipline of economics, supposedly told Burke, after a discussion of economics, that “[Burke] was the only man who, without communication, thought on these topics exactly as [Smith] did.” *Id.* at 73 (brackets in original, footnote omitted). Russell Kirk points out that “much of the account of the American Revolution in John Marshall’s *Life of Washington* is lifted from Burke’s *Annual Register*.” Russell Kirk, *Redeeming the Time* 234, 264–65 (Jeffrey O. Nelson ed., Intercollegiate Stud. Inst. 1998).

286. Edmund Burke, *Reflections on the Revolution in France* 68 (Frank M. Turner ed., Yale U. Press 2003). The reference to commerce, trade, and manufacture as the “gods of our economic politicians” is evocative of the most famous passage in Burke’s *Reflections*—the passage in which he “makes love” to Marie Antoinette and laments that the “age of chivalry is gone” and “that of sophisters, economists, and calculators, has succeeded.”:

It is now sixteen or seventeen years since I saw the queen of France, then the dauphiness, at Versailles; and surely never lighted on this orb, which she hardly [seemed] to touch, a more delightful vision. I saw her just above the horizon, decorating and cheering the elevated sphere she just began to move in,—glittering like the morning-star, full of life, and splendour, and joy. Oh! what a revolution! and what a heart must I have to contemplate without emotion that elevation and

Burke continued:

I see a practice perfectly correspondent to their contempt of this great fundamental part of natural law. I see the confiscators begin with bishops, and chapters, and monasteries; but I do not see them end there. I see the princes of the blood, who, by the oldest usages of that kingdom, held large landed estates, (hardly with the compliment of a debate,) deprived of their possessions, and, in lieu of their stable, independent property, reduced to the hope of some precarious, charitable pension, at the pleasure of an assembly, which of course will pay little regard to the rights of pensioners at pleasure, when it despises those of legal proprietors. Flushed with the insolence of their first inglorious victories, and pressed by the distresses caused by their lust of unhallowed lucre, disappointed but not discouraged, they have at length ventured completely to subvert all property of all descriptions throughout the extent of a great kingdom. They have compelled all men, in all transactions of commerce, in the disposal of lands, in civil dealing, and through the whole communion of life, to accept as perfect payment and good and lawful tender, the symbols of their speculations on a projected sale of their plunder.²⁸⁷

that fall! Little did I dream when she added titles of veneration to those of enthusiastic, distant, respectful love, that she should ever be obliged to carry the sharp antidote against disgrace concealed in that bosom; little did I dream that I should have lived to see such disasters fallen upon her in a nation of gallant men, in a nation of men of honour, and of cavaliers. I thought ten thousand swords must have leaped from their scabbards to avenge even a look that threatened her with insult. *But the age of chivalry is gone. That of sophisters, economists, and calculators has succeeded; and the glory of Europe is extinguished for ever.* Never, never more shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience, that subordination of the heart, which kept alive, even in servitude itself, the spirit of an exalted freedom. The unbought grace of life, the cheap defence of nations, the nurse of manly sentiment and heroic enterprise, is gone! It is gone, that sensibility of principle, that chastity of honour, which felt a stain like a wound, which inspired courage whilst it mitigated ferocity, which ennobled whatever it touched, and under which vice itself lost half its evil, by losing all its grossness.

Id. at 65 (emphasis added); see Alexander M. Bickel, *The Morality of Consent* 21 (Yale U. Press 1975) (quoting from the passage, describing it as the passage that Tom Paine “tellingly picked up [in *Rights of Man*] in which Burke makes love to Marie Antoinette”). “With this passage, . . . ‘the Romantic Movement in English literature had begun.’” *Id.* (quoting Sir Philip Magnus) (footnote omitted).

In a very real sense, Burke laments the replacement of The Age of Chivalry by The Age of Commerce (e.g., the age of sophisters, economists, and calculators). See Will, *supra* n. 9, at 119; see generally O’Brien, *supra* n. 285, at 406–09 (discussing the “queen of France” passage). The Age of Chivalry was an age that celebrated public virtue and its surrogate, personal honor. The Age of Commerce is an age that is dedicated to material wealth and consumption—to the proposition that “more is better.” The Age of Commerce emphasizes individual self-interest. George Will has written:

Drawing upon Montesquieu, many Founders thought that commerce—the submersion of passion and interest in pursuit of private gain—was more reliable than public virtue as a basis of political stability. But real conservatives have said it well and often: Democracy subverts itself if it subverts the habits of self-restraint, self-denial and public-spiritedness. That danger defines the drama of democracy in a commercial nation, a nation devoted to inflaming and satisfying appetites.

Will, *supra* n. 6, at 133.

Conservatives—especially Burkeans—are ambivalent about commerce. Commerce can be vulgar and greedy, but it can also advance human knowledge and promote human excellence. See David Lowenthal, *Montesquieu, 1689–1755*, in *History of Political Philosophy* 513, 531 (Leo Strauss & Joseph Cropsey eds., 3d ed., U. Chi. Press 1987). Conservatives and Burkeans prefer citizens to have sincere and genuine public-spiritedness and self-discipline. Will, *supra* n. 6, at 133. The Founders devised a way to simulate public-spiritedness by setting self-interest against self-interest. *Id.* “Ambition must be made to counteract ambition.” James Madison, *Federalist No. 51*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 319.

287. Burke, *supra* n. 286, at 128.

Plainly, Burke sees commercial conduct as economic conduct. Burke does not endorse a broad definition that would include all human activity within the ambit and scope of “commerce.”

B. There is no Transaction in Interstate Commerce: The “Interstate Paradox”

Assume *arguendo* that the homegrown wheat in *Wickard* and the homegrown marijuana in *Raich* are in “commerce.” As suggested above, some eighteenth century literature suggests “commerce” means “intercourse.”²⁸⁸ Intercourse is broad enough and vague enough to include anything. If the wheat in *Wickard* and the marijuana in *Raich* are commerce, they are still beyond the reach of Congress’s commerce power. That power only extends to “Commerce among the States.” Neither *Wickard* nor *Raich* involve interstate transactions—no state lines are crossed directly or indirectly. There is no transaction in interstate commerce—unless one uses the Interstate Paradox as an interpretive tool to stretch the meaning of “interstate” (i.e., “Interstate means intrastate”).

Even if the commerce power itself does not reach the intrastate conduct in *Wickard* and *Raich*, it can be argued that the Necessary and Proper Clause expands and expends the scope of the commerce power to include intrastate transactions. The notion is that the CSA, as a whole, is a valid exercise of the commerce power and that regulation of intrastate wheat and marijuana is essential to that exercise.²⁸⁹

The argument predicated upon the Necessary and Proper Clause must fail. As Justice Thomas pointed out in his dissent, “Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.”²⁹⁰ The Necessary and Proper Clause—also called the “Sweeping Clause”—does not enlarge or expand the limited and enumerated powers granted to Congress.²⁹¹ As Chief Justice Marshall made clear in *McCulloch v. Maryland*, the Necessary and Proper Clause should not be used as a “pretext . . . for the accomplishment of objects not entrusted to the government.”²⁹²

If the Necessary and Proper Clause does not expand the scope of Congress’s power, what does it do? It does nothing. The Necessary and Proper Clause is—as Alexander Hamilton observed in *Federalist No. 33*—a “tautology” and a “redundancy.”²⁹³

288. See Amar, *supra* n. 93, at 107–08; see also *supra* nn. 119 and 250 and accompanying text. According to Professor Amar, “commerce” had “in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets.” *Id.* at 107. Amar’s argument is very problematic. Such a broad definition of “commerce,” by its terms, could not limit or restrict Congressional power. Interestingly, Amar predicated his argument on Viscount Bolingbroke’s “famous mid-eighteenth-century tract, *The Idea of a Patriot King*.” *Id.* Amar is impressed by the fact that Bolingbroke spoke of the “free and easy commerce of social life.” *Id.* (internal quotation marks omitted). Ironically, Burke answered Amar’s argument over two hundred years ago, in *Reflections on the Revolutions in France*, when he asked: “Who now reads Bolingbroke? Who ever read him through?” Burke, *supra* n. 286, at 76.

289. See *Raich*, 125 S. Ct. at 2215 (Scalia, J., concurring).

290. *Id.* at 2234 (Thomas, J., dissenting).

