

**UNITED STATES v. MORRISON,
THE COMMERCE CLAUSE AND THE
SUBSTANTIAL EFFECTS TEST: NO
SUBSTANTIAL LIMIT ON FEDERAL POWER**

INTRODUCTION

In 1850, the French political economist Frederic Bastiat decried the laws under European monarchs as “[t]he law perverted! . . . [t]he law, I say, not only turned from its proper purpose but made to follow an entirely contrary purpose!”¹ Bastiat implored his readers to “look at the United States . . . where the law is kept more within its proper domain.”² In looking at *United States v. Morrison*,³ and its underlying rationale, Bastiat would see the law “turned from its proper purpose and made to follow an entirely different purpose.”⁴ The law in question is the Commerce Clause, part of Article I, section 8 of the United States Constitution, a section devoted to limiting the federal government’s reach into the lives of individuals through commerce.⁵ During the New Deal era, the Court transformed the Commerce Clause from its proper purpose of placing a limit on what conduct the federal government could control.⁶ By creating the substantial effects test in 1937, the Court turned the Commerce Clause into a license under which Congress began regulating all manner of private conduct.⁷ Under the Court’s New Deal jurisprudence, the Court evaluates federal laws passed by Congress under the guise of regulating com-

1. FREDERIC BASTIAT, *THE LAW* 1 (Dean Russell trans., Foundation for Economic Education 2d ed. 1998) (1850).

2. BASTIAT, *supra* note 1, at v.

3. 120 S. Ct. 1740 (2000).

4. BASTIAT, *supra* note 1, at 1. Compare *United States v. Morrison*, 120 S. Ct. 1740, 1749-54 (2000) (discussing the reach of Congress’ power under the Commerce Clause as extending to activities substantially affecting interstate commerce), with Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-44 (1987) (discussing the Framers’ intent in drafting the Commerce Clause and noting that the “Commerce Clause does not say ‘Congress shall have the power to regulate commerce, and all activities affecting commerce, with foreign nations, among the several states and with Indian tribes’”) (emphasis added), and Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999, 1005, 1011 (1996) noting that the substantial effects test created by the New Deal Court and continuing through *United States v. Lopez* allows Congress to regulate all manner of social and economic conduct well beyond what the Framers’ intended).

5. Epstein, 73 VA. L. REV. at 1396 (noting that the Constitution established a government of limited and enumerated powers).

6. Roger Pilon, *The Purpose and Limits of Government*, in CATO’S LETTERS #13, at 30 (Cato Inst. 1999); Pilon, 40 N.Y.L. SCH. L. REV. at 1005-06.

7. Pilon, *supra* note 6, at 30.

merce.⁸ Although the Court's decision in *Morrison* employed the substantial effects test to strike down an attempt by Congress to regulate violence against women,⁹ the substantial effects test fails to prevent Congress from reaching a large amount of intrastate, private conduct.¹⁰

First, this Note will examine the application of the substantial effects test by reviewing the facts and holding in *Morrison*.¹¹ Second, this Note will explore the original understanding of the Commerce Clause in the context of the doctrine of enumerated powers and previous Commerce Clause jurisprudence, by reviewing cases before and after the Court articulated the substantial effects test in 1937.¹² Third, this Note will examine the substantial effects test and explain why Commerce Clause jurisprudence prior to the New Deal represents an interpretation of the Commerce Clause in line with the Constitution's structure of limited enumerated powers.¹³ Finally, this Note will argue that the Court should reconsider the substantial effects test and return to an understanding of the Commerce Clause reflected in its pre-New Deal jurisprudence.¹⁴

FACTS AND HOLDING

In 1994, Antonio Morrison, James Crawford and Christy Brzonkala were all students of Virginia Polytechnic and State University ("VPI").¹⁵ Morrison and Crawford were members of VPI's football team and Brzonkala was a prospective member of the women's softball team.¹⁶ On September 21, 1994, Morrison and Crawford raped Brzonkala in a dormitory room.¹⁷ Morrison and Crawford, taking

8. *Id.*

9. See *infra* notes 119-24 and accompanying text.

10. See *infra* notes 538-64 and 566-603 and accompanying text. See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231, 1234, 1236, 1249 (1994) (noting the Court's decisions during the New Deal era subverted the original design of limited government contained in the Constitution and allowed Congress to regulate almost all significant areas of individuals' lives).

11. See *infra* notes 15-132 and accompanying text.

12. See *infra* notes 133-517 and accompanying text.

13. See *infra* notes 538-603 and accompanying text.

14. See *infra* notes 604-720 and accompanying text.

15. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 781-82 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc*, 169 F.3d 820 (4th Cir.), *cert. granted*, United States v. Morrison, 527 U.S. 1068 (1999), *cert. dismissed in part*, 529 U.S. 1062, *and aff'd*, 529 U.S. 598 (2000) (hereafter *Brzonkala II*); *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 772, 773 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc*, 169 F.3d 820 (4th Cir.), *cert. granted*, United States v. Morrison, 527 U.S. 1068 (1999), *cert. dismissed in part*, 529 U.S. 1062, *and aff'd*, 529 U.S. 598 (2000) (hereafter *Brzonkala I*).

16. *Brzonkala II*, 935 F. Supp. at 781.

17. *Id.* at 782.

turns, forced Brzonkala to submit to vaginal intercourse three times.¹⁸ After raping her, Morrison told Brzonkala, “[y]ou better not have any fucking diseases.”¹⁹ Brzonkala did not bring criminal charges against Morrison or Crawford because she did not know their full identities until February 1995, and she further believed that “her failure to preserve physical evidence foreclosed any criminal charges.”²⁰ Brzonkala learned Morrison’s full identity after a fellow student told her about Morrison stating publicly that he liked taking sexual advantage of drunk girls.²¹ Subsequently, Brzonkala brought charges against Morrison and Crawford under VPI’s Sexual Assault Policy in February 1995.²²

VPI conducted a hearing but stated the charges were being considered under VPI’s Abusive Conduct Policy, an older code.²³ Morrison admitted to having non-consensual sex with Brzonkala, but Crawford denied any role in the rape.²⁴ The committee issued a determination of guilt against Morrison and imposed a two semester suspension as punishment.²⁵ The committee failed to find sufficient evidence to rule against Crawford.²⁶ Morrison appealed his sanction, but the appeals officer upheld his suspension.²⁷

Morrison hired an attorney who threatened to sue VPI on the grounds VPI had charged him *ex post facto* under the new Sexual Assault Policy, which had only been released for publication to students on July 1, 1994, and was not included in the Student Handbook at the time he committed the rape.²⁸ Not wanting to face a lawsuit, VPI agreed to give Morrison a *de novo* rehearing under the older Abusive Conduct Policy.²⁹ Two VPI officials visited Brzonkala and convinced her to take part in the second hearing.³⁰

At the rehearing, the judicial committee heard testimony from Brzonkala and once again imposed the two semester suspension on Morrison.³¹ Morrison again appealed, and this time the appeals com-

18. *Brzonkala I*, 935 F. Supp. at 774.

19. *Brzonkala II*, 935 F. Supp. at 782.

20. *Brzonkala I*, 935 F. Supp. at 774.

21. *Brzonkala II*, 935 F. Supp. at 782. Morrison stated in the dining hall that “he liked to get girls drunk and fuck the shit out of them.” *Id.*

22. *Brzonkala I*, 935 F. Supp. at 774.

23. *Id.*

24. *Brzonkala II*, 935 F. Supp. at 782.

25. *Id.*

26. *Id.*

27. *Brzonkala I*, 935 F. Supp. at 774. The appeals committee’s decision was final. *Id.*

28. *Brzonkala I*, 935 F. Supp. at 774.

29. *Id.* at 774-75.

30. *Id.* at 774. By the time of the second hearing in July 1995, Brzonkala, suffering from depression and after a suicide attempt, withdrew from VPI. *Id.*

31. *Brzonkala I*, 935 F. Supp. at 775.

mittee set aside the sanction and reduced the charge against Morrison from abusive conduct to using abusive language.³² When Brzonkala learned of the reduced charge and the set aside of the suspension, she, fearing for her safety, decided not to return to VPI in Fall 1995.³³ Shortly after she cancelled her return to VPI, Brzonkala filed suit against Antonio Morrison; James Crawford; Cornell Brown; William Landslide, Comptroller of the Commonwealth ("Comptroller Landslide"); and VPI, in the United States District Court for the Western District of Virginia.³⁴ Brzonkala's claims arose out her rape by Morrison and Crawford and VPI's treatment of her complaint under VPI's Sexual Assault Policy.³⁵

Brzonkala alleged various claims under Title IX of the Education Amendment Act,³⁶ Title III of the Violence Against Women Act ("VAWA"),³⁷ and state law.³⁸ The district court considered Brzonkala's

32. *Id.*

33. *Id.*

34. *Id.* at 773.

35. *Brzonkala II*, 935 F. Supp. at 781-82. The Court dismissed Brzonkala's claims against Cornell Brown. *Id.* His role in the events was unclear. *Id.* The district court in *Brzonkala I* only made one reference to Brown, noting "Brzonkala states that VPI employees coordinated a plan to obscure Brown's role in the rape." *Brzonkala I*, 935 F. Supp. at 775.

36. 20 U.S.C. § 1681 (1994). The relevant section states: "(a) Prohibition against discrimination; exceptions[:] No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (1994).

37. 42 U.S.C. § 13981 (1994). Section 13981 provides:

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section—

- (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
- (2) the term "crime of violence" means—

claims in two separate opinions.³⁹ In *Brzonkala v. Virginia Polytechnic & State University*⁴⁰ ("Brzonkala I"), the court dismissed the Title IX claims of sexual discrimination and creation of a hostile environment against VPI and Comptroller Landsidle, finding Brzonkala failed to state a claim as required by Rule 12(b)(6) of the Federal Rules of Civil Procedure.⁴¹ In *Brzonkala v. Virginia Polytechnic & State University*,⁴² ("Brzonkala II") the court addressed Brzonkala's claims under the VAWA.⁴³

Brzonkala argued VPI discriminated against her under Title IX on the basis of sex.⁴⁴ However, the district court found insufficient facts to sustain her claims.⁴⁵ The court found Brzonkala's facts failed

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- (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
 - (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.
- (e) Limitation and procedures
- (1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).
 - (2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.
 - (3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.
 - (4) Supplemental jurisdiction

Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

42 U.S.C. § 13981.

38. *Brzonkala II*, 935 F. Supp. at 781.

39. *Brzonkala II*, 935 F. Supp. at 779; *Brzonkala I*, 935 F. Supp. at 772.

40. 935 F. Supp. 772 (W.D. Va. 1996).

41. *Brzonkala I*, 935 F. Supp. at 775, 778, 779.

42. 935 F. Supp. 779 (W.D. Va. 1996).

43. *Brzonkala II*, 935 F. Supp. at 781.

44. *Brzonkala I*, 935 F. Supp. at 776.

45. *Brzonkala I*, 935 F. Supp. at 776-78. Title XI, 20 U.S.C. § 1681 prohibits persons from excluding others from educational programs receiving Federal funds "on the basis of sex." *Id.* at 776.

to demonstrate that gender motivated VPI's actions.⁴⁶ Because Brzonkala failed to show that VPI's actions were motivated by gender animus, she could not state claims against VPI and Comptroller Landside under Title IX.⁴⁷

In considering Brzonkala's claim under the VAWA, Chief Judge Jackson Kiser first found Brzonkala had stated sufficient facts to survive a motion to dismiss under Rule 12(b)(6) of Federal Rules of Civil Procedure.⁴⁸ Judge Kiser found Brzonkala stated a claim against Morrison under VAWA, because she alleged a rape motivated by gender animus as shown by Morrison's two derogatory statements.⁴⁹ The court also dismissed Brzonkala's VAWA claims because it found Congress had no authority under the Commerce Clause to pass 42 U.S.C. § 13981.⁵⁰

The district court noted that of the three categories under which Congress can make law under the Commerce Clause, it would evaluate the VAWA under the category of activity having a substantial effect on interstate commerce.⁵¹ Using the substantial effects analysis set forth in *United States v. Lopez*,⁵² the court discussed a four part test: "(a) Nature of the Regulated Activity, (b) Individual Case Inquiry, (c)

46. *Brzonkala I*, 935 F. Supp. at 778-79.

47. *Id.*

48. *Brzonkala II*, 935 F. Supp. at 781, 783, 785. Federal Rule of Civil Procedure 12(b)(6) allows parties to file a motion to dismiss a claim. FED. R. CIV. P. 12(b)(6). Federal Rule of Civil Procedure 12(b)(6) provides: "the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief may be granted . . ." FED. R. CIV. P. 12(b)(6). Federal Rule of Civil Procedure 8 sets forth the rules of pleading in federal court and provides in relation to claims: "(a) Claim for Relief. A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or several different types may be demanded." FED. R. CIV. P. 8.

49. *Brzonkala II*, 935 F. Supp. at 785. Judge Kiser found it unnecessary to decide whether Brzonkala stated a claim against Crawford because of his ruling VAWA unconstitutional. *Id.*

50. *Brzonkala II*, 935 F. Supp. at 793. 42 U.S.C. § 13981 was Subtitle C of Title IV of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, 1941-42 (1994) (codified as 42 U.S.C. § 13981 (1994)). Subtitle C was also known as the Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13981 (1994)). For convenience, this note will refer, as did the district court, to 42 U.S.C. § 13981 as the VAWA throughout. *Brzonkala II*, 935 F. Supp. at 785. In addition to the Commerce Clause, the VAWA cites the Fourteenth Amendment as a source of authority under which Congress passed the VAWA. 42 U.S.C. § 13981(a). The district court found the VAWA an improper use of Congress' Fourteenth Amendment enforcement power because the Act created a right of action based on purely private conduct. *Brzonkala II*, 935 F. Supp. at 799-800.

51. *Brzonkala II*, 935 F. Supp. at 786. The other two categories of activity are use of a channel of interstate commerce and an instrumentality of interstate commerce. *Id.*

52. 514 U.S. 549 (1995).

Relevance of Legislative History, and (d) Practical Implications.”⁵³ First, the court found that violence against women is an intrastate, non-economic activity and the economic effects stated in the congressional record were too distant from interstate commerce to justify regulating violence against women.⁵⁴ Second, the court found the VAWA contained no jurisdictional requirement that limited “each individual case . . . to situations involving interstate commerce.”⁵⁵ Third, despite Congress’ extensive record of hearings on violence against women and the supposed effect of violence on productivity and workforce participation, the court concluded that “[t]he Commerce Power is based on a reasonable effect on interstate commerce, not on Congress’ perceived effect on commerce.”⁵⁶ The court decided the VAWA regulated activities with no reasonable effect on interstate commerce because the causal chain between a violent act against a woman and the effect on interstate commerce involved too many tenuous links.⁵⁷ The court noted Congress’ extensive findings regarding the impact on violence against women on the national economy was not the same as showing a substantial effect on interstate commerce.⁵⁸ Finally, the court concluded the practical implications of the VAWA were that if Congress has the power to regulate crimes of violence motivated by gender because of the remote effects on interstate commerce, then there is very little private activity Congress could not reach.⁵⁹ The court found that the federal government would encroach too much upon traditional state functions.⁶⁰ Thus, the court determined Congress exceeded its power under the Commerce Clause when it enacted the VAWA.⁶¹

Brzonkala appealed the district court’s decision to the United States Court of Appeals for the Fourth Circuit.⁶² Judge Diana Motz wrote the majority opinion reversing and remanding the district court’s decision.⁶³ The Fourth Circuit focused on an extensive record

53. *Brzonkala II*, 935 F. Supp. at 786-88.

54. *Id.* at 789-91.

55. *Id.* at 792.

56. *Id.* at 789.

57. *Id.* at 791.

58. *Id.* at 792.

59. *Id.* at 793.

60. *Id.* at 792.

61. *Id.* at 793.

62. *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 132 F.3d 949, 950 (4th Cir. 1997), *reh’g en banc*, 169 F.3d 820 (4th Cir.), *cert. granted*, *United States v. Morrison*, 527 U.S. 1068 (1999), *and cert. dismissed in part*, 529 U.S. 1062, *and aff’d*, 529 U.S. 598 (2000).

63. *Brzonkala*, 132 F.3d at 952, 974. Judge Motz only turned to the constitutionality of VAWA after a lengthy discussion of the Title IX claims alleged by *Brzonkala* in *Brzonkala I*. *Id.* at 956-62. The majority decided that the district court correctly “dismissed *Brzonkala*’s Title IX claim of disparate treatment.” *Id.* at 962. However, the

Congress established prior to passing the VAWA.⁶⁴ After reviewing *Lopez*, the court concluded the substantial effects test did not mean a judicial interpretation of what an activity's effects were on commerce, but rather whether Congress had a rational basis for concluding the activity regulated affected interstate commerce.⁶⁵ In deciding that Congress had a rational basis for regulating violence against women under the VAWA, the court stated *Lopez* had a limited holding and should be limited to its facts.⁶⁶

Next, the Fourth Circuit found that the VAWA only interfered with traditional state activities on a limited basis because nothing in 42 U.S.C. § 13981 prevents a victim from bringing state civil or criminal claims or charges.⁶⁷ Further, the court reasoned that *Lopez* did not require Congress to regulate an economic activity in order to properly exercise its authority under the Commerce Clause, because the test was whether Congress rationally concluded that the activity substantially affected commerce.⁶⁸ The court also discounted the importance of the absence of a jurisdictional element in the statute, stating such an element was not "necessary for constitutional validity."⁶⁹ Thus, the court held Congress acted within its authority when it enacted the VAWA because Congress premised the VAWA on a rational basis.⁷⁰

Judge J. Michael Luttig dissented, arguing the majority failed to correctly apply the substantial effects tests as articulated in *Lopez*.⁷¹ The dissent reasoned the majority opinion did not conduct the independent substantial effects evaluation set forth by *Lopez*.⁷² Further, the dissent reasoned that complete judicial deference to congressional committee findings was no longer the standard for reviewing federal statutes passed under the power of the Commerce Clause.⁷³ The dissent noted the majority opinion upholding the VAWA neglected to discuss the economic or non-economic attributes of the activities regulated by the VAWA.⁷⁴

majority found that the district court erred in dismissing Brzonkala's claims of a hostile environment. *Id.* at 961.

64. *Brzonkala*, 132 F.3d at 962-63. The Court noted that four years of hearings preceded the passage of the VAWA. *Id.* at 962.

65. *Brzonkala*, 132 F.3d at 968.

66. *Id.* at 969-70.

67. *Id.* at 970.

68. *Id.* at 972.

69. *Id.* at 973.

70. *Id.*

71. *Id.* at 974, 977 (Luttig, J., dissenting).

72. *Id.* at 977 (Luttig, J., dissenting).

73. *Id.* at 974-75 (Luttig, J., dissenting).

74. *Id.* at 976 (Luttig, J., dissenting).

On February 8, 1998, the Fourth Circuit vacated the panel's judgment and opinion, electing to rehear the case en banc.⁷⁵ The en banc opinion affirmed the district court's decision, holding the VAWA unconstitutional as an improper exercise of Congress's power under the Commerce Clause.⁷⁶ Judge Luttig, writing for the majority, concluded Brzonkala had stated a claim under the VAWA.⁷⁷ The court then considered Brzonkala's arguments that Congress did not exceed its power when it passed the VAWA.⁷⁸

The majority, like the district court, relied on the substantial effects test set forth by *Lopez*.⁷⁹ The court noted that under the test, Congress can only regulate pursuant to the Commerce Clause non-commercial activities that "substantially affect interstate commerce."⁸⁰ Defined further, the court stated the test allows only two types of laws.⁸¹ The court noted the first type of law must regulate activities arising out of a commercial transaction which, when aggregated, substantially affect interstate commerce.⁸² The court then noted the second type of law, which must include a jurisdictional element that a court can apply on a case-by-case basis to decide whether a specific application of the law deals with an activity that affects interstate commerce.⁸³

Applying the test, the Fourth Circuit concluded that "violent crime motivated by gender animus . . . [is not] commercial or economic and [such activity] also lacks a meaningful connection with any particular, identifiable economic enterprise or transaction."⁸⁴ The court found that the VAWA also exceeded Congress' Commerce Clause authority because intrastate gender motivated violence in the aggregate did not affect a particular interstate industry or enterprise.⁸⁵ Next, the court noted that the VAWA's language contained no express jurisdictional element, nor did its language imply a jurisdictional element.⁸⁶

The court rejected Brzonkala's argument that the *Lopez* test dealt only with "the presumptive outer limits of congressional power," stat-

75. *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820, 829 (4th Cir. 1999) (en banc), cert. granted, *United States v. Morrison*, 527 U.S. 1068 (1999), and cert. dismissed in part, 529 U.S. 1062, and *aff'd*, 529 U.S. 598 (2000).

76. *Brzonkala*, 169 F.3d at 833.

77. *Id.* at 825, 829.

78. *Id.* at 830.

79. *Id.* at 830-31.

80. *Id.* at 831 (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)).

81. *Id.* at 831.

82. *Id.*

83. *Id.* (quoting *Lopez*, 514 U.S. at 561).

84. *Brzonkala*, 169 F.3d at 834.

85. *Id.* at 835-36.

86. *Id.* at 836.

ing that upholding the VAWA as a valid exercise of authority under the Commerce Clause would vitiate the principles of federalism, resulting in a completely centralized government.⁸⁷ The court held that upholding the VAWA would come too close to recognizing a general federal police power under the Commerce Clause.⁸⁸ Pointing out federalism concerns, the court noted that the VAWA impinged on state regulation of violent crime and relationships between family members, areas traditionally controlled by state law, without any substantial effect or relation to interstate commerce.⁸⁹

The Fourth Circuit also rejected Brzonkala's argument that the extensive congressional record created in relation to the VAWA obliged the court to defer and uphold the VAWA.⁹⁰ Finding such deference improper, the court concluded that interpretation of whether an activity affects commerce was ultimately a judicial question calling for an independent evaluation of the law in question.⁹¹ Focusing again on the scope of the Commerce Clause, the court stated that congressional findings of supposed effects on interstate commerce would not sustain an act of Congress unless the law comported with the requisite legal relation between an activity and commerce.⁹² Examining the congressional record submitted by Brzonkala, the court concluded that while "violence against women . . . ultimately does take a toll on the national economy," the relationship to commerce was too attenuated and inferential to support a use of congressional authority under the Commerce Clause.⁹³

Finally, the court addressed Brzonkala's argument that Congress acted properly in passing the VAWA because it is civil rights legislation and "Congress has traditionally assumed an essential role in enacting legislation to protect civil rights"⁹⁴ Citing Congress' finding that the states had failed in protecting women from gender-based violence,⁹⁵ Brzonkala argued the VAWA addressed these shortcomings much as the Civil Rights Act of 1964 addressed the states' failure to deal with racial discrimination.⁹⁶ Rejecting Brzonkala's argument, the court noted that the VAWA governed purely private, non-economic conduct, not state action.⁹⁷ Thus, the court found the regu-

87. *Id.* at 837

88. *Id.* at 838, 840.

89. *Id.* at 840, 843.

90. *Id.* at 844.

91. *Id.* at 845.

92. *Id.* at 849.

93. *Id.* at 851-52.

94. *Id.* at 852

95. *Id.* (citing S. REP. NO. 102-197, at 39 (1990)).

96. *Id.*

97. *Id.* at 853

lated conduct did not fall within the ambit of state conduct violating the equal protection guarantee of the Fourteenth Amendment nor did it regulate economic activity that the Supreme Court had found justified Congress's authority, under the Commerce Clause, to pass the Civil Rights Act of 1964.⁹⁸ Again focusing on the balance of power between federal and state governments established by the Constitution, the court concluded that the VAWA regulated private, non-economic activity traditionally controlled by the states.⁹⁹ The court noted that Congress based the VAWA on generalized findings of state deficiencies in control of gender motivated violent crime.¹⁰⁰ If the VAWA were upheld on this basis, the court concluded Congress could usurp Commerce Clause limits on federal power and assert a general police power because similar generalized findings of the states' failure to remedy bias could be leveled at almost all fields of traditional state concern.¹⁰¹

Chief Judge J. H. Wilkinson, III and Circuit Judge Paul Niemeyer, concurring in the judgment, filed separate concurring opinions.¹⁰² Chief Judge Wilkinson discussed the role of the judiciary in the constitutional system and concluded the majority's decision reflected "a balanced allocation of powers in our federal system."¹⁰³ Judge Niemeyer delineated an additional argument in favor of striking down the VAWA.¹⁰⁴ Judge Niemeyer's argument, grounded in the Tenth Amendment, stated that Congress exceeded its authority when it passed a regulation that infringed the general police power of the states.¹⁰⁵ Judge Niemeyer concluded the VAWA infringed the general police power reserved to the states under the Tenth Amendment because it regulated activity too remote from interstate commerce.¹⁰⁶

Circuit Judge Diana Motz, joined by Judges Francis Murnaghan, Sam Ervin, III and M. Blane Michael, dissented.¹⁰⁷ The dissent found Congress acted within its authority under the Commerce Clause when it passed the VAWA, because Congress, as shown by its extensive findings, had a rational basis for determining whether violence against women "sufficiently affected interstate commerce."¹⁰⁸

98. *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964)).

99. *Id.*

100. *Id.* at 849.

101. *Id.* at 853.

102. *Id.* at 889, 898 (Wilkinson, J., concurring) (Niemeyer, J., concurring).

103. *Id.* at 897 (Wilkinson, J., concurring).

104. *Id.* at 898 (Niemeyer, J., concurring).

105. *Id.* at 903 (Niemeyer, J., concurring).

106. *Id.* at 903, 905 (Niemeyer, J., concurring).

107. *Id.* at 905, 933 (Motz, J., dissenting).

108. *Id.* at 912 (Motz, J., dissenting).

The dissent stated that rational basis review is justified because the "Commerce Clause pertains to more than just interstate commerce; it gives Congress a plenary power to . . . regulate problems affecting the national economy as a whole."¹⁰⁹ The dissent read *Lopez* not as establishing new jurisprudential limits on Congress' authority under the Commerce Clause, but as reaffirming the Supreme Court's commitment to rational basis review based on deference to legislative findings.¹¹⁰ The dissent stressed the fact the *Lopez* Court struck down a federal statute passed under the aegis of the Commerce Clause, because the Court had no congressional findings to defer to and thus had no rational basis upon which to premise Congress' authority.¹¹¹ The essence of the dissent's argument was if congressional findings rationally demonstrate that an otherwise non-economic activity has an effect on the national economy, then commerce was affected and Congress could regulate the activity in question.¹¹²

Brzonkala and the United States appealed the en banc decision to the United States Supreme Court, which granted certiorari.¹¹³ Brzonkala and the United States argued that the VAWA regulated activity that substantially affected interstate commerce and, therefore, constituted a valid exercise of Congress' power under the Commerce Clause.¹¹⁴ Chief Justice William Rehnquist, joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas, wrote the majority opinion.¹¹⁵ Justice Thomas authored a short concurrence and Justice David Souter filed a dissent joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer.¹¹⁶ Justice Breyer filed a dissenting opinion joined in full by Justice Stevens and in part by Justices Ginsburg and Souter.¹¹⁷ The Court affirmed the circuit court's decision.¹¹⁸

The Court concluded that the VAWA fell outside of Congress' authority under the Commerce Clause because Congress could not regulate "non-economic, violent criminal conduct based solely on that

109. *Id.* at 915 (Motz, J., dissenting).

110. *Id.* at 923 (Motz, J., dissenting).

111. *Id.* at 924 (Motz, J., dissenting).

112. *Id.* at 918-19, 924-25 (Motz, J., dissenting).

113. *United States v. Morrison*, 120 S. Ct. 11 (1999) (mem.).

114. *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000). Petitioners argued in the alternative that 42 U.S.C. § 13981 was a proper exercise of Congress' power under section five of the Fourteenth Amendment. *Id.* at 1754-55.

115. *Morrison*, 120 S. Ct. at 1745.

116. *Id.* at 1759 (Thomas, J. concurring) (Souter, J., dissenting).

117. *Id.* at 1774 (Breyer, J., dissenting).

118. *Id.* at 1759.

conduct's aggregate effect on interstate commerce."¹¹⁹ Relying explicitly on *Lopez*, the Court stated that Congress could not regulate violence against women under the Commerce Clause unless the violent activities regulated were economic in nature and substantially affected interstate commerce.¹²⁰ The Court opined whether a statute governed an activity substantially affecting interstate commerce depended in part upon the Court's evaluation of the statute itself and whether the statute was supported by legislative findings and the strength of the link between the activity in question and interstate commerce.¹²¹ In evaluating the VAWA, the Court found that the statute lacked a jurisdictional element limiting the reach of Congress' power to regulate gender-based violence actually affecting interstate commerce.¹²² Although Congress had supported the VAWA with a voluminous record of findings, the Court found Congress' conclusion, that violence against women substantially affects interstate commerce, relied on a chain of inferences that left the actual effects on commerce too remote from the conduct itself.¹²³ The Court noted that upholding the VAWA, a statute based on a long causal chain from activity to commerce, would "allow Congress to regulate any crime as long as the nationwide aggregated impact of that crime had substantial effects on employment, production, transit, production or consumption."¹²⁴

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer dissented, arguing the Commerce Clause confers on Congress a plenary regulatory power.¹²⁵ Under Congress' plenary authority, Justice Souter noted that he would have upheld the VAWA as a proper use of congressional authority, because the congressional record supporting the VAWA rationally related violence against women to adverse effects in certain sectors of the national economy.¹²⁶ Justice Souter found a substantial effect on commerce from the voluminous congressional record that purported to show violence against women was a national problem.¹²⁷ Justice Souter found that data amassed by Congress in support of the VAWA supplied a rational basis to uphold the VAWA as a constitutional exercise of Commerce Clause power, much like similar

119. *Id.* at 1753-54. The majority also refused to uphold the Act under section five of the Fourteenth Amendment basically because there was no state action, meaning the conduct in question was purely private. *Id.* at 1758-59.

120. *Morrison*, 120 S. Ct. at 1750.

121. *Id.* at 1750-52.

122. *Id.* at 1751-52.

123. *Id.*

124. *Id.* at 1752-53.

125. *Id.* at 1766 (Souter, J., dissenting).

126. *Id.* at 1763 (Souter, J., dissenting).

127. *Id.* (Souter, J., dissenting).

Congressional findings supporting the Civil Rights Act of 1964 provided a sufficient predicate for congressional regulation under the Commerce Clause.¹²⁸

Justice Breyer also dissented, joined in full by Justice Stevens and in part by Justices Ginsburg and Souter, focusing on the majority's use of an economic versus non-economic distinction to evaluate conduct substantially affecting interstate commerce.¹²⁹ Justice Breyer discussed the difficulty of isolating economic from non-economic activity in our close-knit national market and the importance of identifying economic activity in evaluating whether and where the Commerce Clause can be employed.¹³⁰ Justice Breyer concluded that deciding which activities are economic and thus subject to regulation under the Commerce Clause is a job for Congress, not the courts.¹³¹ Justice Breyer ultimately concluded that because Congress stated rational reasons for its conclusion that the VAWA regulated economic activity, the Court should have upheld the VAWA as a constitutional exercise of power under the Commerce Clause.¹³²

BACKGROUND

A. THE COMMERCE CLAUSE AND ENUMERATED POWERS

In drafting the United States Constitution, the Founders aimed to preserve the liberty of individuals.¹³³ Reading the Declaration of Independence as a statement outlining the Founder's vision of liberty, Roger Pilon noted that it contemplated a limited form of government, drawing its power from "the Consent of the governed," necessary to preserving "life, liberty and the pursuit of happiness."¹³⁴ The Framers drafted the Constitution with the principles of the Declaration in mind, and established a form a government meant to leave a majority of the power in the hands of free individuals.¹³⁵ The purpose of the new constitution was two-fold: liberty and union.¹³⁶ To accomplish this end, the Framers developed a dual system of sovereignty, a division of authority between the states and the federal government

128. *Id.* at 1759-1764 (Souter, J., dissenting).

129. *Id.* at 1774 (Breyer, J., dissenting).

130. *Id.* at 1774, 1776 (Breyer, J., dissenting).

131. *Id.* at 1778 (Breyer, J., dissenting).

132. *Id.* at 1777, 1780 (Breyer, J., dissenting).

133. Roger Pilon, *Preface* to THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1, 2-3 (Cato Institute 1998).

134. Pilon, *supra* note 133, at 3-4.

135. *Id.*; Roger Pilon, *A Court Without A Compass*, 40 N.Y.L. SCH. L. REV. 999, 1008 (1996).