291. See Barnett, *supra* n. 9, at 154–90; Epstein, *supra* n. 9, at 71 (“[A]ny broad reading of the Necessary and Proper Clause—one that expands the ends Congress may pursue—makes pointless the entire system of enumerated powers of which the Necessary and Proper Clause is the last.”).

292. *Raich*, 125 S. Ct. at 2234 (quoting *McCulloch v. Md.*, 17 U.S. 316, 423 (1819)).

293. Alexander Hamilton, *Federalist No. 33*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 199. Hamilton’s remarks concerning the Necessary and Proper Clause are especially apt:

The *Raich* majority combines a broad and expansive definition of commerce with a broad and expansive reading of the Necessary and Proper Clause. The result is a national police power so broad and sweeping that it can be called a “blank check”²⁹⁴ or a “license to kill.”²⁹⁵ The problem with the *Raich/Wickard* approach is that it proves too much. If “commerce” means all economic activity, and the Necessary and Proper Clause extends the power to noneconomic activity (including intrastate activity) having a substantial impact on interstate commerce, then it is unnecessary to grant Congress any other powers to regulate economic activity. The *Raich/Wickard* approach makes the enumeration of powers in article I, section 8 of the Constitution “wholly superfluous.”²⁹⁶

Justice Thomas has cataloged the powers that are rendered superfluous by the *Raich/Wickard* interpretation of the Commerce Clause:

[I]f Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to “punish Piracies and Felonies committed on the high Seas,” cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that

The last clause of the eighth section of the first article authorizes the national legislature “to make all laws which shall be *necessary* and *proper* for carrying into execution *the powers* by that Constitution vested in the government of the United States, or in any department or officer thereof”; and the second clause of the sixth article declares that “the Constitution and the laws of the United States made *in pursuance thereof* and the treaties made by their authority shall be the *supreme law* of the land, anything in the constitution or laws of any State to the contrary notwithstanding.”

These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor scared nor profane; and yet, strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. This is so clear a proposition that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan without emotions that disturb its equanimity.

Id. at 197–98 (emphasis in original). Hamilton may have taken a more expansive view of the Necessary and Proper Clause when he proposed the Bank of the United States. See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 196–98 (2003); compare Tribe, *supra* n. 6, at § 5-3 (suggesting that the Necessary and Proper Clause should be read more broadly than Madison proposed and suggesting that there may be implied or inherent legislative powers); see also Fried, *supra* n. 15, at 19–21. “[T]he Sweeping Clause is an admonition to interpret the enumerated powers generously.” Fried, *supra* n. 15, at 21; see Epstein, *supra* n. 9, at 70–71 (suggesting the same).

294. *Lopez*, 514 U.S. at 602 (Thomas, J., concurring)

295. The fictional British Secret Service agent, James Bond (“007”), was granted a license to kill. E.g. Ian Fleming, *Goldfinger* 003 (Penguin Bks. 2002) (originally published in 1959).

296. *Lopez*, 514 U.S. at 588.

Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.²⁹⁷

In *Gibbons*, Chief Justice Marshall described the Constitution as “one of enumeration, and not of definition.”²⁹⁸ “This instrument [i.e., the Constitution] contains an enumeration of powers expressly granted by the people to their government.”²⁹⁹ According to Marshall, “[t]he enumeration presupposes something not enumerated.”³⁰⁰ The broad, virtually all-encompassing power endorsed by *Wickard* and *Raich* leaves nothing un-enumerated; it occupies virtually the entire field of legislative—indeed, governmental—activity. The point bears emphasis: the all-encompassing power granted to Congress by *Wickard* and *Raich* is inconsistent with the plan and purpose of the Constitution.³⁰¹

For the foregoing reasons, neither the Commerce Clause nor the Necessary and Proper Clause justify Congressional regulation of the intrastate activities in *Wickard* and *Raich*.

V. ANALYSIS AND INTERPRETATION

A. *As a General Matter, Intrastate Activities and Conduct are not Proper Subjects for Federal Legislation*

Who cares whether Congress regulates intrastate activities? In theory, it would be possible to argue that states are not important, and that it makes no difference whether Congress regulates intrastate activities.

There are three reasons why Congress should not, as a general matter, be allowed to regulate intrastate activities. First, the text of the Constitution provides no general federal police power. Congress is granted limited and enumerated powers, not plenary powers.³⁰² The Constitutional Convention considered giving Congress a general federal or national police power. The idea was rejected.³⁰³ During the ratification debates,

297. *Id.* at 588–89.

298. 22 U.S. at 189.

299. *Id.* at 187.

300. *Id.* at 195.

301. Justice O’Connor described the all-encompassing nature of the commerce power in her *Raich* dissent, 125 S. Ct. at 2225:

It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power.

Justice Thomas made a similar point: “If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 states.” 125 S. Ct. at 2236 (Thomas, J., dissenting).

302. Greve, *supra* n. 19, at 13–14, 17–18.

303. Barnett, *supra* n. 9, at 155 (discussing proposal by Gunning Bedford).

opponents of the Constitution—the Anti-Federalists—charged that all discretion regarding the powers of Congress resided with Congress *itself*.³⁰⁴ Federalist supporters of the Constitution repeatedly denied the charge.³⁰⁵

Second, the states are sovereign entities under the American Constitution. The states are the successors of the autonomous British colonies; they created the United States by surrendering some but not all of their power to the federal government they created.³⁰⁶ Significantly, the states retained more power than they surrendered. In *Federalist No. 39*, James Madison said that the jurisdiction of the proposed federal government “extends to certain enumerated objects only, and leaves to the several States a residuary and *inviolable* sovereignty over all other objects.”³⁰⁷ In *Federalist No. 17* Alexander Hamilton explained that “[t]he administration of private justice between the citizens of the same State, the supervision of *agriculture* and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a [national] jurisdiction.”³⁰⁸

Third, the states provide protection against tyranny. According to Judge Michael McConnell, the Framers “believed that state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government.”³⁰⁹ Justice Breyer has made a similar point:

By guaranteeing state and local governments broad decision-making authority, federalist principles secure decisions that rest on knowledge of local circumstances, help to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate “novel social and economic experiments.” Through increased transparency, those principles make it easier for citizens to hold government officials accountable. And by bringing government closer to home, they help maintain a sense of local community. In all these ways they facilitate and encourage the ancient liberty that [Benjamin] Constant described: citizen participation in the government’s decision-making process.³¹⁰

According to Justice O’Connor, the “federalist structure of joint sovereigns”³¹¹ results in and “preserves to the people”³¹² numerous benefits and advantages:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.³¹³

304. *Id.*

305. *Id.* at 155–57.

306. Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 *Tex. L. Rev.* 695, 696 (1996).

307. *Id.* at 696 (emphasis in original).

308. Barnett, *supra* n. 9, at 327 (internal quotation marks omitted, brackets in original, emphasis added, footnote omitted). Significantly, both *Wickard* and *Raich* involved agriculture—an activity Hamilton identified as a matter of local concern.

309. Berger, *supra* n. 306, at 698 (quoting Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. Chi. L. Rev.* 1484, 1506 (1987)) (internal quotation marks and footnote omitted).

310. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 57 (Alfred A. Knopf 2005) (footnote omitted).

311. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

312. *Id.*

313. *Id.*

In addition, Justice Brandeis observed that federalism promotes innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”³¹⁴ Significantly, states cannot serve as laboratories of innovation unless they are afforded a sphere of action that is protected from federal encroachment.

B. Regulation of Intrastate Conduct Cannot be Justified because of Changed Circumstances

The commerce power was originally intended to be limited and discrete. Now, it provides the constitutional basis for a national police power—a plenary power to legislate about virtually anything. Why has the commerce power changed?