136. THE FEDERALIST NO. 2, at 39 (John Jay) (Clinton Rossiter ed., 1961).

known as federalism.¹³⁷ Federalism as a system prevents the federal government from tyrannizing the people by protecting their fundamental liberties.¹³⁸

The concept of federalism in the Constitution placed a few powers in the hands of the federal government and reserved the remaining power to "the States or the people."¹³⁹ The division of power between the states and the federal government rests in the structure and text of the Constitution in the form of the doctrine of enumerated powers.¹⁴⁰ By dividing power between two levels of government, the Founders sought to preserve liberty through a system of dual sovereigns checking each other's power.¹⁴¹ The Constitution establishes a set of limited and defined powers granted to the federal government, which are set forth in Article I, section 8.¹⁴² In defending the Constitution, James Madison divided the powers given to the federal government into six distinct classes and then proceeded to discuss the powers and scope of those powers granted.¹⁴³ Among the powers enu-

137. Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 85, 88 (Lawrence M. Friedman ed., 1988).

138. David G. Willie, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1081 (1996). See Heather Hale, Note, *United States v. Lopez: Resisting Further Expansion of Congressional Authority Under the Commerce Clause*, 1996 DET. C.L. REV. 99, 101-02 (1996) (noting that the division of authority between state and federal government preserves the liberty of individuals in society).

139. See THE FEDERALIST NO. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961) (noting that the "powers delegated the federal government are few and defined The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives liberties and properties of the people"); Scheiber, *supra* note 137, at 88-89 (noting that the character of federalism is compound, delineated by the division of powers between states and the federal government); Richard A. Epstein, *Propter Honoris Respectum: Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 188-89 (1996) (noting that the Constitution's basic design seeks a balance of power between states and federal government; federal government only given enough power to preserve union, all other power left to the states).

140. THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961). The jurisdiction of the federal government "is limited to certain enumerated objects." THE FEDERALIST NO. 14, *supra* note 140, at 102. See Pilon, 40 N.Y.L. SCH. L. REV. at 1003 (noting the doctrine of enumerated powers is the centerpiece of the Constitution, a proposition made clear by the language of the Tenth Amendment). The Tenth Amendment provides: "[t]he 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." U.S. CONST. amend X.

141. Steven G. Calabresi, *Symposium: Reflections on United States v. Lopez: "A Government Of Limited And Enumerated Powers": In Defense Of United States v. Lopez*, 94 MICH. L. REV. 752, 785 (1996).

142. U.S. CONST. art. I, § 8; THE FEDERALIST NO. 41, at 255 (James Madison) (Clinton Rossiter ed., 1961).

143. THE FEDERALIST NO. 41, *supra* note 142, at 256 (listing the classes of power as "1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the states; 4. Certain

merated in Article I, section 8 is the power of Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian tribes."¹⁴⁴ Madison considered this power among those subsumed under the third class of power assigned to the federal government.¹⁴⁵

Discussing the meaning and scope of the third class of powers assigned — those needed for the preservation of "harmony and proper intercourse among the States" — Madison noted that one of the principle defects of the Confederacy was its inability to regulate commerce between the states.¹⁴⁶ Madison pointed out that the principle defect a control of commerce among the states by the national government would remedy was preventing animosity between states arising from states levying tariffs on each other's goods passing through.¹⁴⁷ Madison's concern dealt mainly with "the relief of the States which import and export through other States."¹⁴⁸ Madison discussed the necessity of fixing a limited power in the federal government to facilitate reciprocal trade between the States.¹⁴⁹ The scope of Congress' power under the Commerce Clause does not extend beyond eliminating barriers to trade or intercourse between the States.¹⁵⁰ The Commerce Clause only gave Congress the power to regulate — that is, make regular — commerce among the states.¹⁵¹ The Framers designed the Commerce Clause as a check primarily on state power, meant to facilitate peace and free exchange among the states.¹⁵² Thus, when writing the Commerce Clause, the Framers meant to leave outside of federal jurisdiction matters such a manufacturing, contract formation and other things concerning the general lives and liberties of individuals living in the states.¹⁵³ The Framers' understanding of the Commerce Clause in particular, and the doctrine of enumerated powers represents a view consistent with individual lib-

miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provision for giving due efficacy to all these powers.") See generally THE FEDERALIST NOS. 41-44 (James Madison) (Clinton Rossiter ed., 1961) (discussing each class and the power subsumed under each class in detail).

144. U.S. CONST., art. I, § 8, cl. 3.

145. THE FEDERALIST No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961).

146. THE FEDERALIST No. 42, *supra* note 145, at 267.

147. *Id.* at 267-68.

148. *Id.* at 267.

149. *Id.* at 268.

150. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395, 1454 (1987); Willie, 70 TUL. L. REV. at 1077.

151. Pilon, *supra* note 133, at 5; Pilon, 40 N.Y.L. SCH. L. REV. at 1005-06.

152. Pilon, *supra* note 133, at 5; Pilon, 40 N.Y.L. SCH. L. REV. at 1005-06.

153. THE FEDERALIST No. 45, *supra* note 139, at 292-93; Epstein, 73 VA. L. REV. at 1407, 1454; Gary Lawson, *The Rise And Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233-34 (1994).

erty, a view as relevant in the twenty first century as it was in the eighteenth.¹⁵⁴

In *Marbury v. Madison*,¹⁵⁵ the United States Supreme Court declared section 13 of the Judiciary Act of 1789 unconstitutional.¹⁵⁶ In *Marbury*, William Marbury petitioned the United States Supreme Court for a writ of mandamus directing James Madison, then Secretary of State, to issue commissions granted by President John Adams before he left office.¹⁵⁷ The commissions appointed each petitioner to a justice of the peace position for the District of Columbia.¹⁵⁸ Marbury sought a writ originally in the Supreme Court under a provision of the Judiciary Act of 1789 in which Congress conferred original jurisdiction on the United States Supreme Court to hear such cases.¹⁵⁹ In considering Marbury's petition, Chief Justice John Marshall decided three questions.¹⁶⁰ First, the Court considered whether Marbury had a right to receive the commission sought.¹⁶¹ Second, the Court considered whether the law provided him with a remedy.¹⁶² Third, the Court considered whether it had the power to issue the mandamus.¹⁶³

The Court decided first that Marbury had a right to receive the commission because the president had signed the commission and affixed the seal of the United States to it.¹⁶⁴ The Court concluded that Madison would violate a vested right of Marbury's if Madison continued to withhold the commission.¹⁶⁵ Second, the Court found that Marbury had a remedy at law because once made, the president could not revoke Marbury's commission at will, and thus Marbury acquired a legal right which a court could protect.¹⁶⁶ Having decided that Marbury had a right and a remedy, the Court then considered whether the United States Supreme Court could act as Court of original jurisdic-

154. Pilon, *supra* note 133, at 5-7.

155. 5 U.S. (1 Cranch) 137 (1803).

156. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-174, 180 (1803); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 6 (13th ed. 1997).

157. GUNTHER & SULLIVAN, *supra* note 156, at 3.

158. *Id.*

159. *Marbury*, 5 U.S. (1 Cranch) at 176. See An Act to Establish the Judicial Courts of the United States, sec. 13, 1 Stat. 73, 80-81 (1789) (attempting to confer jurisdiction on the Supreme Court "to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts or person holding office, under the authority of the United States"). See also GUNTHER & SULLIVAN, *supra* note 156, at 6 (referring to An Act to Establish the Judicial Courts of the United States, sec. 13, 1 Stat. 73, 80-81 (1789) as the "Judiciary Act of 1789).

160. *Marbury*, 5 U.S. (1 Cranch) at 153.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 162, 168.

165. *Id.*

166. *Id.* at 166-68.

tion and grant the mandamus.¹⁶⁷ The Court decided it could not issue the mandamus because Marbury proceeded under an unconstitutional act of Congress.¹⁶⁸ In interpreting the Constitution, the Court considered the language of Article III, section 2, and found that the Judiciary Act apportioned power between the Supreme and inferior courts, thus violating the mandate in Article III that the Supreme Court was one of appellate jurisdiction except for a limited class of cases.¹⁶⁹ In interpreting Article III, the Court stated that if the Judiciary Act were allowed to stand, it would render much of Article III surplus language because the restrictions in Article III placed on the class of cases amenable to Supreme Court jurisdiction would mean nothing.¹⁷⁰ The Court declared that each clause and word in Constitution was meant to have a definite effect.¹⁷¹ The Court found unacceptable any interpretation that rendered a word or phrase of the Constitution meaningless.¹⁷² The Court noted that the United States government was one of limited, enumerated power, with the power of the legislature defined in a written constitution, in order not to forget the limits beyond which Congress may not go.¹⁷³ If Congress could usurp Constitutional limits with an ordinary act, then the Court reasoned, the limits set down in Constitution meant nothing.¹⁷⁴ Accordingly, the Court concluded ordinary legislative acts that violated the Constitution's

167. *Id.* at 168, 173-74.

168. *Id.* at 180.

169. *Id.* at 174-75. See also GUNTHER & SULLIVAN, *supra* note 156, at 6 (referring to An Act to Establish the Judicial Courts of the United States, sec. 13, 1 Stat. 73, 80-81 (1789) as the "Judiciary Act of 1789). Article III, section 2 states in part:

The judicial Power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all cases in affecting Ambassadors, other Public ministers and Consuls; — to all cases of admiralty and maritime jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other cases, before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make

U.S. CONST. art. III, § 2.

170. *Marbury*, 5 U.S. (1 Cranch) at 174. See GUNTHER & SULLIVAN, *supra* note 156, at 6 (referring to An Act to Establish the Judicial Courts of the United States, sec. 13, 1 Stat. 73, 80-81 (1789) as the "Judiciary Act of 1789).

171. *Marbury*, 5 U.S. (1 Cranch) at 174.

172. *Id.*

173. *Id.* at 177-78.

174. *Id.*

text or structure cannot stand.¹⁷⁵ Thus, the Court found the Judiciary Act of 1789 violated the constitution and could not stand.¹⁷⁶

B. PRE-NEW DEAL COMMERCE CLAUSE JURISPRUDENCE

In *Gibbons v. Ogden*,¹⁷⁷ the United States Supreme Court held unconstitutional a New York law granting a New York citizen a monopoly on steamboat transportation between New York and New Jersey.¹⁷⁸ In *Gibbons*, Aaron Ogden sued Thomas Gibbons in the Chancery Court of New York seeking an injunction preventing Gibbons from operating steamboats between Elizabethtown, New Jersey, and New York.¹⁷⁹ Ogden received from John R. Livingston an exclusive right to operate steamboats between Elizabethtown Point and New York City for a period of ten years beginning March 1, 1815.¹⁸⁰ John Livingston granted Ogden this right under the authority of an indenture given to him by Robert R. Livingston and Robert Fulton, who had received in 1807, from the New York Legislature, the "exclusive right . . . to navigate the waters of [New York] by boats or vessels moved by steam . . ."¹⁸¹ The act granting this privilege prohibited any other person from navigating steamboats in New York waters and stated that persons violating the act forfeited their vessels to the grantees.¹⁸² Gibbons claimed he had a right to operate his steamboats unobstructed between New Jersey and New York because his vessels were enrolled and licensed under the United States coasting license statute to carry on the coasting trade.¹⁸³

The chancery court found for Ogden, holding the United States coasting license statute did not occupy the same area as the New York act under which Ogden claimed a right.¹⁸⁴ The chancery court reasoned the federal statute only established the character of the vessel, but did not intend to control the operation of vessels licensed.¹⁸⁵ The

175. *Id.*

176. *Id.* at 173, 180. See GUNTHER & SULLIVAN, *supra* note 156, at 6 (referring to An Act to Establish the Judicial Courts of the United States, sec. 13, 1 Stat. 73, 80-81 (1789) as "the Judiciary Act of 1789").

177. 22 U.S. (9 Wheat.) 1 (1824).

178. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1-2, 221 (1824).

179. *Gibbons v. Ogden*, 1 N.Y. Ch. Ann. 797, 797-98 (1819), *aff'd*, 17 Johns 488 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824).

180. *Gibbons*, 1 N.Y. Ch. Ann. at 797.

181. *Id.*

182. *Id.*

183. *Id.* at 798. Gibbons also claimed that he had been given the right to operate between Elizabethtown, N.J. and New York City under a deed given by Adam Brown to defendant who had acquired the steamboat monopoly rights from the heirs of Robert R. Livingston and Robert Fulton. *Id.*

184. *Gibbons*, 1 N.Y. Ch. Ann. at 799-800.

185. *Id.* at 799.

court construed the federal statute as leaving to the states the power to control what a boat owner can and cannot do with his property.¹⁸⁶ According to the chancery court, control over the use and enjoyment of personal property belonged to the states and because the statute in question controlled the use of Gibbons' boats, it could not conflict with a federal statute merely giving the boats a national character.¹⁸⁷

Gibbons appealed the decision of the chancery court to the Court of Errors of the State of New York, arguing that the New York act under which Ogden claimed his steamboat monopoly directly collided with the federal coasting statute Congress passed under authority granted by the Commerce Clause.¹⁸⁸ Gibbons argued Congress meant to occupy the whole area of interstate navigation under the coasting statute and, therefore, states could not act to restrain commerce through navigable waters between the states.¹⁸⁹ The court of errors affirmed the chancellor's opinion, finding the federal statute's only purpose was to establish the national character of American vessels in order to impose differential duties on American versus foreign countries' vessels.¹⁹⁰ The court reasoned that vessels involved in the coasting trade did not derive their right to trade from the federal license, because such ships had a right to trade regardless of whether they possessed a federal coasting license.¹⁹¹ The court concluded the federal coasting statute did not address commerce between the states, and thus, could not conflict with the New York law that controlled steamboat passage between New York and New Jersey.¹⁹² Gibbons appealed the decision of the Court of Errors of the State of New York to the United States Supreme Court, arguing the New York act under which Ogden claimed his monopoly violated the constitution by attempting to control interstate commerce.¹⁹³ New York argued its law did not conflict with the sole authority of Congress to regulate commerce.¹⁹⁴

The Supreme Court reversed the decision of the court of errors, determining the New York act under which Ogden claimed his monopoly violated the United States Constitution.¹⁹⁵ Chief Justice John Marshall, writing for the Court, reasoned first that the Commerce

186. *Id.*

187. *Id.* at 799-800.

188. *Gibbons v. Ogden*, 17 Johns 488, 501-02 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824)

189. *Gibbons*, 17 Johns at 502.

190. *Id.* at 509-10.

191. *Id.* at 509.

192. *Id.* at 508-09.

193. *Gibbons*, 22 U.S. (9 Wheat) at 186.

194. *Id.*

195. *Id.* at 1-2, 239-40.

Clause enumerated a federal power to regulate commerce among the several states and the word "commerce" as used in the Commerce Clause included navigation.¹⁹⁶ The Court then described the scope of Congress' power under the Commerce Clause, interpreting such power to include all "commercial intercourse between the United States and foreign nations" and between the several states.¹⁹⁷ In interpreting the word "among," the Court noted it meant intermingled with, and thus, commercial intercourse did not stop at a state's border but extended into the interior of the state.¹⁹⁸ However, the Court further noted that the word "among" also contemplated commercial intercourse involving "more States than one."¹⁹⁹ The Court reasoned that commerce among the states meant trading intercourse beginning in one state and terminating in another.²⁰⁰ Further, the Court determined the power granted solely to Congress under the clause was only plenary as to commerce among the several states.²⁰¹ Under this regulatory power, the Court found Congress could act to facilitate navigation in the waters of New York so long as that navigation concerned commercial intercourse between at least two states.²⁰² The Court also noted the right to trade between the states existed prior to the writing of the Constitution and that the Constitution conferred on Congress the right to regulate interstate commerce.²⁰³ The Court stated the federal coasting statute regulated navigation between the states, thus making it proper pursuant to Congress' power to regulate commerce "among the several states."²⁰⁴ The Court determined that New York's statute directly collided with the federal coasting statute by preventing a federally licensed operator from engaging in the coasting trade.²⁰⁵ Thus, the Court concluded the New York law could not stand.²⁰⁶

In *United States v. Dewitt*,²⁰⁷ the United States Supreme Court found unconstitutional a federal statute criminalizing the sale of grades of naphtha or illuminating oils that burned at a temperature of

196. *Id.* at 186, 189-90.

197. *Id.* at 193.

198. *Id.* at 194.

199. *Id.* at 193-94.

200. *Id.* at 195-96.

201. *Id.* at 197.