In his *Morrison* dissent, Justice Breyer argued that the commerce power is now a plenary power because, over time, the nature of commerce has changed.³¹⁵ When the Constitution was adopted in 1787, there was no unified, integrated national market.³¹⁶ There were thirteen separate state markets. After the Civil War, a national market developed. As a consequence (the argument asserts), all commerce is interstate commerce.³¹⁷

Justice Breyer asserts that the Court must accept the fact that the world has changed, and that changed circumstances have rendered old conceptions of the commerce power obsolete: “The world is different now, and ‘judges cannot change the world.’”³¹⁸

There are three problems with Justice Breyer’s argument that the commerce power now extends to intrastate activities because the nature of commerce has changed. First, all activities are not commercial. The argument that all commerce is interstate commerce does not imply that all *activities* are interstate commerce. Wheat and marijuana grown for personal use are not commerce.³¹⁹

Second, the basic premise is false. Some commerce is demonstrably *not* interstate commerce. While the instrumentalities of interstate commerce (telephones, broadband

314. *Raich*, 125 S. Ct. at 2220 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)) (internal quotation marks omitted); see Epstein, *supra* n. 9, at 38–40; White, *supra* n. 15, at 278–84. Competing state governments offer citizens a choice with respect to public goods and services. By making a choice among states, citizens create and define communities and local cultures. This view finds its best expression in the “Tiebout hypothesis,” a theory elaborated by Charles Tiebout in a 1956 paper. “The famous Tiebout hypothesis states that competition between local governments allows ordinary citizens to sort themselves into those communities that supply the public amenities that best suit their own particular needs.” Epstein, *supra* n. 9, at 60 (citing Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Political Econ. 416 (1956)). In lay terms, this is the phenomenon of “[v]oting-with-the-feet.” Dennis C. Mueller, *Public Choice III* 186 (Cambridge U. Press 2003); see *id.* at ch. 10 (discussing the public choice theory of federalism).

315. 529 U.S. at 656–61 (Breyer, J., dissenting).

316. See *id.*

317. *Id.* at 660 (“We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate.”) (citing *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 251 (1964)); see Fried, *supra* n. 15, at 32.

318. Fried, *supra* n. 15, at 32 (quoting *Morrison*, 529 U.S. at 660).

319. *Raich*, 125 S. Ct. at 2224–25 (O’Connor, J., dissenting); Cushman, *supra* n. 189, at 212–22; White, *supra* n. 15, at 229–31.

communications, radio, television) dominate the national economy, they are not the sole constituents of interstate commerce. David Engdahl has advanced what he calls the “herpes theory” of interstate commerce.³²⁰ Under this theory, “some lingering federal power”³²¹—that is, the commerce power—“infects whatever has passed through the federal dominion.”³²² It is necessary to recognize a corollary to the herpes theory: Not everything is infected. Some people and things do not pass through the channels of interstate commerce. Some activities do not use the instrumentalities of interstate commerce.

Third, it is not true that “judges cannot change the world.” It is the mission of judges to change the world: Judges resolve disputes. Judges also serve as “republican schoolmasters”³²³ for all citizens.³²⁴ And judges have changed the world. *Marbury v. Madison*,³²⁵ *Brown v. Maryland*,³²⁶ *Dred Scott v. Sandford*,³²⁷ and *Roe v. Wade*³²⁸ all made and changed human history.

C. *Why did Justices Kennedy and Scalia Vote with the Majority?*

The result in *Raich* is surprising because of the changed positions of Justice Scalia and Justice Kennedy. Scalia and Kennedy voted with the majority in *Lopez* and *Morrison*. The key question is: Why did they change their votes in *Raich*? There are at least three possible answers.

First, *Raich* is a drug case. Commentators have suggested that there is a “drug exception” to the Constitution. According to this theory, the normal rules of constitutional law are suspended in cases involving drug crimes.³²⁹ Scalia and Kennedy may have been influenced in some subtle way by the desire to affirm and enforce an anti-drug law.³³⁰

320. Barnett, *supra* n. 9, at 316 (citing David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 Harv. J.L. & Pub. Policy 107, 120 (1998)).

321. *Id.* (internal quotation marks omitted).

322. *Id.* (internal quotation marks omitted).

323. See Ralph A. Rossum, *The Supreme Court: Republican Schoolmaster*, in Leo Strauss, *the Straussians, and the American Regime* 363 (Kenneth L. Deutsch & John A. Murley eds., Rowman & Littlefield 1999).

324. *Id.*

325. 5 U.S. 137 (1803).

326. 25 U.S. 419 (1827).

327. 60 U.S. 393 (1856).

328. 410 U.S. 113 (1973).

329. See Roger Pilon, *Tenants, Students, and Drugs: A Comment on the War on the Rule of Law*, in *Cato Supreme Court Review, 2001–2002*, at 227, 227–28 (Cato Inst. 2002) (citing Erik Luna, *Drug Exceptionalism*, 47 Vill. L. Rev. 753 (2002)); *contra Skinner v. Ry. Lab. Exec. Assn.*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting) (“There is no drug exception to the Constitution.”).

330. This explanation seems unlikely. Although *Raich* is a drug case, it is primarily a constitutional case. It is unlikely that Scalia or Kennedy would be decisively and materially influenced by a personal opinion regarding drugs. Thomas, O’Connor, and Rehnquist dissented in *Raich*. That does not mean that they are pro-drug, or that they endorse the use of medical marijuana.

While arguments are advanced for legalizing drugs, those arguments are not compelling. Theodore Dalrymple, a doctor who has practiced in a British inner-city hospital and prison, has written:

It might be argued that the freedom to choose among a variety of intoxicating substances is a much more important freedom and that millions of people have derived innocent fun from taking stimulants and narcotics. But the consumption of drugs has the effect of reducing men’s freedom by circumscribing the range of their interests. It impairs their ability to pursue more important human

Second, *Raich* and *Wickard* are very similar cases. If Scalia and Kennedy had joined the *Raich* dissenters (Rehnquist, O'Connor, and Thomas), it might have been necessary to overrule *Wickard*. The practical cost of overturning *Wickard* may have been too high. Many significant pieces of legislation are predicated upon the expansive, "national police power" construction of the Commerce Clause. Overturning *Wickard* would create "Constitutional doubt" regarding federal criminal statutes, environmental protection legislation, and civil rights acts.³³¹ It is possible to imagine a very negative popular—or Congressional—reaction to cases overturning such statutes. Congress might initiate its own "court-packing plan." Kennedy and Scalia may not have been willing to risk the Court's political prestige and institutional legitimacy.³³²

Third, it is possible that Scalia and Kennedy are not as committed to federalism as Rehnquist, Thomas, and O'Connor. Until very recently, it was generally accepted that Congress was not really restricted or limited by the Commerce Clause. Scalia and Kennedy may be more inclined to defer to Congress than to second guess federal legislation. Kennedy is committed to the principle of *stare decisis* in Commerce Clause cases. In his *Lopez* concurrence, Kennedy indicated his reluctance to overturn the old cases that endorse a broad commerce power—including *Wickard*. In *Lopez*, he wrote:

The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the

aims, such as raising a family and fulfilling civic obligations. Very often it impairs their ability to pursue gainful employment and promotes parasitism. Moreover, far from being expanders of consciousness, most drugs severely limit it. On of the most striking characteristics of drug-takers is their intense and tedious self-absorption; and their journeys into inner space are generally forays into inner vacuums. Drug-taking is a lazy man's way of pursuing happiness and wisdom, and the shortcut turns out to be the deadest of dead ends. We lose remarkably little by not being permitted to take drugs.

Theodore Dalrymple, *Our Culture, What's Left of It: The Mandarins and the Masses* 223–24 (Ivan R. Dee 2005). Dalrymple's argument seems unanswerable.

331. See Chemerinsky, *supra* n. 15, at 267, 267 nn. 149–150.

332. If the Court were to overturn *Wickard*, it would also be necessary to overturn other decisions. A massive, or even a substantial, violation of the principle of *stare decisis* might make the Court appear to be a *political* body. The Justices may have wanted to avoid the appearance of politics and, accordingly, to preserve institutional integrity and legitimacy. See Bickel, *supra* n. 2, at 108–09. Kennedy's commitment to *stare decisis* is well known. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

assumption that we have a single market and a unified purpose to build a stable national economy.³³³

At his confirmation hearings in 1986, Scalia indicated a willingness to defer to the judgment of Congress regarding the exercise of power under the Commerce Clause. He stated:

[T]he primary defender of the constitutional balance, the Federal Government versus the States[, i.e.] the primary institution to strike the right balance is the Congress.

The [C]ourt's struggles to prescribe what is the proper role of the Federal Government vis-à-vis the State have essentially been abandoned for quite a while.³³⁴

In addition, commentators have remarked upon Scalia's lack of enthusiasm for the doctrine of federalism.³³⁵

In the alternative, Scalia and Kennedy may have joined the majority in *Raich* in order to *preserve* federalism. They may have joined on the condition that criticism of *Lopez* and *Morrison*—the most important cases in the “New Federalism”—be limited. Significantly, *Raich* did not reverse or expressly limit *Lopez* and *Morrison*.