202. *Id.*

203. *Id.* at 197, 211.

204. *Id.* at 189, 213-16.

205. *Id.* at 221, 239-40.

206. *Id.* at 240.

207. 76 U.S. (9 Wall.) 41 (1869).

less than 110 degrees Fahrenheit.²⁰⁸ In *Dewitt*, the United States charged Dewitt with selling illuminating oils capable of burning at less than 110 degrees Fahrenheit.²⁰⁹ Dewitt demurred and the judges of the circuit court certified questions upon which they were divided including whether the statute was constitutional.²¹⁰ Chief Justice Salmon Chase, writing for the Court, answered that the statute violated the Commerce Clause and could not operate within the boundaries of a state.²¹¹ The Court reasoned that the statute did not regulate interstate commerce, but sought to regulate trade within the States.²¹² The Court noted the statute had no other purpose or effect than to prohibit the sale of illuminating oils of certain grades.²¹³ Because the statute only concerned conduct internal to the states and not commerce, the Court determined that the statute constituted a police regulation.²¹⁴ Thus, the Court concluded the United States could not enforce the statute against Dewitt, who sold oil within the territorial boundaries of Michigan.²¹⁵

In *Kidd v. Pearson*,²¹⁶ the United States Supreme Court found that Iowa Code, chapter 6, title 11, sections 1523-38, prohibiting the manufacturing of intoxicating liquor within the state, did not violate the Commerce Clause when the statute was applied to prevent a distiller within Iowa from manufacturing intoxicating liquor solely for export out-of-state.²¹⁷ In *Kidd*, I. E. Pearson and S. J. Loughran sued J. S. Kidd in the circuit court of Polk County, Iowa, for a permanent injunction preventing Kidd from manufacturing and selling intoxicating liquors.²¹⁸ Pearson proceeded under Iowa Code, chapter 6, title 11, sections 1523-26 that prohibited a person from manufacturing and selling intoxicating liquor in Iowa, except for "mechanical, medicinal, culinary or sacramental purposes."²¹⁹ Section 1523 declared manufacture of liquor within Iowa for purposes other than those listed a nuisance, but section 1524 allowed importers of liquor to possess it and sell it providing the out-of-state liquor remained in its original

208. *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 42 (1869). The case came before the court on a certificate of division between circuit court judges in the Eastern District of Michigan. *Dewitt*, 76 U.S. (9 Wall.) at 41.

209. *Dewitt*, 76 U.S. (9 Wall.) at 42.

210. *Id.*

211. *Id.* at 42-43, 45.

212. *Id.* at 45.

213. *Id.* at 44.

214. *Id.*

215. *Id.* at 42, 45.

216. 128 U.S. 1 (1888).

217. *Kidd v. Pearson*, 128 U.S. 1, 2-4, 25-26 (1888).

218. *Kidd v. Pearson*, 9 S. Ct. 6, 6 (1888).

219. *Kidd*, 9 S. Ct. at 7.

containers.²²⁰ Section 1526 provided that manufacturers of liquor for authorized purposes and sellers of imported liquor had to obtain a license to do business from the county in which they conducted business.²²¹ Pearson alleged that Kidd operated a distillery and manufactured liquor for purposes of export out-of-state and not for mechanical, medicinal, culinary or sacramental purposes.²²² Kidd argued that he operated a distillery under a permit obtained from the Polk County board of supervisors and was authorized to manufacture and sell liquor.²²³ At trial, undisputed evidence showed that Kidd did not sell any liquor within Iowa for any of the authorized purposes, but rather manufactured and sold all liquor for export out of Iowa.²²⁴ Upon this evidence, the Polk County circuit court ordered Kidd's distillery a nuisance and permanently enjoined him from manufacturing any more liquor.²²⁵

Kidd appealed the order of the trial court to the Supreme Court of Iowa, arguing that the liquor regulatory scheme constituted a regulation of interstate commerce.²²⁶ Kidd argued because the United States Constitution gave Congress exclusive control over interstate commerce, Iowa's statute interfered with Congress' power by prohibiting him from manufacturing liquor for export out-of-state.²²⁷ The Supreme Court of Iowa affirmed the decision of the trial court, concluding the statute did not regulate interstate commerce and, thus, constituted a valid exercise of state power.²²⁸ The court reasoned the statute prohibited only manufacture of liquor except for specific purposes and it did not forbid the transportation of liquor out-of-state.²²⁹ The court noted the statute did not regulate commerce because commerce consisted of the "interchange of commodities or property."²³⁰ The court reasoned that a good must exist before it can be exchanged and goods come into existence through manufacturing, a process separate from and preceding commerce.²³¹ The court found that Iowa's statute regulated manufacturing not commerce, and thus, did not con-

220. *Id.*

221. *Id.*

222. *Pearson v. International Distillery*, 34 N.W. 1, 2 (Iowa 1887), *aff'd*, *Kidd v. Pearson*, 128 U.S. 1 (1888).

223. *Kidd*, 9 S. Ct. at 7.

224. *Id.*

225. *Id.*

226. *Pearson*, 34 N.W. at 1, 6.

227. *Id.* at 6.

228. *Id.* at 6, 10.

229. *Id.* at 6.

230. *Id.* The court stated, "[i]f the law be obeyed, no liquor will be manufactured for transportation." *Id.*

231. *Pearson*, 34 N.W. at 6.

flict with federal authority.²³² Kidd filed for a writ of error with the United States Supreme Court, which granted the writ to consider whether Iowa's statute, as construed by the Iowa Supreme Court, conflicted with the Commerce Clause.²³³

The Supreme Court affirmed, concluding Iowa's statute did not regulate interstate commerce and, thus, did not interfere with federal authority.²³⁴ Justice Lucius Lamar, writing for the majority, reasoned Iowa's statute forbade manufacture and sale exclusive of the other.²³⁵ The Court noted the statute forbade the manufacture and sale of liquor within Iowa except for medicinal, mechanical, culinary or sacramental purposes.²³⁶ The Court further noted that the goods Kidd sought to ship in interstate commerce could not lawfully exist because he had not produced them for any of the four specified purposes.²³⁷ The Court rejected Kidd's argument that the statute, by recognizing the value of alcohol for some purposes within Iowa, recognized that alcohol had value as property, and therefore, could not be regarded as a nuisance simply because Kidd produced alcohol solely for export.²³⁸ The Court agreed with the Iowa court reasoning the statute did not legalize manufacture for any purpose, but only manufacture for specific purposes.²³⁹ The Court found that the Iowa statute could regulate manufacture without regulating commerce because it prohibited conduct internal to the state.²⁴⁰ The Court noted that interpreting the Commerce Clause to include manufacturing would subject all industry to uniform federal rules not suited to the infinite unpredictable variety of conditions existing across the nation.²⁴¹ The Court found that Iowa could exercise its police power to prevent Kidd from manufacturing liquor for purposes other than those specified and Iowa's exercise of such power did not regulate commerce, although it had the effect of limiting the quantity of liquor available in interstate commerce.²⁴² The Court reasoned that commerce did not begin until produced goods were "committed to [a] common carrier for transportation [out-of-state] . . . or have started on their ultimate passage to that state."²⁴³ Thus, the Court found that Kidd's intent to ex-

232. *Id.*

233. *Kidd*, 128 U.S. at 2, 15.

234. *Id.* at 22-23, 26.

235. *Id.* at 15, 19.

236. *Id.* at 19.

237. *Id.*

238. *Id.* at 18.

239. *Id.* at 18-19.

240. *Id.* at 20.

241. *Id.* at 21.

242. *Id.* at 22-23.

243. *Id.* at 25.

port the liquor he manufactured did not make his product a part of interstate commerce and, therefore, Iowa's statute did not interfere with federal authority.²⁴⁴

In *United States v. E.C. Knight Co.*,²⁴⁵ the United States Supreme Court found the United States did not have the authority to prosecute the E.C. Knight Company under the Sherman Antitrust Act, because the acquisition of shares of other manufacturers did not restrain interstate trade or commerce.²⁴⁶ In *E.C. Knight*, the United States sued the E.C. Knight Company, Spreckels' Sugar Refining Company, Franklin Sugar Refining Company, and the Delaware Sugar House in the Circuit Court for the Eastern District of Pennsylvania for violating the Sherman Antitrust Act.²⁴⁷ The United States alleged the defendants conspired to violate the Act by facilitating a deal under which the American Sugar Refining Company ("American Sugar") acquired control of all but 2 percent of the sugar refining capacity then existing in the United States.²⁴⁸ Knight, Spreckels, Franklin and Delaware, all located in Philadelphia, Pennsylvania, produced annually 33 percent of the total quantity of refined sugar in the United States.²⁴⁹ Revere of Boston produced about 2 percent and American Sugar produced the rest.²⁵⁰ The United States alleged that American Sugar, through its agent, acquired control of Knight, Spreckels, Franklin, and Delaware by entering into contracts under which the stockholders of the four companies agreed to swap their shares for those of American Sugar.²⁵¹ Thus, American Sugar gained control of 98 percent of the sugar refining capacity then existing in the United States.²⁵² The United States alleged the contracts by which American Sugar acquired control of the four Philadelphia refineries were a conspiracy to restrain or monopolize interstate commerce in sugar in violation of the Sherman Antitrust Act.²⁵³

The lower circuit court dismissed the United States' bill, holding American Sugar did not contract with the Philadelphia refineries to restrain or monopolize interstate commerce.²⁵⁴ The lower circuit court reasoned that the contracts and acts in question did not relate to

244. *Id.* at 25-26.

245. 156 U.S. 1 (1895).

246. *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895); Epstein, 73 Va. L. Rev. at 1342.

247. *United States v. E.C. Knight Co.*, 60 F. 306, 306-07 (C.C.E.D. Pa.), *aff'd*, 60 F. 934 (3d Cir. 1894), *aff'd*, 156 U.S. 1 (1895).

248. *E.C. Knight*, 60 F. at 306-07.

249. *Id.* at 306.

250. *Id.*

251. *Id.* at 306-07.

252. *Id.* at 307.

253. *Id.*

254. *Id.* at 308, 310.

commerce, but only to the manufacturing of sugar within the state of Pennsylvania.²⁵⁵ The lower circuit court reasoned that commerce was the flow of goods between and across the states, and the defendant companies did not intend and have not shown a propensity to interfere with "commerce among the several states."²⁵⁶ The lower circuit court concluded the manufacturing activities of the defendant companies might incidentally affect commerce, but allowing Congress to regulate these activities under the guise of regulating commerce would destroy the federal-state balance established by the United States Constitution.²⁵⁷

The United States appealed the decision of the lower circuit court to the United States Court of Appeals for the Third Circuit, arguing that the contracts between the Philadelphia refineries and American Sugar violated the Sherman Antitrust Act and constituted an attempt to restrain or monopolize interstate commerce.²⁵⁸ The court affirmed the lower circuit court's opinion, concluding the complaint showed no evidence that the defendant companies conspired to monopolize or restrain interstate commerce.²⁵⁹ Noting that American Sugar, through the contracts, now dominated the refining and sale of sugar, the court reasoned that such control did not amount to a restraint or monopoly of interstate commerce in sugar because American Sugar gained control over manufacturing, not commerce.²⁶⁰ Treating manufacturing and commerce as distinct things, the court reasoned that while buying and selling were elements of commerce, commerce itself should be strictly limited to the movement interstate of persons and property.²⁶¹ The United States appealed the decision of the Third Circuit to the United States Supreme Court, arguing the lower courts erred in finding that contracts between American Sugar and the Philadelphia refineries did not violate the Sherman Antitrust Act.²⁶² The United States argued that because a large part of the population of the United States used and enjoyed sugar, the manufacture of sugar by a monopoly selling to the United States at large rose to the level of interstate commerce.²⁶³

The Court affirmed the decision of the Third Circuit, holding the Sherman Antitrust Act did not authorize the United States to control

255. *Id.* at 309.

256. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).

257. *Id.* at 310.

258. *United States v. E.C. Knight Co.*, 60 F. 934, 934-35 (3d Cir. 1894), *aff'd*, 156 U.S. 1 (1895).

259. *E.C. Knight*, 60 F. 934 at 936-37.

260. *Id.* at 936

261. *Id.*

262. *E.C. Knight*, 156 U.S. at 1, 10.

263. *Id.* at 12.

the contracts through which defendants formed a monopoly on sugar manufacturing.²⁶⁴ Chief Justice Melville Fuller, writing for the majority, reasoned the Sherman Antitrust Act aimed to prevent monopolies and restraints of interstate commerce.²⁶⁵ Therefore, the Court reasoned, in order for the United States to prosecute the defendants, their activities must constitute a restraint or monopoly of interstate commerce.²⁶⁶ The Court rejected the government's argument noting that while manufacturing allows control over the disposition of the finished good, such control was secondary and only affected commerce indirectly.²⁶⁷ The Court separated manufacturing and commerce into two spheres, reasoning that the intent to export manufactures out-of-state does not turn manufacturing into commerce.²⁶⁸ The Court noted that manufacturing involved turning raw materials into finished products, while commerce, as contemplated by the Commerce Clause, involved transportation of finished goods between the states.²⁶⁹ The Court reasoned that, if Congress could reach manufacturing activities that affected interstate commerce indirectly in the name of regulating commerce, it could reach all activity and remove from the states all control of business operations.²⁷⁰ The Court concluded the Sherman Antitrust Act could only reach activities directly related to interstate commerce and the only object of the contracts between American Sugar and the Philadelphia refineries was to gain control over the manufacture and not the commerce of sugar.²⁷¹

In *Houston, East & West Texas Railway Co. v. United States*,²⁷² ("Shreveport Rate"), the United States Supreme Court concluded that an order of the Interstate Commerce Commission ("ICC"), an agency established by Congress under the Interstate Commerce Act of 1887 ("ICA"), did not violate the Commerce Clause because it regulated intrastate railroad rates of interstate carriers.²⁷³ In *Shreveport Rate*,

264. *Id.* at 16-18.

265. *Id.* at 9, 10.

266. *Id.* at 11-12.

267. *Id.* at 12. The Court stated "[c]ommerce succeeds to manufacture, and is not a part of it." *Id.*

268. *E.C. Knight*, 156 U.S. at 13.

269. *Id.* at 14.

270. *Id.* at 16.

271. *Id.* at 16-17.

272. 234 U.S. 342 (1914).

273. Interstate Commerce Rate Act, 24 Stat. 379, 383 (1887); *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 355 (1914). Congress abolished the ICC in 1995 and replaced the agency with the Surface Transportation Board. See 49 U.S.C. § 701(a) (Supp. I 1995) (establishing the Surface Transportation Board); Pub. L. No. 104-88, 109 Stat. 804, sec. 101, 49 U.S.C. § 701, note (Supp. I 1995) (abolishing the Interstate Commerce Commission). See also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1415 (1987) (referring to *Houston E. & W. Texas Railway Co. v. United States* as the *Shreveport Rate Case*).

the railroad commission of Louisiana brought a proceeding before the ICC, seeking an adjustment of the rates of a number of railroads operating out of Texas and into Shreveport.²⁷⁴ The railroad commission of Louisiana complained because the Texas-based carriers had fixed lower rates from Dallas to points east of Dallas than from points into east Texas from Shreveport, Louisiana.²⁷⁵ The Texas railroads defended their rate structure on the grounds they were compelled to institute these rates by the Texas railroad commission, whose stated policy was to discriminate in favor of protecting Texas industries and communities out of fear Texas would become "dependent upon other states" for industrial goods.²⁷⁶ The Texas commission saw the differential rate structure as a method through which to protect Texas industry.²⁷⁷

The ICC found in favor of the Louisiana commission, finding that the rates maintained out of Shreveport and into Texas by the Texas and Pacific Railway and the Houston, East & West Texas Railway (collectively "Texas railroads"), under the auspices of the Texas railroad commission, were "unjust and unreasonable."²⁷⁸ The ICC ordered the Texas railroads to cease and desist from charging Texas commission rates and to institute the rates ordered by the ICC.²⁷⁹ The ICC reasoned the policy of Congress in enacting the ICA and creating the ICC was to "unite the railroads into a national system" and to prevent interstate carriers from obstructing interstate commerce by establishing different rates as between two states.²⁸⁰ The ICC reasoned it had the power to control the intrastate rates established by the Texas railroad commission because the plain meaning of the ICA allowed Congress to regulate intrastate rates that impacted on interstate commerce.²⁸¹ The ICC reasoned that a state could not adopt internal policies that restricted the flow of interstate commerce.²⁸² The ICC further reasoned that, because the intrastate Texas rates restricted interstate commerce, the ICC could act to change them.²⁸³

The Texas railroads appealed the ICC's decision to the Commerce Court, arguing Congress did not have the authority to mandate

274. *Meredith v. St. Louis S.W. Ry. Co.*, 23 I.C.C. 31, 33 (1912).