D. Judges Should Not Read the Constitution Ironically

It is currently fashionable for intellectuals to read documents ironically. Richard Rorty, the popular and frequently-cited philosopher, has celebrated a hypothetical figure—an archetype—he calls the “liberal ironist.”³³⁶ Liberals are “people who think

333. 514 U.S. at 574 (Kennedy, J., concurring).

334. Sen. Comm. on the Jud., *Hearings Before the Committee on the Judiciary on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States*, 99th Cong. 81–82 (Aug. 5–6, 1986).

335. See e.g. Richard A. Brisbin, Jr., *Justice Antonin Scalia and the Conservative Revival* 125 (Johns Hopkins U. Press 1997); Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* ix (Lexington Bks. 2001) (noting that Scalia has stated that “the people of the United States demonstrated that they no longer believed in federalism when they ratified the Seventeenth Amendment.”).

336. Richard Rorty, *Contingency, Irony, and Solidarity* xv (Cambridge U. Press 1989) [hereinafter Rorty, *Contingency*]; see Simon Blackburn, *Truth: A Guide* 167 (Oxford U. Press 2005) (“[Rorty] is celebrated for recommending ‘liberal irony’ as the proper standpoint on life.”). Rorty is known primarily as a pragmatist. See *A Companion to Epistemology*, supra n. 7, at 449–50; Richard A. Posner, *Overcoming Law* 444 (Harv. U. Press 1995) (describing Rorty as “the best-known living philosopher of pragmatism”); *Rorty & Pragmatism: The Philosopher Responds to His Critics* ix (Herman J. Saatkamp, Jr., ed., Vanderbilt U. Press 1995) [hereinafter *Rorty & Pragmatism*]; Robert Justin Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty’s Social Thought*, 67 Tul. L. Rev. 1561, 1563 (1993) (“More than any other single writer, Richard Rorty is responsible for the pragmatic revolution in legal theory.”) (citing Daniel J. Morrissey, *Pragmatism and the Politics of Meaning*, 43 Drake L. Rev. 615 (1995)). Rorty has been criticized for being too much of a pragmatist—too willing to discard traditional philosophical notions and distinctions (for example, the notion of an objective difference between right and wrong). Professor Susan Haack has described Rorty’s philosophy as “vulgar pragmatism.” Susan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology* ch. 9 (Blackwell 1995). Haack criticizes Rorty on the grounds that his work is cynical and relativistic. *Id.* at 192. Rorty responds to Haack in *Rorty & Pragmatism. Rorty & Pragmatism*, supra, at 148–53.

Rorty rejects philosophical efforts to find ultimate truths, fundamental values, and permanent things. For Rorty, “there exists no absolute truth, no privileged text, no God’s-eye point of view.” Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 Wis. L. Rev. 131, 131–32 (1992) (footnote omitted). He thinks that we believe things, not because they are true, but rather “because the belief fits our

that cruelty is the worst thing we do.”³³⁷ Ironists are people “who [face] up to the contingency of his or her own most central beliefs and desires[, people who are] sufficiently historicist and nominalist to have abandoned the idea that those central beliefs and desires refer back to something beyond the reach of time and chance.”³³⁸ In other words, ironists are people who are not certain of their fundamental beliefs. As a consequence, ironists are people who are “never quite able to take themselves seriously.”³³⁹

other beliefs.” Posner, *supra*, at 448. For this reason, Rorty is philosophically unable to condemn Hitler. “I have always (well, not always, but for the last twenty years or so) been puzzled about what was supposed to count as a knockdown answer to Hitler.” *Id.* at 448 n. 8 (quoting Richard Rorty, *Truth and Freedom: A Reply to Thomas McCarthy*, 16 *Critical Inquiry* 633, 636 (1990)) (internal quotation marks omitted).

337. Rorty, *Contingency, supra* n. 336, at xv; *see id.* at 74. From this insight it follows that:

‘morality’ should not be taken to denote anything other than our abilities to notice, identify with, and alleviate pain and humiliation. Someone who is committed to the vocabulary of liberalism thinks that there is *no noncircular theoretical justification* for his belief that cruelty is a horrible thing. He thinks and talks from within the midst of certain historically and culturally local practices. He does not take the validity of those practices to rest on an ahistorical or transcultural foundation. He takes his commitment to liberalism to be nothing more than a function of his commitment to community.

James Conant, *Freedom, Cruelty, and Truth: Rorty versus Orwell*, in *Rorty and His Critics* 276, 277 (Robert B. Brandom ed., Blackwell Publ. 2000) (emphasis in original, footnotes omitted); *see* Rorty, *Contingency, supra* n. 336, at xv, 189, 193, 195.

338. Rorty, *Contingency, supra* n. 336, at xv; *see id.* at 73. Daniel J. Morrissey describes the role of irony in Rorty’s thought as follows:

Rorty’s salvation from nihilism . . . is the notion that our society’s commitment to personal freedom will allow each of us to become, in his words, “strong poets”—shapers of our own “imaginative identifications.” Irony is the human skill that can make it possible for us to realize that goal. Irony, for Rorty, is the ability to redescribe our contingent situations. . . . [I]rony empowers each of us to verbally recreate ourselves and our worlds.

Morrissey, *supra* n. 336, at 639 (footnotes omitted); *see* Rorty, *Contingency, supra* n. 336, at 73–93. Rorty takes the term “strong poet” from Harold Bloom, the Yale University literary critic. Rorty, *Contingency, supra* n. 336, at 53. For Harold Bloom, strong poets are “major figures with the persistence to wrestle with their strong precursors, even to the death.” Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* 5 (2d ed., Oxford U. Press 1997). “Poets, by the time they have grown strong, do not read the poetry of X, for really strong poets can read only themselves.” *Id.* at 19.

Morrissey continues:

Rorty pays great debt to Freud who, he says, democratized that art [i.e., irony] by legitimizing the idiosyncratic fantasy life of each person. All of us then can find our ultimate satisfaction by gaining this semantic control over our lives. We can’t make contact with something larger or more enduring than ourselves. If we become adept at irony, we can put our unique stamp on life and, like Nietzsche, be able to say at the end of our days “thus I willed it.”

Morrissey, *supra* n. 336, at 639 (footnotes omitted).

339. Rorty, *Contingency, supra* n. 336, at 73; *see* Blackburn, *supra* n. 336, at 167. Rortian ironists know that the “vocabularies” they use to describe their fundamental beliefs are “always on the verge of obsolescence.” Blackburn, *supra* n. 336, at 167. According to Haack, the “skilful insinuation” is that “non-ironists are humorless prigs.” Haack, *supra* n. 336, at 193 (citing Richard Rorty, *Essays on Heidegger and Others* 86 (Cambridge U. Press 1991) [hereinafter Rorty, *Essays on Heidegger and Others*]) (footnote omitted). In fact, Rorty has described philosophers who think of themselves as seeking the truth as “lovably old-fashioned prigs.” Susan Haack, *Manifesto of a Passionate Moderate: Unfashionable Essays* 7 (U. Chi. Press 1998) (citing Rorty, *Essays on Heidegger and Others, supra*, at 86) (internal quotation marks and footnote omitted) [hereinafter Haack, *Manifesto*]. When Rorty’s most influential work, *Contingency, irony, and solidarity*, was reviewed in the *Harvard Law Review*, the reviewer observed that “Rorty’s constant reminder to indulge ‘the spirit of playfulness’ suggests an implicit reliance on an unbearable lightness of being.” Allan C. Hutchinson, *The Three ‘Rs’: Reading/Rorty/Radically*, 103 *Harv. L. Rev.* 555, 568 (1989).