275. *Meredith*, 23 I.C.C. at 33. The ICC report gave this example: "[a] rate of [sixty] cents carries first class traffic to the eastward from Dallas a distance of 160 miles, while the same rate of [sixty] cents will carry the same class of traffic but [fifty-five] miles into Texas from Shreveport." *Id.*

276. *Meredith*, 23 I.C.C. at 35.

277. *Id.*

278. *Id.* at 46.

279. *Id.* at 46-47.

280. *Id.* at 41.

281. *Id.* at 43.

282. *Id.* at 45-46.

283. *Id.*

changes in the intrastate rates established by the state of Texas.²⁸⁴ The Commerce Court dismissed both petitions, holding the railroads must follow the ICC order because federal authority could preempt state authority regarding the intrastate rates affecting interstate commerce.²⁸⁵ The Commerce Court reasoned the ICC had the power to adjust the intrastate rates of the Texas railroads because the intrastate rates fixed by the Texas commission interfered directly and substantially with interstate commerce.²⁸⁶ The Commerce Court thought that such rate fixing in favor of intrastate business interests would undermine the purpose of the federal law, which was to facilitate the free flow of interstate commerce through railroads.²⁸⁷ The Commerce Court grounded its holding on the supremacy of federal law where the federal law was an appropriate exercise of constitutional authority.²⁸⁸

The Texas railroads appealed the decision of the Commerce Court to the United States Supreme Court, arguing Congress did not have constitutional authority to control the intrastate rates of interstate carriers.²⁸⁹ The Supreme Court affirmed the order of the Commerce Court, finding Congress had the authority to regulate the intrastate rates of interstate carriers where such rates exerted a close and substantial effect on interstate commerce.²⁹⁰ Justice Charles Hughes, writing for the majority, reasoned that under the Commerce Clause, Congress possesses power to regulate interstate commerce and where such power exists, it dominates.²⁹¹ Regarding whether Congress had the power to control intrastate rates of interstate railroads, the Court reasoned that Congress could reach such rates because the Commerce Clause presumes an ability to control matters exerting a substantial effect on the conditions under which interstate commerce occurred.²⁹² The Court noted that the rates fixed by the Texas commission were such that they prevented competition between Texas and Louisiana on fair terms.²⁹³ The Court further noted that the intrastate rates

284. *Texas & P. Ry. Co. v. United States*, 205 F. 380 (Comm. Ct. 1913), *aff'd*, *Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914). Separate appeals were taken. *Texas & P. Ry. Co.*, 205 F. at 380; *Houston E. & W. Texas Ry. Co. v. United States*, 205 F. 391, 391 (Comm. Ct. 1913). However, the holding and reasoning of the Commerce Court for both cases is related in *Texas & P. Ry. Co. v. United States*, 205 F. 380 (Comm. Ct. 1913).

285. *Houston E. & W. Texas Ry. Co.*, 205 F. at 391; *Texas & P. Ry. Co.*, 205 F. at 389-90.

286. *Texas & P. Ry. Co.*, 205 F. at 386.

287. *Id.*

288. *Id.* at 387.

289. *Houston E. & W. Texas Ry. Co.*, 234 U.S. at 345, 350.

290. *Id.* at 355, 360.

291. *Id.* at 345, 350.

292. *Id.* at 351.

293. *Id.*

were so interrelated with the interstate rates so as to become one rather than two areas in which a government could regulate.²⁹⁴ Because federal law is supreme, the Court determined that the Texas regulation, in interfering with the federal law, had to yield.²⁹⁵ Thus, the Court found Congress could authorize the ICC to institute measures fostering interstate commerce between Texas and Louisiana, and that such measures could include the fixing of new rates opposed to those of the Texas railroad commission.²⁹⁶

C. THE HISTORICAL SETTING PRIOR TO THE NEW DEAL CASES

From 1922 to 1929, the American economy flourished.²⁹⁷ In 1923, the unemployment rate was 3% and most industrial sectors including automobiles, refrigerators, radios and other consumer durables prospered.²⁹⁸ National income increased from \$59.4 billion to \$87.2 billion between 1921 and 1929, indicating widespread prosperity among most Americans.²⁹⁹ During the 1920s, America's industrial economy worked to make available to all Americans what were previously considered luxury items owned only by the wealthy.³⁰⁰ For example, in 1929, the number of cars registered in the United States equaled 26,501,443, up from 1,258,062 in 1914, and spending on radios rose from \$10,648,000 in 1920 to \$411,637,000 in 1929.³⁰¹ Total sales of electrical products tripled in the 1920s to \$2.4 billion.³⁰² America led world production by the end of the decade, producing 34.4% of the total compared to second place Britain with 10.4%.³⁰³ Overall, profits and prosperity prevailed in a time people began describing as a New Era.³⁰⁴

However, beginning in 1928 margin-trading and the popularity of investment trusts drove the market to vastly overstate the real valuations of stock shares.³⁰⁵ For example, the prevalent interest rates on loans used to buy shares was 8 to 12% whereas the dividend yield on these shares equaled only about 1 to 2%.³⁰⁶ One investment trust

294. *Id.*

295. *Id.* at 351-52.

296. *Id.* at 347, 351, 353, 354.

297. ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 160 (1987).

298. HIGGS, *supra* note 297, at 160.

299. HIGGS, *supra* note 297, at 160; PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 722 (1997).

300. JOHNSON, *supra* note 299, at 723.

301. *Id.*

302. *Id.*

303. *Id.* at 724.

304. HIGGS, *supra* note 297, at 160.

305. JOHNSON, *supra* note 299, at 732-33.

306. *Id.* at 733.

with a paper value of over \$1 billion in 1929 had as its chief asset an electrical company worth only \$6 million in 1921.³⁰⁷ In June of 1929, the economy began a downturn, led by a severe market correction that began on October 21, 1929.³⁰⁸ On October 24, 1929, shares dropped precipitously with no buyers and eleven well-known Wall Street men had committed suicide by the end of the day.³⁰⁹ Between 1929 and 1933, during the unfortunate Herbert Hoover's presidency, real gross national product "per capita fell by more than 30[%]," to a level almost equal to that in 1908, a depression year.³¹⁰ Manufacturing of producer and consumer durables fell 67% and 50% respectively, new construction fell by 78%, and unemployment of the labor force reached 25%.³¹¹ Additionally, between 1930 and 1933 many banks failed and over nine thousand suspended operations, precipitating \$2.5 billion in losses, falling in equal share on depositors, stockholders and other creditors.³¹² Corporate net income was negative in 1931, 1932 and 1933, the worst year being 1932 with net losses of \$3.4 billion.³¹³ Hoover responded to the depression by among other things cutting taxes in 1929 and raising them to new, higher levels in 1932, increasing government spending, trying to maintain high-wage levels by providing \$300 million in Federal Reserve credit, and giving farmers \$500 million in federal funds under the new Agricultural Marketing Act.³¹⁴ Hoover also began a number of public works projects under the auspices of the Reconstruction Finance Corporation including the San Francisco Bay Bridge, the Los Angeles Aqueduct and the Hoover Dam.³¹⁵ New Dealers conceded later that Roosevelt's infamous New Deal only continued and expanded programs begun under Hoover's administration.³¹⁶

During the winter of 1932-33, the darkest days of the depression, and during the interregnum between Hoover's and Roosevelt's first term as President, many states were imposing banking "holidays" that limited the kind and amounts of withdrawals depositors could make.³¹⁷ When Roosevelt took office, he purposely closed down every

307. *Id.*

308. *Id.* at 734; HIGGS, *supra* note 297, at 161.

309. JOHNSON, *supra* note 299, at 735.

310. HIGGS, *supra* note 297, at 161.

311. *Id.*

312. *Id.* Johnson noted that between 1931 and 1932, 5096 banks failed. JOHNSON, *supra* note 299, at 742.

313. HIGGS, *supra* note 297, at 162.

314. JOHNSON, *supra* note 299, at 740.

315. *Id.*

316. *Id.* at 740-41. Johnson also noted that neither Hoover nor Roosevelt understood the causes of the Depression and that the 'solutions' promulgated by both men likely served to exacerbate the depression. *Id.* at 736.

317. HIGGS, *supra* note 297, at 168.

bank in the nation, adding an artificially created economic crisis to the one already in progress.³¹⁸ Roosevelt took office amidst cries of "emergency" from the media, politicians and aspiring reformers.³¹⁹ The word "emergency" became the driving force of a Congress that began passing bills with little debate or even familiarity with the contents.³²⁰ In May and June of 1933, Congress passed the Agricultural Adjustment Act of 1933 and the National Industrial Recovery Act.³²¹

D. NO DEAL ON THE NATIONAL INDUSTRIAL RECOVERY ACT

In *A.L.A. Schechter Poultry Corp. v. United States*,³²² the United States Supreme Court held that the National Industrial Recovery Act ("NIRA"), under which defendants were convicted for violating wage and hour requirements, exceeded Congress' authority under the Constitution.³²³ In *Schechter Poultry*, a grand jury sitting for the United States District Court for the Eastern District of New York, issued a sixty-count indictment charging Joseph, Martin, Alex and Aaron Schechter; A.L.A. Schechter Poultry Corporation; and Schechter Live Poultry Market, Incorporated with violating the NIRA and the Code of Fair Competition for the Live Poultry Industry for the Metropolitan Area of New York City ("Live Poultry Code").³²⁴ The NIRA contained provisions delegating to the President of the United States the power to approve or prescribe codes of fair competition.³²⁵ President Roosevelt approved the Live Poultry Code in April of 1934.³²⁶ The indictment charged that the defendants conspired to violate the NIRA and the Live Poultry Code by selling poultry unfit for consumption by humans, selling uninspected poultry, engaging in 'selective killing' of poultry, intimidating Code investigators and the Supervisor, filing fictitious sales reports, failing to provide reports on wages and hours, paying illegal wages, and permitting employees to work overtime.³²⁷

318. *Id.* at 169-70.

319. *Id.* at 170, 171.

320. *Id.* at 171. Higgs cited as one example the Emergency Banking Act of 1933, under which Roosevelt closed every bank in the United States. *Id.* The Emergency Banking Act passed by a "unanimous shout in the House of Representatives after thirty-eight minutes of debate, even though no member of the House had a copy of the bill." *Id.*

321. HIGGS, *supra* note 297, at 175, 177.

322. 295 U.S. 495 (1935).

323. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 499, 521, 551 (1935).

324. *United States v. Schechter*, 8 F. Supp. 136, 140 (E.D.N.Y. 1934), *aff'd in part, rev'd in part*, *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617 (2d Cir.), *cert. granted*, *Schechter v. United States*, 295 U.S. 723, and *aff'd in part, rev'd in part*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

325. *Schechter*, 8 F. Supp. at 142.

326. *Id.* at 140.

327. *Id.* at 141.

Defendants demurred to the indictment arguing, inter alia, the NIRA and the Live Poultry Code exceeded the federal government's power under the Commerce Clause.³²⁸

The district court sustained the demurrer as to counts six through twenty-three because those counts charged eighteen sales in violation of the Live Poultry Code or NIRA, but failed to allocate any specific sales to any specific count, thus, precluding defendants from knowing which conduct related to which charge.³²⁹ The court also sustained the demurrer as to count forty because it failed to allege that employees worked on days they could not as specified by the NIRA.³³⁰ The court denied the demurrer as to the remaining counts and held the NIRA and the Live Poultry Code did not violate the Eighth Amendment, the Fifth Amendment, Article I, section 1 of the Constitution, or the Commerce Clause.³³¹ Regarding the Commerce Clause, the district court reasoned the NIRA and Live Poultry Code proscribed conduct that substantially affected interstate commerce.³³² The court further reasoned that Congress could legislate intrastate activities in one state affecting other states because the nature of the federal government was to govern for general or national purposes.³³³ The district court reasoned the NIRA dealt with a national problem, and thus, Congress could reach all activities proscribed under competition codes that "substantially affected interstate commerce."³³⁴ The court convicted the defendants on nineteen counts.³³⁵

The defendants appealed the decision of the district court to the United States Court of Appeals for the Second Circuit, arguing that the NIRA and Live Poultry Code were unconstitutional under both the

328. *Id.* Defendants also argued that the NIRA and the Live Poultry Code violated the Eighth Amendment by imposing excessive fines, U.S. CONST. amend. VIII; violated the Fifth Amendment due process clause, U.S. CONST. amend. V; violated the delegation power contained in Art. I, section 1 of the Constitution; and that the indictment itself failed because it was vague, general, stated conclusions rather than facts and duplicitous. *Id.* at 141.

329. *Schechter*, 8 F. Supp. at 151.

330. *Id.*

331. *Id.* at 142-43, 149, 151 (finding that a \$500 fine per offense did not violate Fifth Amendment due process clause, or the Eighth Amendment excessive fines clause). An act of Congress vesting the President with broad powers to deal with national emergencies declared by Congress does not violate Article I, section 1 of the Constitution where standards of congressional policy are "sufficiently set forth" and the selection of remedy for the national problem as well as the application of the remedy rested with Congress. *Schechter*, 8 F. Supp. at 145.

332. *Schechter*, 8 F. Supp. at 149.

333. *Id.* at 147 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194-96).

334. *Id.* at 142, 147.

335. *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 618 (2d Cir. 1935), *cert. granted*, *Schechter v. United States*, 295 U.S. 723, and *aff'd in part, rev'd in part*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Commerce Clause and Article I, section 1 of the Constitution.³³⁶ The Second Circuit affirmed in part and reversed in part the district court's opinion, finding the NIRA and Live Poultry Code did not violate either the Commerce Clause or Article I, section 1 of the Constitution.³³⁷ The court first addressed whether the NIRA and Live Poultry Code were within Congress' power under the Commerce Clause.³³⁸ The court then turned to defendants' argument that the provisions allowing the president to set and/or approve codes of competition violated Article I, section 1 of the Constitution.³³⁹ The United States argued the conduct controlled by the Live Poultry Code, for which defendants were convicted, affected interstate commerce, and thus, fell within Congress' power under the Commerce Clause.³⁴⁰ The United States focused on the fact that New York was the largest poultry market in the country, exerting an influence on prices in other markets across the country.³⁴¹ The United States argued that practices such as shipping diseased poultry, resulting from non-inspection, selling below cost, and only killing poultry selectively caused a depression in prices nationwide.³⁴² Further, the government argued that paying lower wages affected interstate commerce because it allowed Schechter to cut prices, thereby contributing to price deflation.³⁴³

The court reasoned that the NIRA regulated activity substantially and directly affecting interstate commerce because sales of unhealthy poultry prevented healthy poultry from reaching New York, and depressed the price for poultry nationwide.³⁴⁴ Further, the court reasoned that in times of economic emergency, Congress may properly regulate trade practices that "in normal times would have only an indirect and incidental effect upon interstate commerce."³⁴⁵ The court grounded its conclusion on the theory that an emergency may justify more extensive use by Congress of a constitutional power.³⁴⁶ The court, however, ruled that the wage and hour provisions of the Code were invalid because wages paid to Schechter's employees were wages paid to workers not directly engaged in interstate commerce, thus, hours worked and wages paid could not exert an effect on interstate

336. *Schechter Poultry*, 76 F.2d at 617-18, 620.

337. *Id.* at 620-21, 624.

338. *Id.* at 619-20.

339. *Id.* at 620.

340. *Id.* at 618-19.

341. *Id.* at 618.

342. *Id.* at 619.

343. *Id.*

344. *Id.* at 619-20.

345. *Id.* at 620.