Rorty explained the approach of the liberal ironist by comparing her to a stuffy, priggish unenlightened foil, a figure Rorty calls “the metaphysician”:³⁴⁰

The typical strategy of the metaphysician is to spot an apparent contradiction between two platitudes, two intuitively plausible propositions, and then propose a distinction which will resolve the contradiction. Metaphysicians then go on to embed this distinction within a network of associated distinctions – a philosophical theory – which will take some of the strain off the initial distinction. This sort of theory construction is the same method used by judges to decide hard cases, and by theologians to interpret hard texts. That activity is the metaphysician’s paradigm of rationality. He sees philosophical theories as converging – a series of discoveries about the nature of such things as truth and personhood, which get closer and closer to the way they really are, and carry the culture as a whole closer to an accurate representation of reality.³⁴¹

The ironist, in contrast to the metaphysician, analyzes philosophical theories in terms of ever-changing “vocabularies”:

The ironist . . . views the sequence of such theories – such interlocked patterns of novel distinctions – as gradual, tacit substitutions of a new vocabulary for an old one. She calls “platitudes” what the metaphysician calls “intuitions.” She is inclined to say that when we surrender an old platitude (e.g., “The number of biological species is fixed” or “Human beings differ from animals because they have sparks of the divine with them” or “Blacks have no rights which whites are bound to respect”), we have made a change rather than discovered a fact. The ironist, observing the sequence of “great philosophers” and the interaction between their thought and its social setting, sees a series of changes in the linguistic and other practices of the Europeans. Whereas the metaphysician sees the modern Europeans as particularly good at discovering how things really are, the ironist sees them as particularly rapid in changing their self-image, in re-creating themselves.³⁴²

Metaphysicians argue the truth or validity of logical “propositions.”³⁴³ They make or draw inferences.³⁴⁴ Ironists, in contrast, argue by redefining or redescribing terms.³⁴⁵ Ironists invent new terms and use “old words in new senses”:³⁴⁶

340. Rorty, *Contingency*, *supra* n. 336, at 77.

341. *Id.* The metaphysician’s method has been analogized to the method a common law judge uses to decide a case. See Hutchinson, *supra* n. 339, at 577.

342. Rorty, *Contingency*, *supra* n. 336, at 77–78. Rorty’s description of what a liberal ironist actually does—substituting a new vocabulary for an old one—is vague. Susan Haack provides the following illustration:

SHE: For the last time, do you love me or don’t you?

HE: I DON’T!

SHE: Quit stalling, I want a *direct* answer.

Jane Russell and Fred Astaire, ‘carrying on the conversation’

Haack, *supra* n. 336, at 182 (emphasis in original, footnote omitted). Haack gives credit to iconoclastic Australian philosopher David Stove for “reporting this dialogue.” *Id.* at 232 n. 1.

In Haack’s example, “HE” (i.e., Fred Astaire) is a metaphysician. HE uses the same old vocabulary to answer questions. “SHE” (i.e., Jane Russell) is a liberal ironist. SHE invents a new vocabulary in which Fred’s words (i.e., “I DON’T”) are somehow ambiguous—or, at any rate, something other than a direct answer. The point is clear: “[A]nything can be made to look good or bad by being redescribed.” John Patrick Diggins, *The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority* 470 (U. Chi. Press 1994) (discussing Rorty) (internal quotation marks omitted).

343. Rorty, *Contingency*, *supra* n. 336, at 77.

344. *Id.*

345. *Id.* at 78.

The metaphysician thinks that there is an overriding intellectual duty to present arguments for one's controversial views – arguments which will start from relatively uncontroversial premises. The ironist thinks that such arguments – logical arguments – are all very well in their way, and useful as expository devices, but in the end not much more than ways of getting people to change their practices without admitting they have done so. The ironist's preferred form of argument is dialectical in the sense that she takes the unit of persuasion to be a vocabulary rather than a proposition. Her method is redescription rather than inference. Ironists specialize in redescribing ranges of objects or events in partially neologistic jargon, in the hope of inciting people to adopt and extend that jargon. *An ironist hopes that by the time she has finished using old words in new senses, not to mention introducing brand-new words, people will no longer ask questions phrased in the old words.*³⁴⁷

Justice Jackson unconsciously played the role of a “liberal ironist” when he wrote the *Wickard* opinion. He abandoned the old vocabulary of the Commerce Clause—“dual sovereignty,” “direct effect,” and the distinction between “commerce” and “manufacturing” and “agriculture.” Jackson substituted a new vocabulary: He equated “commerce” with “economics,” but allowed noncommercial and noneconomic conduct to be regulated under the Commerce Clause (the “Common Paradox”). He defined “interstate” to include “intrastate” (the “Interstate Paradox”). He justified the regulation of intrastate commerce when the regulated conduct had a substantial effect on interstate commerce, but equated “trivial” with “substantial” (the “Substantial Paradox.”)

By following and reaffirming *Wickard*, the *Raich* Court also acted as liberal ironists. Interestingly, the *Raich* Court could claim that it was simply following well-established precedent (i.e., *Wickard*).

There is a major methodological problem. Irony—whether intentional or unintentional—is the opposite of common sense.³⁴⁸ Constitutional interpretation should

346. *Id.*

347. *Id.* (emphasis added). In a way, the “substitutions of a new vocabulary” by a liberal ironist resembles a “paradigm shift” in natural science—the replacement of an old theoretical model of the world by a new one (e.g., the replacement of the geocentric world view by a heliocentric world view, the replacement of Newtonian physics by relativistic physics/quantum mechanics). The idea of “paradigm shifts” is associated with Thomas S. Kuhn. See *A Companion to Epistemology*, *supra* n. 7, at 295. As previously noted, Professor Barry Cushman has observed that the New Deal Justices—the Roosevelt appointees—were able to break free of the “older constitutional vocabulary” of the Nine Old Men. See Cushman, *supra* n. 189, at 224; see also *supra* nn. 202–237 and accompanying text.

348. Rorty, *Contingency*, *supra* n. 336, at 74 (“The opposite of irony is common sense.”). Conant has paraphrased Rorty as follows:

Ironism is *opposed to common sense*. To be commonsensical is to take for granted that statements formulated in one's current vocabulary – the vocabulary to one which one has become habituated – suffice to describe and judge the beliefs, actions and lives of those who employ alternative vocabularies. An ironist is someone who thinks there is no single preferred vocabulary. No vocabulary is closer or more transparent to reality than any other. An ironist realizes that anything can be made to look good or bad by being redescribed in an alternative vocabulary. She renounces the attempt to formulate neutral criteria of choice between vocabularies. While provisionally continuing to employ her present vocabulary, she nourishes radical and abiding doubts concerning it, and has no truck with arguments phrased in it which seek either to underwrite or to dissolve these doubts. She cherishes works of literature as precious cognitive resources because they initiate her into *new vocabularies*, furnishing her with novel means – not for seeing reality as it is, but rather – for *playing off descriptions against redescrptions*.

Conant, *supra* n. 337, at 277 (emphasis in original, footnote omitted).

be common sense interpretation. As Justice Joseph Story put it: “[T]he Constitution is to be expounded in its plain, obvious, and common sense.”³⁴⁹

Chief Justice Marshall also emphasized the need to interpret Constitutional language in its common, or natural, sense. In *Gibbons v. Ogden*, Marshall said:

As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.³⁵⁰

Laurence Tribe’s comment on the quoted language from *Gibbons* is interesting and, for the most part, apt: “John Marshall argued in *Gibbons v. Ogden* that there is good reason, whenever possible, to resist reading the Constitution as a gnostic text.”³⁵¹

Justices of the Supreme Court, like lawyers and other federal officials, take an oath to support the Constitution of the United States.³⁵² As a result of that oath, the Justices have a duty of fidelity to the Constitution. When Justices read the Constitution ironically, they violate their oath.³⁵³

349. *Leo Strauss, the Straussians, and the American Regime*, *supra* n. 323 (quoting Joseph Story, *Commentaries on the Constitution of the United States* vol. 1, 436–37 (Hilliard Gray & Co. 1833)) (internal quotation marks omitted, bracket in original, footnote omitted). According to Justice Story,

Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of a practical nature, founded on the common business of human life, adopted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.

Id. at 366–67 (internal quotation marks and footnote omitted).

Late in life James Madison—the Father of the Constitution—wrote a letter suggesting that “the public” was the “surest expositor of the Constitution.” Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 146 (Oxford U. Press 2004). This leads some modern commentators to propose that the plain and natural meaning of the text should govern. *See id.* at 233–48.