346. *Id.*

commerce.³⁴⁷ The court reversed the district court and refused to sustain count forty-six of the indictment.³⁴⁸

The court next considered the Schechter's challenge that the NIRA's code-making provision violated Article I, section 1 of the Constitution.³⁴⁹ Regarding the provision of the NIRA that delegated code-making power to the President, the court reasoned that no violation of Article I, section 1 of the Constitution occurred because the NIRA did not grant to the President a "roving commission to inquire into evils and then, upon discovering them, do anything he pleases."³⁵⁰ The court construed the NIRA as limiting presidential power to approve or issue detailed codes consistent with the general standards established under the NIRA.³⁵¹ The court characterized the power given to the president as rule-making rather than law-making.³⁵² The Schechters filed a petition for a writ of certiorari with the United State Supreme Court, which granted certiorari to consider whether the NIRA and Live Poultry Code promulgated thereunder exceeded Congress' power under the Commerce Clause and violated Article I, section 1 of the Constitution.³⁵³

The Supreme Court reversed the circuit court, holding the NIRA unconstitutionally delegated legislative power to the president.³⁵⁴ The Court further held the NIRA and Live Poultry Code exceeded Congress' power to regulate interstate commerce under the Commerce Clause.³⁵⁵ Chief Justice Charles Hughes, writing for the Court, reasoned first that the codes authorized under the NIRA were law and not rules because the codes place individuals under a duty to act or refrain from acting and imposed criminal penalties for violating the codes' provisions.³⁵⁶ Second, the Court reasoned that Congress improperly delegated its power because the NIRA failed to specify what laws the president would enforce, but rather allowed the president unfettered discretion to seek out problems with trade or industry and

347. *Id.* at 624. Judge Learned Hand wrote a concurring opinion in which he stated that allowing Congress to control wages and hours under the theory that such manufacturing and related concerns affect commerce would also allow Congress to control rent of industrial buildings and the cost of materials and machines used in manufacturing. *Id.* at 624-25 (Hand, J., concurring).

348. *Schechter Poultry*, 76 F.2d. at 624.

349. *Id.* at 620-24.

350. *Id.* at 623.

351. *Id.*

352. *Id.* at 622-23. "Congress was powerless to contend [with complex conditions] without delegating to some other department the power to attend to the innumerable details thereof." *Id.* at 623.

353. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S 495, 495, 499, 519 (1935).

354. *Schechter Poultry*, 295 U.S. at 542, 551.

355. *Id.* at 550-51.

356. *Id.* at 519, 529.

institute penal statutes to correct perceived problems.³⁵⁷ The Court found no limits within the NIRA on the president's discretion in deciding which codes to adopt, allowing him to pick and choose from among those presented for his approval and to add conditions of his own or eliminate provisions at his discretion.³⁵⁸ In all, the Court determined that the NIRA failed to provide any standards for governing trade, industry and related activities, thus, providing no specific commission under which the executive could operate.³⁵⁹ Thus, the Court concluded the NIRA delegated legislative power to the president, an act expressly forbidden under Article I, section 1 of the Constitution.³⁶⁰

Next, the Court addressed Congress' authority under the Commerce Clause to control operation of a poultry business located wholly within the state of New York.³⁶¹ The Court reasoned that Congress could not reach the Schechters' activities because the poultry they handled had left the flow of interstate commerce.³⁶² The Court found that interstate commerce ceased after it had reached the point of local sale and use.³⁶³ The Court noted the Schechters did not resell to out-of-state customers and their business was not a temporary stopping point in commerce between the states.³⁶⁴ Thus, the Court reasoned Congress could not reach the activities in question relying on a stream of commerce theory.³⁶⁵ Further, the Court reasoned that the transactions conducted by the Schechters did not affect interstate commerce because the conduct of their business — i.e. hours worked and wages paid — in selling poultry had no direct effect on interstate commerce.³⁶⁶ The Court reasoned that the activities made crimes under the Live Poultry Code could only affect commerce if they bore a "close and substantial relation to interstate commerce."³⁶⁷ The Court found the Schechters' activities did not exert a direct effect on interstate commerce because their business practices did not affect a movement of goods in interstate commerce, but only affected the goods after they settled locally.³⁶⁸ Further, the Court found the Schechters' activities

357. *Id.* at 537-38. Justice Benjamin Cardozo concurred on this point and, of the NIRA provisions authorizing the president to issue codes of fair competition like the Live Poultry Code, stated "[t]his is delegation running riot." *Id.* at 551, 553 (Cardozo, J., concurring).

358. *Schechter Poultry*, 195 U.S. at 538-39.

359. *Id.* at 541-42.

360. *Id.* at 542.

361. *Id.* at 542-43.

362. *Id.* at 543.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 548.

367. *Id.* at 544-46.

368. *Id.* at 543.

did not amount to a conspiracy to interfere with the movement of goods in interstate commerce because their activities were confined to a local region and effects on interstate commerce were indirect.³⁶⁹ Thus, the Court concluded because the NIRA and Live Poultry Code attempted to control intrastate activity indirectly affecting interstate commerce, the NIRA and Live Poultry Code exceeded Congress power under the Commerce Clause.³⁷⁰

E. WELCOME TO THE WELFARE STATE: THE NEW DEAL CASES AND BEYOND

In *NLRB v. Jones & Laughlin Steel Corp.*,³⁷¹ the United States Supreme Court held Congress possessed the authority under the Commerce Clause to enact the National Labor Relations Act ("NLRA"), allowing the National Labor Relations Board ("Board") to enforce a federal law establishing standards under which employees could organize and collectively bargain.³⁷² In *Jones & Laughlin Steel*, the Board issued a complaint against the Jones & Laughlin Steel Corporation, alleging they had fired twelve employees from its Aliquippa, Pennsylvania Works for joining unions and/or assisting in collective bargaining in violation of the NLRA.³⁷³ The complaint sought reinstatement of the twelve employees.³⁷⁴

The Board made detailed findings of fact regarding the nature and extent of Jones & Laughlin's plant and concluded that its operations "constitut[ed] a continuous flow of trade, traffic, and commerce among the several states."³⁷⁵ The Board noted that if a strike disrupted the Aliquippa Works, "the business of the Pittsburgh and Lake Erie — an interstate carrier — [of which Jones & Laughlin was its largest shipper] would be seriously crippled."³⁷⁶ Jones & Laughlin ar-

369. *Id.* at 543, 545-46, 548.

370. *Id.* at 550-51.

371. 301 U.S. 1 (1937).

372. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22-24, 43 (1937).

373. *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. 503, 503-04, *enforcement denied*, *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998 (5th Cir.), *cert. granted*, 299 U.S. 534 (1936), *and rev'd*, 301 U.S. 1 (1937).

374. *In re Jones & Laughlin*, 1 N.L.R.B. at 503.

375. *Id.* at 504-09. Jones & Laughlin produced steel, steel ingots, finished rolled products, coke and pig-iron at two Pennsylvania plants, Aliquippa and Pittsburgh. *Id.* at 504-05. It operated as a vertically integrated conglomerate owning ore, coal and limestone mines as well as lake and river boats and facilities and railroad track, terminals and cars. *Id.* at 505. The mines were located in Michigan, Minnesota, Pennsylvania and West Virginia. *Id.* The company maintained warehouses, steel-fabricating shops, distribution centers, stores and yards throughout the Midwestern and Northeastern United States. *Id.* at 506. Although Jones & Laughlin manufactured its products within Pennsylvania, seventy-five percent were shipped out of the state. *Id.* In 1934, the company employed a total of 523,000 men. *Id.* at 507.

376. *In re Jones & Laughlin*, 1 N.L.R.B. at 505.

gued that discharging the employees constituted an intrastate activity, and thus, not subject to Congress' or the Board's control.³⁷⁷ The Board ruled that Jones & Laughlin engaged in unfair labor practices in discharging ten of the twelve employees and that such practices affected interstate commerce.³⁷⁸ The Board issued a cease and desist order instructing Jones & Laughlin to reinstate the fired employees and to post signs in their shops and yards stating that Jones & Laughlin would not discriminate against any employee for joining a union.³⁷⁹

The Board sought enforcement of its order in the United States Court of Appeals for the Fifth Circuit.³⁸⁰ The Fifth Circuit denied the petition for enforcement, stating that "the Board has no jurisdiction over a labor dispute between employer and employees touching the discharge of laborers in a steel plant, who were engaged only in manufacture."³⁸¹ The court reasoned manufacturing comprised a local activity and that commerce as contemplated by the Commerce Clause only refers to the trade of products between the states.³⁸² The court maintained that Jones & Laughlin could engage in production and interstate commerce and that doing both simultaneously in many locations and manners did not allow Congress to regulate activities at manufacturing plants.³⁸³ Thus, the court concluded Congress had no authority to pass the NLRA under which the Board acted.³⁸⁴ The Board filed a petition for writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether Congress had constitutionally promulgated the NLRA.³⁸⁵

The Supreme Court reversed the decision of the Fifth Circuit, holding the NLRA and thus the actions of the Board were not beyond Congress' constitutional authority.³⁸⁶ Chief Justice Charles Hughes, writing for the majority, reasoned that Congress acted within its jurisdiction because the NLRA only purported to reach activities affecting, meaning burdening or obstructing, interstate commerce.³⁸⁷ The Court noted Jones & Laughlin's argument that firing the employees related to manufacturing and not commerce could not defeat federal

377. *Id.* at 504.

378. *Id.* at 517.

379. *Id.* at 517-18.

380. *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998, 998 (5th Cir.), *cert. granted*, 299 U.S. 534 (1936), *and rev'd*, 301 U.S. 1 (1937).

381. *Jones & Laughlin Steel*, 83 F.2d at 998.

382. *Id.* at 999.

383. *Id.*

384. *Id.*

385. *Jones & Laughlin Steel*, 301 U.S. at 22, 30.

386. *Id.* at 30, 43, 49.

387. *Id.* at 31.

jurisdiction because, though intrastate, Jones & Laughlin's activities had a "close and substantial relation to interstate commerce."³⁸⁸ The Court noted that Congress could exercise control over intrastate activities of Jones & Laughlin because it had the power to facilitate the free flow of traffic between the states.³⁸⁹ The Court did not consider the fact the employees Jones & Laughlin fired were only engaged in production of steel determinative.³⁹⁰ The Court found the determinative factor was the effect of Jones & Laughlin's labor practices on interstate commerce.³⁹¹ Because of the close relation Jones & Laughlin's manufacturing had to interstate commerce, the Court found Congress could act under the Commerce Clause to safeguard manufacturing employees against unfair labor practices of their employer.³⁹² Thus, the Court concluded the Board's order, consistent with the NLRA, did not exceed federal power under the Commerce Clause.³⁹³

Justice James McReynolds dissented, joined by Justices Willis Van Devanter, George Sutherland and Pierce Butler, reasoning the Court failed to follow well-established precedent.³⁹⁴ Justice McReynolds reasoned that by upholding the NLRA, the Court approved federal control of "purely local industry beyond anything heretofore deemed permissible."³⁹⁵ The dissent stated that the affecting commerce test for Commerce Clause jurisdiction adopted by the Court authorized congressional control of nearly all "human industry" because almost any activity could be said to affect commerce by following a chain of inferential reasoning.³⁹⁶ The dissent argued the majority failed to distinguish the various interstate and intrastate activities involved.³⁹⁷ The dissent noted that materials flowing into the Aliquippa Works constituted one stream of interstate commerce through transportation.³⁹⁸ Likewise, the dissent noted that the products leaving the Aliquippa Works constituted a new, separate stream of interstate commerce.³⁹⁹ The dissent noted further that while the materials were at Aliquippa Works, manufacturing occurred, an activity distinct and separate from the two streams of commerce, which were themselves distinct.⁴⁰⁰ The dissent stated the effect of an employer's act of dis-

388. *Id.* at 34, 37.

389. *Id.* at 38.

390. *Id.* at 40.

391. *Id.*

392. *Id.* at 43.

393. *Id.* at 43, 49.

394. *Id.* at 76 (McReynolds, J., dissenting).

395. *Id.* at 78 (McReynolds, J., dissenting).

396. *Id.* at 94, 97 (McReynolds, J., dissenting).

397. *Id.* at 98-99 (McReynolds, J., dissenting).

398. *Id.* at 85, 98 (McReynolds, J., dissenting).

399. *Id.* (McReynolds, J., dissenting).

400. *Id.* (McReynolds, J., dissenting).

charging a manufacturing employee could be connected to interstate commerce only through a long chain of inferences.⁴⁰¹ The dissent reasoned that such a chain of inferences showing an effect on commerce could be constructed to justify congressional regulation of "almost anything [including] marriage, birth, [and] death."⁴⁰² The dissent concluded Jones & Laughlin's labor practices did not rise to the level of direct or material interferences within interstate commerce, and thus, the states and not Congress were the proper authorities to legislate such practices.⁴⁰³

The Court's decision in *Jones & Laughlin Steel* numbered one of many in 1937 that signified a transformation in attitude regarding constitutional values pertaining to individualism, private property, and free markets.⁴⁰⁴ The old respect for these values prevalent until 1929 declined quickly and a majority of Americans embraced Roosevelt's social welfarism under the mistaken belief that economic freedom, as opposed to improvident government policies, had in part created and extended the Great Depression.⁴⁰⁵

In *United States v. Darby*,⁴⁰⁶ the United States Supreme Court concluded the Fair Labor Standards Act ("FLSA") was constitutional.⁴⁰⁷ The FLSA declared that employers engaged in interstate commerce who failed to conform to minimum wage and hour requirements established under the Act were prohibited from shipping their goods in interstate commerce.⁴⁰⁸ In *Darby*, the United States indicted, in the United States District Court of the Southern District of Georgia, F. W. Darby Lumber Company and Fred W. Darby for violating minimum wage requirements established by Congress in the FLSA.⁴⁰⁹ The indictment charged that the defendants had violated the FLSA by failing to pay minimum wages to workers manufacturing goods defendants intended to ship in interstate commerce.⁴¹⁰

The court quashed the indictment, holding the indictment failed to notify defendants that their production intrastate "was so connected with interstate commerce as to justify the control of Congress under the commerce clause"⁴¹¹ The court reasoned that the lan-

401. *Id.* at 99 (McReynolds, J., dissenting).

402. *Id.* (McReynolds, J., dissenting).

403. *Id.* at 99-101 (McReynolds, J., dissenting).

404. HIGGS, *supra* note 297, at 192.

405. *Id.* at 192-93.

406. 312 U.S. 100 (1941).

407. *United States v. Darby*, 312 U.S. 100, 108, 122 (1941).

408. *Darby*, 312 U.S. at 109.

409. *United States v. F.W. Darby Lumber Co.*, 32 F. Supp. 734, 734, 737 (S.D. Ga. 1940), *rev'd*, *United States v. Darby*, 312 U.S. 100 (1941).

410. *Darby Lumber*, 32 F. Supp. at 737.

411. *Id.* at 737-38.

guage of the FLSA, as interpreted by the indictment to include the "mere intent" at the time of production to ship goods in interstate commerce, did not satisfy the requirement of a direct connection between production and interstate commerce needed for the court to sustain the FLSA under the Commerce Clause.⁴¹² The orders defendants took from out-of-state customers did not amount to, and were not of such a nature, "as to directly affect interstate commerce."⁴¹³ The indictment ultimately failed because it did not specify how the payment of wages to workers producing goods for prospective out-of-state customers affected interstate commerce.⁴¹⁴

The United States appealed the decision of the district court directly to the United States Supreme Court, arguing the district court erred in holding that Congress did not have the power under the Commerce Clause to punish the acts listed in the indictment.⁴¹⁵ The Supreme Court reversed the decision of the district court, deciding that Congress had the constitutional authority to regulate wages and hours in a productive enterprise.⁴¹⁶ Justice Harlan Stone, writing for the Court, reasoned that Congress could reach the activities of defendants because the FLSA aimed to prevent interstate commerce from becoming an instrument through which substandard labor conditions could spread.⁴¹⁷ While recognizing the activity Congress sought to control under the FLSA occurred intrastate, the Court further reasoned Congress could reach such activity through the Commerce Clause provided the activities in question "have a substantial effect on interstate commerce."⁴¹⁸ Finally, the Court considered the means Congress adopted to attain the end of maintaining standard working conditions nationwide and concluded that suppressing goods produced under substandard conditions from entering interstate commerce was within Congress' power because any such goods entering the competition through commerce "may affect the whole."⁴¹⁹ Thus, the Court concluded Congress could legislate a rational solution to the problem of substandard working conditions in manufacturing because such

412. *Id.* at 737. The court interpreted the following language: "[e]very employer shall pay to each of his employees who is engaged in commerce or in the production of goods for interstate commerce wages at the following rates." *Id.* (quoting Fair Labor Standards Act, 52 Stat. 1060, 1062, sec. 6(a) (1938) (codified as amended at 29 U.S.C. § 206 (1994 and Supp. IV 1998))).

413. *Darby Lumber*, 32 F. Supp. at 736-37.

414. *Id.* at 737.