350. Tribe, *supra* n. 6, at 61 (quoting *Gibbons*, 22 U.S. at 188) (internal quotation marks and footnote omitted).

351. *Id.* Interestingly, Scalia has suggested that secret, hidden meanings can play a role in adjudication. In a law review article, Scalia observed that “I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it.” Daniel A. Farber & Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* 38 (U. Chi. Press 2002) (quoting Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 589 (1989–90)) (internal quotation marks and footnote omitted). It is not clear whether Scalia was being serious. Professors Farber and Sherry suggest that Scalia’s statement “has an intriguing resonance with conservative philosopher Leo Strauss’s views that texts by the wise conceal their true views.” *Id.* at 178 n. 29; *see* Leo Strauss, *Persecution and the Art of Writing* ch. 2 (U. Chi. Press 1952); Richard A. Posner, *What Has Modern Literary Theory to Offer Law?* 53 Stan. L. Rev. 195, 203 (2000); *see also* George P. Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* 2, 2–10 (Oxford U. Press 2001) (suggesting that the Reconstruction Amendments instituted a regime change and that “[t]he principles of this new legal regime are so radically different from our original Constitution, drafted in 1787, that they deserve to be recognized as a second American constitution”).

352. U.S. Const. art. VI, cl. 3.

353. *See e.g. Marbury*, 5 U.S. at 180; Nowak & Rotunda, *supra* n. 15, at § 1.3; *but see* Bickel, *supra* n. 2, at 7–8. When Justices read the Constitution ironically they substitute a new vocabulary for the actual words in the text of the Constitution. In other words, they divest the text of its common sense meaning. They reject stability and historical continuity, and embrace “change.” George Will makes the point as follows:

When we require legislators and Presidents to swear allegiance to the Constitution, are we really asking only that they pledge allegiance to a system of “change”? Americans have generally

The Commerce Clause paradoxes are not defensible: “Interstate” does not mean “intrastate.” “Commerce” does not mean “noncommercial activity” (e.g., growing wheat or marijuana for home use). “Substantial” does not mean “trivial” (e.g., the amount of wheat grown by farmer Filburn or the amount of marijuana cultivated and used by Raich and Monson). When words in the Constitution are “redefined” to mean their opposites—their antonyms—there is no fidelity to the Constitution. Defining a word to mean its antonym is not a legitimate practice under any theory of interpretation. The *Wickard* Justices violated their oath. The *Raich* Court should not have followed *Wickard*.

Some lawyers and constitutional theorists may object to the argument for fidelity to the text of the Constitution on the ground that it is a species of “originalism.” It is generally acknowledged that originalism is dead as a theory of constitutional interpretation.³⁵⁴ It is not “interpretation,” however, to read a word to mean its linguistic/semantic opposite (e.g., to read “black” to mean “white”). There has to be a practical or pragmatic limit to interpretation. Imagine a spectrum or continuum of constitutional interpretation with (1) judicial interpretation of simple concrete terms as one end point (e.g., “No person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years.”³⁵⁵) and (2) formal amendment as the other end point (e.g., “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”³⁵⁶). At some point, “interpretation” would become “amendment.” This limit might be called the Orwellian Limit, in honor of “Newspeak,” the language George Orwell invented for his novel, *Nineteen Eighty-Four*.³⁵⁷ Alternatively, the limit of permissible constitutional interpretation might be called the “Orwell-Schwarzenegger Limit.” Surely everyone would agree that the Constitution

assumed that “change” means “growth,” which implies health. But even if . . . that equation is accepted, it does not settle this question: What does Constitution constitute? It constitutes a polity, a nation, which is more than an institutional arrangement for perpetual openness or “change.” It would be quixotic and imprudent for a community to attempt to freeze its customs, habits and dispositions. But it would be imprudent and probably fatal to a community to deny the community any right to attempt to perpetuate itself in recognizable form.

Will, *supra* n. 9, at 78–79.

The case for historical continuity was made, famously and eloquently, by Justice Holmes. In a speech on June 25, 1895, at a dinner of the Harvard Law School Association in honor of Professor C. C. Langdell, Holmes said:

The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.

Oliver Wendell Holmes, Jr., Speech, *Speech at a Dinner of the Harvard Law School Association in Honor of Professor C. C. Langdell* (Harv. L. Sch. Assn., June 25, 1895), in *The Essential Holmes: Selections from Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* 184 (Richard A. Posner, ed., U. Chi. Press 1992); see Diggins, *supra* n. 342, at 354.

354. See e.g. Farber & Sherry, *supra* n. 351, at 10–28; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).

355. U.S. Const. art. II, § 1.

356. U.S. Const. amend. 21, § 1.

357. See Orwell, *supra* n. 231.

would have to be amended (by means of the formal article V process) in order to allow Arnold Schwarzenegger to become president of the United States. Schwarzenegger was born in Austria and is a naturalized citizen. Only persons who are “natural born Citizen[s]”³⁵⁸ of the United States can become President.³⁵⁹ The thesis of this article is that the *Raich* and *Wickard* Courts exceeded the Orwell-Schwarzenegger Limit—that they impermissibly and unconstitutionally “amended” the Commerce Clause.³⁶⁰

The *Wickard* Justices were not the first Justices to violate their oath by interpreting the Constitution ironically. In *Plessy v. Ferguson*,³⁶¹ the Court endorsed the doctrine of “separate but equal”—a form of apartheid.³⁶² “Equal” means, among other things, “the same.” “Separate” means “different.” Separate facilities—that is, different facilities—cannot be “the same.” “Different” is the antonym of the “same.” The Court was playing language games in *Plessy*.³⁶³

Two important qualifications must be made. First, this article condemns the practice of constitutional irony—the paradoxical redefinition of constitutional terms to mean their opposites. It does not condemn all forms of constitutional agnosticism or constitutional skepticism. The Constitution is itself agnostic (or, at least, pluralistic). It provides a platform within which citizens can use their liberty to achieve their destinies. The Constitution does not endorse a specific philosophy, political agenda, or economic theory.³⁶⁴

Then-Associate Justice Rehnquist quoted the following language, from Holmes’s *Lochner* dissent, with approval:

[The] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our

358. U.S. Const. art. II, § 1.

359. *Id.*

360. See Barnett, *supra* n. 9, at ch. 4 (discussing interpretation and the requirement of written amendments to the Constitution); *id.* at 312–15 (discussing the Commerce Clause); *id.* at 350–53 (discussing amendments).

361. 163 U.S. 537 (1896).

362. *Id.* at 551–52.

363. As a matter of semantics, the constitutional irony in *Plessy* is arguably more subtle than the irony in *Wickard* and *Raich*. But, it is hard to say that there was anything subtle about *Plessy*.

364. George Carey, *Who or What Killed the Philadelphia Constitution?* 36 *Tulsa L.J.* 621, 636 (2001); William H. Rehnquist, *Observation: The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 703 (1976). Will rejects Holmes’s famous statement that a Constitution “is made for people of fundamentally differing views.” Will, *supra* n. 9, at 79 (internal quotation marks omitted). According to Will,

The Constitution does not just distribute powers, it does so in a cultural context of principles and beliefs and expectations about the appropriate social outcome of the exercise of those powers. Only a few of those are even intimated in the text of the Constitution. That is why, considered apart from the cultural context, the Constitution is impossible to explicate. *Holmes’s famous statement that a constitution “is made for people of fundamentally differing views” is radically false.* A constitution not only presupposes a consensus of “views” on fundamentals; it also presupposes concern for its own continuance. Therefore, it presupposes efforts to predispose rising generations to the “views” and habits and dispositions that underlie institutional arrangements. In this sense, a constitution is not only an allocator of powers: it is also the polity’s frame of mind.

Id. (emphasis added, footnote omitted); see also *id.* at 79–80.

judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.³⁶⁵

Some of the most distinguished federal judges have been skeptics. Learned Hand, for example, was fascinated by a saying of Oliver Cromwell: “I beseech ye in the bowels of Christ, think that ye may be mistaken.”³⁶⁶ Hand wanted Cromwell’s paean to skepticism to be “written ‘over the portals of every church, every courthouse and at every crossroads in the nation.’”³⁶⁷ Hand held the remarkable view that the spirit of liberty is essentially the spirit that “is not too sure that it is right.”³⁶⁸ Hand believed that people should “doubt a little of [their] own infallibility.”³⁶⁹ Handian skepticism seems positive and appropriate.³⁷⁰

Hand’s skepticism may echo and reverberate the skepticism of Justice Oliver Wendell Holmes. Holmes—the “Great Overlord of the Law”—wrote that “time has upset many fighting faiths”³⁷¹ and that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”³⁷² In his essay on natural law, Holmes wrote that:

Certitude is not the test of certainty. We have been cock-sure of many things that were not so. . . . One cannot be wrenched from the rocky crevices into which one is thrown for many years without feeling that one is attacked in one’s life. What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one’s experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor

365. Rehnquist, *supra* n. 364, at 703 (quoting *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting)).

366. Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* xxiv (Irving Dilliard ed., 3d ed., Alfred A. Knopf 1974) (internal quotation marks omitted).

367. *Id.* at xxv; see Hayek, *supra* n. 107, at 530 n. 12.

368. Hand, *supra* n. 366, at 190.

369. Farber & Sherry, *supra* n. 351, at 124 (internal quotation marks omitted, bracket in original, footnote omitted).

370. One of Hand’s law clerks, Ronald Dworkin, described Hand’s attitude this way:

Hand’s skepticism consisted not in the philosophical view that no moral conviction can be objectively true, but in a disabling uncertainty that he—or anyone else—could discover which convictions were true: he thought moral matters were much too subtle and complex to allow anyone much confidence in his own opinions. He often said that he despised “absolutes.” He meant, by that ambiguous phrase, that he distrusted any attempt to resolve the untidy complexity of a moral or legal or political issue in a neat and simple formula. . . . [H]e had come to the remarkable view that the spirit of liberty is essentially the spirit “that is not too sure that it is right,” and . . . he recommended, as a “combination of tolerance and imagination that to me is the epitome of all good government,” Benjamin Franklin’s plea that people should on occasion “doubt a little of [their] own infallibility.”

Id. at 124, 124 n. 8 (ellipses and brackets in original, footnote omitted).

Interestingly, Hand’s view that the spirit of liberty is the spirit “that is not too sure that it is right” seems completely inconsistent with the Court’s famous proclamation that “[l]iberty finds no refuge in a jurisprudence of doubt.” *Casey*, 505 U.S. at 844; see Farber & Sherry, *supra* n. 351, at 124 (making the same comparison).

371. White, *supra* n. 15, at 136 (quoting *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (internal quotation marks and footnote omitted). Cardozo called Holmes “the great overlord of the law and its philosophy.” John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* 66 (U. Cal. Press 1976) (quoting Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev. 682, 691 (1931)) (internal quotation marks omitted).

372. White, *supra* n. 15, at 136 (quoting *Abrams*, 250 U.S. at 630) (internal quotation marks and footnote omitted).

souls, may be equally dogmatic about something else. And this again means skepticism.³⁷³

Holmes's skepticism, however, was not benign. It was a thoroughgoing moral skepticism, a near nihilist position born of Holmes's horrible experiences in the Civil War:

With the smell of war in his nostrils, Holmes concluded that every cause—the abolition of human slavery included—was a personal taste of no notable significance. The postwar Holmes ranked the prewar Holmes with the Trotskyites, the pacifists, and the Christian Scientists. He evidently thought himself a fool to have believed in a cause beyond himself. Experiencing the death of comrades, the flow of senseless orders, the sight of lifeless bodies piled deep in the trenches, the rush of blood from his mouth, a bullet in the neck, a bullet in the chest, and a bullet in the ankle, Holmes concluded that right could never be more than the will of the strongest—“what a given crowd will fight for.”³⁷⁴

Holmes's three serious wounds and other Civil War experiences did not simply destroy his beliefs. The war “made him lose his belief in beliefs.”³⁷⁵

Holmes's extreme skepticism has been condemned by thoughtful critics as “adolescent.”³⁷⁶ A contemporary admirer of Holmes—Judge Richard Posner—advocates a more moderate skepticism: (1) Posner emphasizes the “test of time,”³⁷⁷ the positive and creative part of Holmes's skepticism;³⁷⁸ (2) Posner emphasizes candor—making one's skepticism public;³⁷⁹ and (3) Posner makes the vital point that a moderate judicial skepticism can promote two important judicial virtues—caution and humility.³⁸⁰ According to Posner,

[j]urisprudence itself is much too solemn and self-important. Its votaries write too marmoreal, hieratic and censorious a prose. . . . [L]aw needs more of the scientific spirit

373. Rehnquist, *supra* n. 364, at 704–05 (quoting *Natural Law*, in Oliver Wendell Holmes, *Collected Legal Papers* 310, 311 (Harcourt, Brace & Co. 1921)) (internal quotation marks omitted, ellipses in original, footnote omitted).

374. Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 185 (U. Chi. Press 2000).

375. Louis Menand, *The Metaphysical Club* 4 (Farrar, Straus & Giroux 2001).

376. E.g. Alschuler, *supra* n. 374, at 194 (noting that Holmes's views of moral issues “were more adolescent than profound” (footnote omitted)); Grant Gilmore, *The Ages of American Law* 48–49 (Yale U. Press 1977); Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 *Stan. L. Rev.* 254 (1963); Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 *Stan. L. Rev.* 3 (1962); see also Leuchtenburg, *supra* n. 189, at 3–29, 14 (criticizing Holmes for imposing his personal views of eugenics by judicial fiat: “Three generations of imbeciles are enough”); Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* xvii (Little, Brown & Co. 1989) (“Justice Holmes proved to be a shadowed figure, marked by the bigotry and sexism of his age, who in personal letters seemed to espouse a kind of fascist ideology. He was a violent, combative, womanizing aristocrat.”). Interestingly, but perhaps not surprisingly, Rorty admires Holmes's poetic style and praises his *Lochner* dissent. See Richard Rorty, *Philosophy and Social Hope* 99 (Penguin Bks. 1999).

377. Richard A. Posner, *The Problems of Jurisprudence* 112 (Harv. U. Press 1990).

378. *Id.* at 112–13, 453 (“Today we are all skeptics.”).

379. *Id.* at 453.

380. *Id.* at 452–53; see Bickel, *supra* n. 286, at 3–5 (describing “[t]wo diverging traditions in the mainstream of Western political thought”—a “liberal contractarian” tradition and a “conservative Whig” tradition). “Without carrying matters to a logical extreme, indeed without pretense to intellectual valor, and without sanguine spirit, the Whig model rests on a mature skepticism.” Bickel, *supra* n. 286, at 4.

than it has—the spirit of inquiry, challenge, fallibalism, open-mindedness, respect for fact and acceptance of change.³⁸¹

In summary, a condemnation of constitutional irony is not the same as a condemnation of constitutional skepticism, especially if the judge's skepticism is discussed and disclosed in a way that is open and obvious.

Second, it is theoretically possible that a judge or Justice may, in an extraordinary situation, reject a “common sense” or “plain language” interpretation of the Constitution. That theoretical possibility is considered by Professor Randy Barnett in *Restoring the Lost Constitution*.³⁸² If it is necessary to reject a “common sense” reading of the Constitution, Professor Barnett suggests that the judge or Justice must expressly acknowledge that he or she is departing fundamentally from the text:

Before the Constitution can be rejected, however, two things must occur. First, one must determine what its words mean to see if they come up short. These words were put in writing so they would remain the same until properly changed in writing. Therefore the meaning to be evaluated is that which was established at the time of enactment or amendment. Ascertaining the original meaning of the text is, then, a prerequisite for rejecting it as inadequate.

Second, it must be shown and admitted that the written Constitution has failed because its substance is inadequate to provide the assurances that legitimacy requires and, therefore, we are not governing by its terms any longer. In its place will be a provision that a court finds superior to that contained in the text. Any actor who tries to substitute another provision from that contained in the Constitution without rejecting the text is trying to have his cake and eat it too.³⁸³

When would a judge be justified in rejecting the letter of the Constitution? One example comes to mind: A court considering a case involving the pro-slavery provisions of the Constitution, prior to the enactment of the Civil War Amendments, would have been justified in using Barnett's method. The pro-slavery provisions of the Constitution were, of course, illegitimate.³⁸⁴

VI. CONCLUSION

A. *Raich and Federalism*

Raich is not a good decision. *Raich* obscures and trivializes fundamental truths: The Commerce Clause was intended to eliminate internal barriers to trade. It enabled the

381. Posner, *supra* n. 377, at 465; see also Epstein, *supra* n. 180, at 263 (“Wrongly understood, skepticism undermines freedom. Rightly understood, skepticism and freedom form an indissoluble pair.”); Farber & Sherry, *supra* n. 351, at 39–41 (discussing Scalia's skepticism).

382. Barnett, *supra* n. 9.

383. *Id.* at 111.