415. *Darby*, 312 U.S. at 101, 112.

416. *Id.* at 115, 126.

417. *Id.* at 108, 115.

418. *Id.* at 118-19.

419. *Id.* at 123.

goods affect commerce by making commerce the conduit for the spread of substandard labor conditions.⁴²⁰

In *Wickard v. Filburn*,⁴²¹ the United States Supreme Court found that amendments to the Agricultural Adjustment Act of 1938, that penalized a farmer for growing wheat for his own use, thereby exceeding a federally established quota, did not exceed Congress' power under the Commerce Clause.⁴²² In *Wickard*, Roscoe C. Filburn sued Claude R. Wickard, the Secretary of Agriculture, and others to enjoin enforcement of penalty provisions amended to the Act in 1941 pursuant to a national referendum.⁴²³ Filburn operated a small multi-purpose farm in Montgomery County, Ohio, on which he raised poultry and dairy cattle.⁴²⁴ Filburn sold milk, eggs and meat and grew a small amount of winter wheat used for feeding the livestock, chickens and himself.⁴²⁵ Filburn also sold a portion of the wheat he raised and kept a stock of each harvest for seed.⁴²⁶ The Agricultural Adjustment Act established a marketing quota that limited the amount of wheat a farmer could grow.⁴²⁷ The Agricultural Adjustment Act also established penalties for exceeding the quotas.⁴²⁸ In 1941, Secretary Wickard called for a national referendum under which farmers could vote to determine whether to adopt new quotas.⁴²⁹ The referendum passed and the United States assessed Filburn a penalty of 49¢ a bushel for each of the 239 bushels of wheat by which he exceeded the quota.⁴³⁰

The United States District Court for the Southern District of Ohio, hearing the case as a three judge panel, found two-to-one in favor of Filburn, holding that the law increasing the penalty as adopted by referendum violated Filburn's Fifth Amendment due process rights by taking away his property.⁴³¹ The court focused on Secretary Wickard's speech and reasoned it misled farmers into thinking the new amendment would not punish "deliberately planted excess acreage beyond the law in effect at the time of planting."⁴³² The court

420. *Id.* at 115.

421. 317 U.S. 111 (1942).

422. *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942).

423. *Filburn v. Helke*, 43 F. Supp. 1017, 1017-19 (S.D. Ohio), *prob. juris. noted*, *Wickard v. Filburn*, 62 S. Ct. 919, *and rev'd*, 317 U.S. 111 (1942).

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

425. *Id.*

426. *Id.*

427. *Filburn*, 43 F. Supp. at 1017.

428. *Id.* at 1017, 1018.

429. *Id.* at 1017-18. In a radio address, Wickard intimated that if the referendum did not pass with the required two-thirds majority, government support for wheat farmers would end. *Id.* at 1018.

430. *Filburn*, 43 F. Supp. at 1018.

431. *Id.* at 1017, 1019-20.

432. *Id.* at 1019.

noted that the penalty provision voted on in the referendum "was approved only five days prior to the national referendum" adopting the amendments, thus, reasoning many of the farmers relied on Secretary Wickard's speech in deciding whether or not to vote affirmatively.⁴³³

Secretary Wickard appealed the decision of the district court to the United States Supreme Court, which addressed the district court's finding of a violation of Filburn's due process rights based on Secretary Wickard's misleading speech; and whether the amendments to the Agricultural Adjustment Act of 1938 were sustainable as an exercise of Congress' power under the Commerce Clause.⁴³⁴ The Supreme Court reversed the decision of the district court, holding first that Secretary Wickard's speech could not be used as grounds for invalidating the referendum because the record failed to establish what influence if any this speech had on the farmers' votes.⁴³⁵ Second, the Supreme Court held Congress did not exceed its power under the Commerce Clause when it passed the Agricultural Adjustment Act and its amendments, and thus, Congress' power could reach the home-grown and consumed wheat of Filburn.⁴³⁶

Justice Robert Jackson, writing for the Court, reasoned that Filburn's home-grown wheat, "taken together with that of many others similarly situated," created a large amount of wheat that could have entered the market and had a "substantial influence on price and market conditions."⁴³⁷ The Court noted that because the scheme of Agricultural Adjustment Act was to "control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages" and regulate prices in a national market, Congress could properly reach the activities of small wheat-growers such as Filburn.⁴³⁸ The Court stated Congress could reach these activities because it was entitled to consider the effects of the activities it sought to regulate.⁴³⁹ Thus, the Court concluded the activities of many such home-growers and consumers such as Filburn could have a substantial effect on commerce, because if the wheat of many such growers entered commerce in aggregate, it could defeat Congress' attempt to stimulate trade in the national market.⁴⁴⁰

433. *Id.* at 1018-19.

434. *Wickard*, 317 U.S. at 118-30.

435. *Id.* at 117, 133.

436. *Id.* at 128-29.

437. *Id.* at 113, 128.

438. *Id.* at 115, 128-29.

439. *Id.* at 120.

440. *Id.* at 128-129. See Epstein, 71 NOTRE DAME L. REV. at 172-73 (noting that *Wickard's* rationale allowed unlimited expansion of the scope of Congress' power under the Commerce Clause and coincidentally "just about anything" counted as having a substantial relation to interstate commerce); Lewis B. Kaden, *Politics, Money, and State*

In *Heart of Atlanta Motel, Inc. v. United States*,⁴⁴¹ the United States Supreme Court upheld Title II of the Civil Rights Act of 1964 as a valid exercise of Congress' power under the Commerce Clause.⁴⁴² Title II prohibited racial discrimination in public accommodations by business establishments serving the public, where the operations of such businesses affected commerce.⁴⁴³ In *Heart of Atlanta Motel, Inc. v. United States*,⁴⁴⁴ Heart of Atlanta Motel Incorporated ("Heart of Atlanta") brought suit in the United States District Court for the Northern District of Georgia to prevent the United States from enforcing the Civil Rights Act of 1964, thereby attacking the constitutionality of the public accommodation provisions.⁴⁴⁴ Heart of Atlanta operated a motel in downtown Atlanta, Georgia.⁴⁴⁵ The motel refused to rent rooms to persons desiring accommodations on different grounds, one of which was race.⁴⁴⁶

A three-judge panel of the district court heard the case pursuant to 28 U.S.C. § 2282.⁴⁴⁷ The panel found for the United States, holding *per-curiam* the Civil Rights Act constitutional.⁴⁴⁸ The court reasoned the activities of Heart of Atlanta affected interstate commerce so as to "make regulation of them [the] appropriate means to the attainment of [the] legitimate end" of outlawing racial discrimination in public accommodations.⁴⁴⁹ The court found Congress could rationally conclude that the practices of hotel operators related to serving transient guests were activities affecting interstate commerce.⁴⁵⁰ As such, the court would defer to Congress' judgment in passing the Civil Rights Act.⁴⁵¹

Heart of Atlanta appealed the decision of the district court directly to the United States Supreme Court, arguing, *inter alia*, the district court erred by finding that Congress did not exceed its power

Sovereignty, 79 COLUM. L. REV. 847 (1979) reprinted in part in MODERN CONSTITUTIONAL THEORY: A READER 271, 271 (John H. Garvey et al. eds., 1999) (noting that after 1936 Congress began regulating a vast array of intrastate conduct, resulting in a transfer of power away from the states to the federal government); Anna Johnson Cramer, Note, *The Right Results for All the Wrong Reason: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 282 (noting that the Court's decision in *Wickard* approved federal control over purely local conduct effectively reading out of the Commerce Clause the "interstate aspect" of the Clause).

441. 379 U.S. 241 (1964).

442. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

443. *Heart of Atlanta Motel*, 379 U.S. at 247.

444. *Heart of Atlanta Motel, Inc. v. United States*, 231 F. Supp. 393, 394 (N.D. Ga.), *prob. juris. noted*, 379 U.S. 241, and *aff'd*, 379 U.S. 241 (1964).

445. *Heart of Atlanta Motel*, 231 F. Supp. at 394.

446. *Id.*

447. *Id.*

448. *Id.* at 394, 396.

449. *Id.* at 395 (citations omitted).

450. *Id.* at 395, 396.

451. *Id.*

under the Commerce Clause to regulate commerce.⁴⁵² The Supreme Court affirmed the decision of the district court, holding Congress was within its power when it adopted the Civil Rights Act and, thus, the Civil Rights Act was constitutional.⁴⁵³ Justice Tom Clark, writing for the Court, reasoned that Congress acted properly under the Commerce Clause when the activity Congress sought to regulate involved “commerce which concerns more States than one’ and has a real and substantial relation to the national interest.”⁴⁵⁴ The Court found that interstate commerce included intercourse between the states and included persons traveling between states.⁴⁵⁵ The Court observed that racial discrimination had a disruptive effect on commercial intercourse.⁴⁵⁶ Because Heart of Atlanta’s racial discrimination disrupted interstate commerce, Congress could act to alleviate such disruption through the public accommodations provisions of the Civil Rights Act of 1964.⁴⁵⁷ The Court declined to question the means Congress chose to alleviate a disruption of interstate commerce, because it found Congress had a rational basis for concluding that racial discrimination affected interstate commerce and the Civil Rights Act presented a reasonable solution to the problem.⁴⁵⁸

In *United States v. Lopez*,⁴⁵⁹ the United States Supreme Court concluded that Congress exceeded its power under the Commerce Clause when it passed the Gun Free School Zones Act (“GFSZA”) of 1990.⁴⁶⁰ In *Lopez*, a grand jury sitting for the United States District Court in the Western District of Texas indicted Alfonso Lopez, Jr., a twelfth-grader at Edison High School in San Antonio, Texas, for carrying an unloaded .38 caliber handgun and bullets to school.⁴⁶¹ Lopez pled not guilty and filed a motion to dismiss, claiming Congress had exceeded its powers enumerated in the Constitution.⁴⁶² The court denied Lopez’s motion, finding that section 922(q) was a constitutional exercise of the power of Congress to regulate activities affecting com-

452. *Heart of Atlanta Motel*, 379 U.S. at 241, 243-44.

453. *Id.* at 261-62.

454. *Id.* at 242, 255 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194-97).

455. *Id.* at 255-56.

456. *Id.* at 257.

457. *Id.* at 247-48, 257.

458. *Id.* at 261-62.

459. 514 U.S. 549 (1995).

460. *United States v. Lopez*, 514 U.S. 549, 551, 561 (1995). The statute made it illegal to possess a firearm in a school zone. *United States v. Lopez*, 2 F.3d 1342, 1345-46 (5th Cir. 1993), *cert. granted*, 511 U.S. 1029 (1994), *and aff’d*, 514 U.S. 549 (1995) (citing the GFSZA at 18 U.S.C. § 922(q)(1)(A) (1988, Supp. V)).

461. *Lopez*, 2 F.3d at 1345. The proceedings in the district court were taken from the Fifth Circuit opinion. *Id.*

462. *Lopez*, 2 F.3d at 1345.

merce.⁴⁶³ The court reasoned that operating a high school was an activity affecting interstate commerce and, therefore, Congress could properly enact the GFSZA.⁴⁶⁴

Lopez appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, arguing the GFSZA exceeded Congress' delegated powers under the Commerce Clause and intruded upon matters left to the states under the Tenth Amendment.⁴⁶⁵ The government responded by arguing the GFSZA was "no different from a number of other federal firearms crimes" that had a connection to commerce.⁴⁶⁶ After considering at length the history of federal firearms statutes in the United States, the Fifth Circuit reversed Lopez's conviction and remanded, directing the district court to dismiss the indictment.⁴⁶⁷ The court held Congress exceeded its power under the Commerce Clause and thus invalidated section 922(q).⁴⁶⁸ The court reasoned the conviction could not be sustained because Congress had failed to specify in section 922(q) a sufficient nexus between the criminal act of possessing a gun within one-thousand feet of a school and interstate commerce.⁴⁶⁹ The court refused to "simply assume," as the district court did, that solely intrastate possession of a gun without more exerted a substantial effect on interstate commerce.⁴⁷⁰ Further, the court ruled that the government's argument that the GFSZA was simply another species of federal firearms legislation akin to many other enactments then in force failed because "section 922(q) . . . represent[ed] a sharp break with the long-standing pattern of federal firearms legislation."⁴⁷¹ In its reasoning, the court recognized that the commerce power, while broad in scope, "is not unlimited."⁴⁷² The United States filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether Congress exceeded its power under the Commerce Clause when it passed 18 U.S.C. § 922(q).⁴⁷³

463. *Id.*

464. *Id.* After this ruling, the court tried Lopez at a bench trial and found him guilty upon stipulated evidence. *Id.* The court imposed a sentence of six months imprisonment and two years supervised release. *Id.*

465. *Lopez*, 2 F.3d at 1346. The Tenth Amendment states: "[t]he 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." U.S. CONST., amend. X.

466. *Lopez*, 2 F.3d at 1347.

467. *Id.* at 1348-60, 1368.

468. *Id.* at 1367-68.

469. *Id.* at 1346 n.3, 1368.

470. *Id.* at 1366-67.

471. *Id.* at 1347, 1366.

472. *Id.* at 1361.

473. *Lopez*, 514 U.S. at 549, 552.

The Supreme Court affirmed the decision of the Fifth Circuit, holding the law under which the district court convicted Lopez could not stand.⁴⁷⁴ Chief Justice William Rehnquist, writing for the majority, analyzed 18 U.S.C. § 922 (q) under the substantial effects test, which requires that in order for Congress to constitutionally act under the commerce power, the activity in question must substantially affect interstate commerce.⁴⁷⁵ The Court first reasoned that because gun possession in a school zone was not a commercial activity, such activity, when aggregated, did not substantially affect interstate commerce.⁴⁷⁶ The Court ruled that by passing the statute, Congress attempted to criminalize gun possession, an activity that did not relate to commerce in any way.⁴⁷⁷ Thus, the Court found that the GF-SZA, under which Congress proposed to regulate possession of guns near schools, could not stand as a proper use of the commerce power.⁴⁷⁸

Second, the Court reasoned the statute could not stand because it contained no "jurisdictional element which would ensure, through case-by-case inquiry that the firearm possession in question affects interstate commerce."⁴⁷⁹ The Court found a jurisdictional element would have limited the federal government's reach to a "discrete set of firearm possessions" near schools that had an intimate connection with or substantially affected interstate commerce.⁴⁸⁰ The Court stated because the statute did not contain such a limiting element, Congress exceeded its power under the Commerce Clause by creating a statute that reached a class of gun possessions not related to interstate commerce.⁴⁸¹

Third, the Court reasoned that while violent crime may affect the educational process and ultimately exert an adverse effect on the learning environment in schools, such a chain of inferences do not amount to a substantial effect on interstate commerce.⁴⁸² The Court further noted allowing such inferential chains to justify federal regulation would effectively transform Congress' Commerce Clause authority into a general police power.⁴⁸³ Because the Court concluded

474. *Id.* at 561, 568.

475. *Id.* at 550, 559. Congress can also act constitutionally under the commerce power if the statute in question deals with the channels of interstate commerce or instrumentalities, persons and things in interstate commerce. *Id.* at 558 (citations omitted).

476. *Lopez*, 514 U.S. at 561.

477. *Id.*

478. *Id.* at 551, 561.

479. *Id.* at 561.

480. *Id.* at 562.

481. *Id.* at 561-62.

482. *Id.* at 564, 567.

483. *Id.* at 567.

that the Constitution does not grant the federal government general police power, and the GFZSA did not regulate commerce, the Court found the GFZSA unconstitutional.⁴⁸⁴

Justice Clarence Thomas authored a concurring opinion.⁴⁸⁵ Justice Thomas observed that the substantial effects test, the test employed by the majority, rests on "case law [that] has drifted far from the original understanding of the Commerce Clause."⁴⁸⁶ Justice Thomas reasoned the substantial effects test, "if taken to its logical extreme, gives Congress a 'police power.'"⁴⁸⁷ Therefore, Justice Thomas argued for a reconsideration of the substantial effects test in light of the Commerce Clause's text and history.⁴⁸⁸ Justice Thomas first examined the meaning of the word commerce at the time the Constitution was ratified and concluded that commerce does not mean all activities related to production and products.⁴⁸⁹ Justice Thomas noted the word "commerce" means only the buying, selling and transportation of products.⁴⁹⁰ Pointing to the structure of the Commerce Clause, Justice Thomas concluded it does not subsume everything substantially affecting commerce because such an interpretation renders eight of the other clauses in Article I surplusage.⁴⁹¹

Justice Thomas also found support for a distinction between commerce and other economic activities in literature written at the time of the Nation's founding.⁴⁹² In particular, Justice Thomas noted the Founding Fathers were aware of the substantial effects manufacturing and agriculture could impose on commerce, but the Constitution did not "cede authority over all these activities to Congress."⁴⁹³ Justice Thomas noted that the meaning of *Gibbons* has been misconstrued in order to support the substantial effects test.⁴⁹⁴ Justice Thomas further stated that the aggregation principle, implicitly accepted by the majority and a large part of the Court's substantial effects jurisprudence, "has no stopping point."⁴⁹⁵ Justice Thomas

484. *Id.* at 567-68.