384. *Id.* at 109–13, 111 n. 62. “You don't have to remain faithful to evil law just because it is law, even if you're a judge.” David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 *Stan. L. Rev.* 1001, 1030, 1030 n. 213 (1996) (citing H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 615–21 (1958)) (noting German judges not obligated to obey Nazi laws); see also Bickel, *supra* n. 286, at 99–123. Exercises of “judicial civil disobedience” should be the rare exception, not the rule.

take-off and growth of the American economy by creating a massive free trade zone and common market. The Commerce Clause was not intended to grant Congress a national police power, or to authorize the regulation of trivial, noncommercial intrastate conduct. In sum, *Raich* misapprehends the purpose of the Commerce Clause and stretches the clause beyond its intended scope. The means used to reach that doctrinal end (stretching the Commerce Clause) are the Interstate Paradox, the Commerce Paradox, and the Substantial Paradox. *Raich* distorts the meaning of the Commerce Clause by reading the Constitution ironically. Significantly, *Raich* leaves Congress completely free to determine the limits of the commerce power. *Raich*, like *Wickard*, gives Congress a blank check. If *Raich* remains the law, there will be no meaningful judicial review of many, perhaps most, federal statutes.

Some commentators say *Raich* signals and symbolizes the end of the “New Federalism,” the beating heart of the Rehnquist legacy. *Raich* did not kill federalism. If *Wickard* was not the death of federalism, *Raich* will not be the death of federalism. To be sure, *Raich* limits and undermines the “New Federalism” of *Lopez* and *Morrison*. Significantly, *Raich* does not overrule *Lopez* or *Morrison*. Federalism will rise again.³⁸⁵

B. Constitutional Irony

The *Wickard* and *Raich* Courts are Constitutional Ironists, the judicial equivalents of Rorty’s Liberal Ironists and Harold Bloom’s Strong Poets. They practice a Rortian jurisprudence of “redescription,” substituting new vocabularies for old. They reject the plain and obvious meaning of “commerce” because that meaning is contingent—historically conditioned and obsolete—and because it limits and restricts the power of the federal government. They may think that they are only playing with words. Like Bloom’s “strong poets” they may think that they are not bound by old texts—by the works of their predecessors: “Poets, by the time they have grown strong, do not read the poetry of X, for the really strong poets can read only themselves. For them, to be judicious is weak, and to compare, exactly and fairly, is to be not elect.”³⁸⁶

Writing about Rorty, John Patrick Diggins has explained the dangers of playing with words:

[T]he spectacle of power and evil may not be contingent and instead defy the philosopher [or the judge] who assumes that reality, known only as interpreted, can be reinterpreted to suit political purposes. Experimenting with vocabularies can do little to change determinate phenomena that exist independently of language. . . . [L]anguage fixation is the focus of the thinker who refused to acknowledge that the wicked inventiveness of power eludes its passing representations.³⁸⁷

385. In *Garcia*, Justice Rehnquist wrote “a brief but painful dissent,” *Oxford Companion*, *supra* n. 15, at 378, expressing confidence that the Tenth Amendment federalism of *Usery* “will . . . in time again command the support of a majority of this Court.” *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting). Justice O’Connor began her dissent by writing “The Court today surveys the battle scene of federalism and sounds a retreat.” *Id.* (O’Connor, J., dissenting, with whom Powell & Rehnquist, JJ., join). She ended by commenting “I share Justice Rehnquist’s belief that this Court will in time again assume its constitutional responsibility.” *Id.* at 589.

386. Bloom, *supra* n. 338, at 19; see also *supra* n. 338 and accompanying text.

387. Diggins, *supra* n. 342, at 481–82.

By playing with language, Constitutional Ironists look only to what Edmund Burke called “the shell and husk of history”:³⁸⁸

You might change the names. The things in some shape remain the same. A certain *quantum* of power must always exist in the community, in some hands, and under some appellation. Wise men will apply their remedies to vices, not to names: to the causes of evil which are permanent, not to the occasional organs by which they act, and the transitory modes in which they appear. Otherwise you will be wise historically, a fool in practice. Seldom have two ages the same fashion in their pretexts and same modes of mischief. Wickedness is a little more inventive. Whilst you are discussing fashion, the fashion is gone by. The very same vice assumes a new body. The spirit transmigrates; and, far from losing its principle of life by the change of its appearance, it is renovated in its new organs with the fresh vigour of a juvenile activity. It walks abroad; it continues its ravages; whilst you are gibbeting the carcass, or demolishing the tomb. You are terrifying yourself with ghosts and apparitions, while your house is the haunt of robbers. It is thus with all those, who attending only to *the shell and husk of history*, think they are waging war with intolerance, pride, and cruelty, whilst, under the colour of abhorring the ill principles of antiquated parties, they are authorizing and feeding the same odious vice in different factions, and perhaps in worse.³⁸⁹

The Constitution is not merely an old literary text, the work of some long-dead “weak” poet, to be “reinterpreted” and “redescribed” ironically. The Constitution is solid, hard-edged reality: It is the supreme law of the land. It exists to prevent tyranny and the abuse of power.³⁹⁰ For lawyers and judges fidelity to the Constitution is not merely a duty, it is a necessity. Fidelity to the Constitution means upholding and following the Constitution, and giving the words of the Constitution their plain, common-sense meaning. Reading the Constitution ironically, and giving novel and paradoxical meanings to old words, is not upholding or following the Constitution. Constitutional irony—ignoring the limits and meaning of the text of the Constitution—is itself a subtle form of philosophical and poetic tyranny, an intellectual abuse of power.³⁹¹

388. *Id.* at 482 (quoting Burke, *supra* n. 286, at 120).

389. Diggins, *supra* n. 342, at 482 (quoting Burke, *supra* n. 286, at 119–20) (internal quotation marks and footnote omitted, second emphasis added). This passage by Burke is also quoted in O’Brien’s, *The Great Melody*, *supra* n. 285, at 604.

390. See Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” James Madison, *Federalist No. 47*, in Hamilton, Madison & Jay, *The Federalist Papers*, *supra* n. 95, at 297, 298.

George Will’s observation is particularly apt: “By construing the Constitution in a way that enables the federal government to act everywhere, we have taught Americans to think it is natural and right for the federal government to take custody of every problem, to organize the provision of every need, to satisfy every want.” George F. Will, *The Leveling Wind: Politics, the Culture and Other News* 78 (Penguin Bks. 1994). The result is a government that “becomes a bland Leviathan, a soft, kindly meant but ultimately corrupting statism, a statism of benighted benevolence.” *Id.*

391. Constitutional irony—like Rorty’s philosophical irony and Bloom’s literary irony—is an intellectual abuse of power because it denigrates and belittles the notion of truth. Rorty explains his notion of truth as follows:

It is central to the idea of a liberal society that, in respect to words as opposed to deeds, persuasion as opposed to force, anything goes. This openmindedness should not be fostered because, as Scripture teaches, Truth is great and will prevail, nor because, as Milton suggests, Truth will always

From time to time, it is necessary for the citizens of a republic to fight and die to protect that republic. It has generally been deemed reasonable to ask American citizens to fight and die to protect the Constitution. This begs the question: Is it reasonable to ask American citizens to fight and die to protect a Constitution that has been stripped of meaning by Constitutional Ironists?

win in a free and open encounter. It should be fostered for its own sake. *A liberal society is one which is content to call "true" whatever the upshot of such encounters turns out to be.*

Rorty, *Contingency*, *supra* n. 336, at 51–52 (emphasis in original).

Susan Haack rejects and criticizes Rorty's notion truth:

"True" is a word we apply to statements about which we agree; but that is because, if we agree that things are thus and so, we agree that it is true that things are thus and so. But we may agree that things are thus and so when it is *not* true that things are thus and so. So "true" is not a word that truly applies to all or only statements about which we agree; and neither, of course, does calling a statement true mean that it is a statement we agree about.

Haack, *Manifesto*, *supra* n. 339, at 19 (emphasis in original).

It is, of course, desirable to be openminded and tolerant about words, ideas, and persuasion. When being openminded and tolerant about words, ideas, and persuasion, however, it is not necessary to call them "true." Only words, ideas, and persuasion that are true deserve to be called "true." Benson & Stangroom, *supra* n. 9, at 166–67 (quoting and discussing Rorty and Haack on "truth"). It is not true that "black" is "white." It is not true that "war" is "peace." It is not true that "intrastate" is "interstate." It is not true that "trivial" is "substantial." And, it is not true that "noncommercial intercourse" is "commerce."