485. *Id.* at 584 (Thomas, J., concurring).

486. *Id.* (Thomas, J., concurring).

487. *Id.* (Thomas, J., concurring).

488. *Id.* at 585 (Thomas, J., concurring). See Thomas W. Merrill, *Toward A Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y. 31, 33 (1998) (noting the Court failed to set any clear theory of the Commerce Clause's outer limits when it decided *Lopez*).

489. *Lopez*, 514 U.S., at 586-87 (Thomas, J., concurring).

490. *Id.* at 587 (Thomas, J., concurring).

491. *Id.* at 588-89 (Thomas, J., concurring). Justice Thomas cited in particular Article I, section 8 clauses 4, 5, 6, 7, 8, 10, 12 and 13. *Id.* (Thomas, J., concurring).

492. *Lopez*, 514 U.S. at 590-91 (Thomas, J., concurring).

493. *Id.* at 591 (Thomas, J., concurring).

494. *Id.* at 593-94 (Thomas, J., concurring).

495. *Id.* at 600 (Thomas, J., concurring).

concluded by suggesting the Court craft a new test for constitutionality under the Commerce Clause in the context of an appropriate future case.⁴⁹⁶

Justice Stephen Breyer joined by Justices John Stevens, David Souter, and Ruth Bader Ginsburg dissented, reasoning the GFSZA fell “well within the scope of the commerce power as [the] Court has understood that power for over the last half century.”⁴⁹⁷ The dissent accepted the substantial effects test and aggregation principle, and stated the Court must defer to Congress’ factual determinations that an activity it chooses to govern affects interstate commerce.⁴⁹⁸ Next, the dissent stated the Court needed to determine in this case whether Congress “could have had a rational basis for finding a . . . substantial connection between gun-related school violence and interstate commerce.”⁴⁹⁹ The dissent then marshaled a large number of factual data and reports to show Congress could have rationally found that gun possession near schools exerted a substantial effect on interstate commerce.⁵⁰⁰

Finally, the dissent stated the majority’s opinion caused three problems.⁵⁰¹ First, the majority’s decision contradicted settled Commerce Clause precedent in which other federal statutes criminalizing intrastate conduct were found valid.⁵⁰² Second, the majority’s decision created a test that judged an activity by its fit into a particular category, rather than its effect on interstate commerce.⁵⁰³ Third, the dissent determined the majority’s decision threatened “legal uncertainty in an area of law that . . . [had been] reasonably well settled” and will restrict Congress’ ability to make new law protecting the well-being of Americans.⁵⁰⁴

In 1994, Congress passed the Violence Against Women Act (“VAWA”)⁵⁰⁵ because, in Congress’ estimation, neither State nor Federal law adequately protected women from violent, gender motivated

496. *Id.* at 602 (Thomas, J., concurring).

497. *Id.* at 615 (Breyer, J., dissenting).

498. *Id.* at 615-17 (Breyer, J., dissenting).

499. *Id.* at 618 (Breyer, J., dissenting).

500. *Id.* at 623 (Breyer, J., dissenting).

501. *Id.* at 625 (Breyer, J., dissenting).

502. *Id.* (Breyer, J., dissenting).

503. *Id.* at 627 (Breyer, J., dissenting).

504. *Id.* at 630-31 (Breyer, J., dissenting).

505. 42 U.S.C. § 13981 (1994). 42 U.S.C. § 13981 was Subtitle C of Title IV of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, 1941-42 (1994) (codified as 42 U.S.C. § 13981 (1994)). Subtitle C was also known as the Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13981 (1994)).

crime.⁵⁰⁶ Congress decided to create a federal civil rights remedy for crimes of gender based violence occurring “on the street or in the home” in order to allow victims of gender based violence to protect their interests.⁵⁰⁷ Congress provided two rationale for the VAWA.⁵⁰⁸ First, Congress thought the VAWA was necessary to provide victims of gender violence with equal protection of the law.⁵⁰⁹ Second, Congress thought the VAWA was necessary to reduce what it characterized as gender motivated violence’s “substantial adverse effect on interstate commerce.”⁵¹⁰

The VAWA’s stated purpose was to “protect the civil rights of victims of gender motivated violence and to promote public safety, health and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.”⁵¹¹ Subsection (b) of the VAWA conferred a right on all persons “to be free from crimes of violence motivated by gender.”⁵¹² The VAWA next delineated a private right of action by victims of gender-motivated violence against their attackers.⁵¹³ Actions prosecuted under the auspices of the VAWA required that the plaintiff be a victim of a crime committed “because of gender, or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”⁵¹⁴ A “crime of violence” meant a felony against a person as defined under state or federal law or a property crime that presents serious risk of physical harm.⁵¹⁵ The VAWA did not purport to cover crimes of violence not motivated by gender.⁵¹⁶ The VAWA expressly provided that there was no federal court jurisdiction over matters of divorce, alimony, marital property or child custody.⁵¹⁷

506. H.R. CONF. REP. NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

507. H.R. CONF. REP. NO. 103-711, at 385.

508. *Id.*

509. *Id.*

510. *Id.* Congress cited as effects everything from deterring women from traveling interstate to decreasing the “supply and demand for interstate products . . .” *Id.*

511. 42 U.S.C. § 13981(a) (1994).

512. 42 U.S.C. § 13981(b) (1994).

513. 42 U.S.C. § 13981(c) (1994). This subsection allowed the injured party to recover punitive and compensatory damages and to seek injunctive or declaratory relief. 42 U.S.C. § 13981(c).

514. 42 U.S.C. § 13981(d)(1) (1994). The act does not require that the defendant be first charged or convicted of committing the violent felony underlying the plaintiff’s cause of action. 42 U.S.C. § 13981(e)(2) (1994).

515. 42 U.S.C. § 13981(d)(2)(A) (1994).

516. 42 U.S.C. § 13981(e)(1) (1994).

517. 42 U.S.C. § 13981(e)(4) (1994).

ANALYSIS

In *United States v. Morrison*,⁵¹⁸ the United States Supreme Court applied the substantial effects test articulated by the Court in *United States v. Lopez*,⁵¹⁹ to find that Congress exceeded its power under the Commerce Clause when it passed the Violence Against Women Act ("VAWA"),⁵²⁰ which provided victims of gender motivated violence with a federal civil cause of action against their alleged attackers.⁵²¹ The majority opinion, relying squarely on the Court's decision in *Lopez*, essentially used a comparative analytical format to conclude that, like the Gun Free School Zones Act ("GFSZA") in *Lopez*, the VAWA tried to regulate "non-economic, violent criminal conduct."⁵²² Beyond its reliance on *Lopez*, the Court refused to extend its holding in *Wickard v. Filburn*,⁵²³ which upheld the regulation of extremely local economic activity because of its aggregate effect on interstate commerce.⁵²⁴ The Court noted that extensive congressional findings cannot by themselves render a statute constitutional.⁵²⁵ The holding in *Morrison* confirmed that the Court's decision in *Lopez* was an accurate statement of law with regard to the Commerce Clause.⁵²⁶ While the majority in *Morrison* accepted *Lopez* as controlling precedent, an unanswered question remains: whether *Lopez's* substantial effects analysis really represents the correct understanding of the meaning and scope of Congress' power under the Commerce Clause.⁵²⁷

Unfortunately, the Court's continued reliance on the substantial effects test in *Morrison* perpetuates an incorrect understanding of the

518. 120 S. Ct. 1740 (2000).

519. 514 U.S. 549 (1995).

520. *United States v. Morrison*, 120 S. Ct. 1740, 1745, 1751-54 (2000).

521. 42 U.S.C. § 13981 (1994). 42 U.S.C. § 13981 was Subtitle C of Title IV of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, 1941-42 (1994) (codified as 42 U.S.C. § 13981 (1994)). Subtitle C was also known as the Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13981 (1994)). For convenience, this Analysis will refer, as did the district court, to 42 U.S.C. § 13981 as the VAWA throughout. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 785 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc*, 169 F.3d 820 (4th Cir.), *cert. granted*, *United States v. Morrison*, 527 U.S. 1068 (1999), *cert. dismissed in part*, 529 U.S. 1062, *and aff'd*, 529 U.S. 598 (2000) (hereafter *Brzonkala II*).

522. *Morrison*, 120 S. Ct. at 1749-54.

523. 317 U.S. 111 (1942).

524. *Morrison*, 120 S. Ct. at 1750, 1753-55; *Wickard v. Filburn*, 317 U.S. 111, 113, 115, 120, 128-29 (1942).

525. *Morrison*, 120 S. Ct. at 1752.

526. *Compare Id.* at 1749-55 (relying on *United States v. Lopez*, 514 U.S. 549 (1995) as the most recent decision regarding Congress' Commerce Clause authority to find that Congress did not have the power under the Commerce Clause to enact VAWA), *with Morrison*, 120 S. Ct. at 1777-78 (Breyer, J., dissenting) (contending that *Lopez* is not an accurate statement of the law).

527. *See infra* notes 604-720 and accompanying text.

Commerce Clause that began with the Court's New Deal cases.⁵²⁸ The substantial effects test is incorrect because it allows Congress to exceed its power and encroach on areas of law reserved to the States under the Tenth Amendment.⁵²⁹ The substantial effects test is incorrect and the Court must craft in the future a more rigorous test of federal legislation passed under the guise of the Commerce Clause to prevent Congress from gaining "a police power over all aspects of American life."⁵³⁰ First, this Analysis will examine the broad scope of the substantial effects test.⁵³¹ Second, this Analysis will examine why cases like *Morrison*, while placing a limit on Congress' power, do not rest on a sound footing.⁵³² Third, this Analysis will discuss why the substantial effects test is incorrect and why the original meaning of the Commerce Clause ought to provide a guide for the Court and Congress.⁵³³ Fourth, this Analysis will discuss what is meant by the original understanding of the Commerce Clause and argues that cases like *Gibbons v. Ogden*⁵³⁴ and *United States v. E.C. Knight & Co.*⁵³⁵ reflect the Commerce Clause's original meaning upon which future commerce clause decisions ought to rest.⁵³⁶

A. THE SUBSTANTIAL EFFECTS TEST AS APPLIED IN *MORRISON*

The substantial effects test as applied in *Morrison* continues to allow Congress to regulate private, intrastate non-economic conduct despite the Court's attempt to establish an economic versus non-economic distinction.⁵³⁷ The substantial effects test is a twentieth century invention.⁵³⁸ Its breadth currently allows Congress to regulate everything from wheat grown for home consumption, to wages, hours, and labor practices and racially discriminatory conduct.⁵³⁹ Given this

528. See *infra* notes 566-624 and accompanying text.

529. *United States v. Lopez*, 514 U.S. 549, 584-85, 589 (1995); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. at 1231, 1234, 1236 (1994).

530. *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring). See *infra* notes 604-720 and accompanying text.

531. See *infra* notes 538-64 and accompanying text.

532. See *infra* notes 566-603 and accompanying text.

533. See *infra* notes 604-24 and accompanying text.

534. 22 U.S. (9 Wheat) 1 (1824).

535. 156 U.S. 1 (1895).

536. See *infra* notes 626-720 and accompanying text.

537. See *infra* notes 538-64 and accompanying text.

538. *Lopez*, 514 U.S. at 596 (Thomas, J., concurring).

539. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253, 256-62 (1964) (approving Congressional regulation of intrastate conduct — racially discriminatory conduct in public accommodations — under the 1964 Civil Rights Act because racial discrimination substantially affected commerce by preventing black men and women from traveling); *Wickard*, 317 U.S. at 115, 127-29 (approving Congressional regulation of intrastate conduct — home-grown wheat for home consumption — under the Agricultural Adjustment Act of 1938 because of the substantial effect on commerce

range of federally regulated activity, the dissent in *Morrison* reasoned the substantial effects test covered violence against women because Congress concluded violence against women had an effect on interstate commerce.⁵⁴⁰ In *Morrison*, the United States' main argument in its brief supporting Brzonkala contended because violent crime against women "impede[s] its victims' efforts to work, travel, and engage in other economic activity," violence against women substantially affects interstate commerce.⁵⁴¹ The United States' argument for upholding the VAWA under the Commerce Clause followed the rationale in *NLRB v. Jones & Laughlin Steel Corp.*,⁵⁴² *United States v. Darby*,⁵⁴³ *Wickard*, and some of the Court's other twentieth century precedents establishing the substantial effects test.⁵⁴⁴ While in *Morrison*, through its reliance on *Lopez*, the Court purported to limit Congress' power by striking down the VAWA, the substantial effects test

many similar wheat-growers and consumers could have had); *United States v. Darby*, 312 U.S. 100, 108-11, 117-26 (1941) (approving Congressional regulation of intrastate conduct — minimum wages and hours for employees — under the Fair Labor Standards Act because companies without minimum wage and hour standards could have substantially affected interstate commerce by introducing goods produced at lower cost into interstate commerce); *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30-31, 34, 37-38, 40, 43, 49 (1937) (approving Congressional regulation of intrastate conduct — union organizing and manufacturers' labor practices — under the NLRA because labor practices of manufacturers could have had a substantial effect on interstate commerce).

540. *Morrison*, 120 S. Ct. at 1764 (Souter, J., dissenting) (noting that at any time between *Wickard* in 1942 and *Lopez* in 1995 "the VAWA would have passed Court review as a valid exercise of Congress' power under the Commerce Clause").

541. Brief for the United States at 3, 20, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5 and 99-29).

542. 301 U.S. 1 (1937).

543. 312 U.S. 100 (1941).

544. Compare Brief for the United States, at 20-32, *Morrison*, (Nos. 99-5, 99-29) (relying on, among other cases, *Heart of Atlanta Motel*, *Wickard*, *Darby*, and *Jones & Laughlin Steel* to argue that section 13981 of the VAWA was a legitimate exercise of Congress' authority under the Commerce Clause because gender-motivated violence placed had a substantial effect on interstate commerce by curtailing victims' participation in the national economy), with *Heart of Atlanta Motel*, 379 U.S. at 247-50, 252-62 (finding that Congress could regulate racial discrimination in public accommodations because Congress concluded such conduct substantially affected commerce by discouraging black men and women from traveling interstate), *Wickard*, 317 U.S. at 128-30 (finding Congress could regulate home-grown and consumed wheat because Congress concluded that a large number of home-growers-and-consumers affected commerce by growing wheat that could enter the market and thereby substantially affect price and market conditions), *Darby*, 312 U.S. at 121-26 (finding Congress could regulate wages and hours in manufacturing because Congress found that a lack of a national standard for wages and hours allowed non-complying manufacturers to exert an effect on interstate commerce when they shipped their goods interstate), and *Jones & Laughlin Steel*, 301 U.S. at 30-31, 36-43 (finding Congress could regulate manufacturers' labor practices and union activity because Congress was regulating intrastate activities that substantially affected interstate commerce).

preserve Congress' broad regulatory reach that is the foundation of the America's large administrative state.⁵⁴⁵

For example, in *Heart of Atlanta Motel Inc. v. United States*,⁵⁴⁶ the Court used the substantial effects test articulated in its New Deal cases to uphold the 1964 Civil Rights Act as a valid exercise of Congress' power under the Commerce Clause.⁵⁴⁷ While the setting in which the behavior regulated in *Heart of Atlanta Motel* was commercial in nature, the actual activity regulated, racial discrimination, was purely non-economic in nature.⁵⁴⁸ Yet, the Court allowed federal regulation of non-economic behavior by relying on evidence showing racial discrimination practiced by businesses such as Heart of Atlanta substantially affected interstate commerce by discouraging black men and women from traveling.⁵⁴⁹ In *Morrison*, Justice David Souter cites a large number of reports, studies, and Congressional hearings purporting to show a large, aggregate effect of violence against women on the American economy.⁵⁵⁰ Control of intrastate private conduct was the goal of the Civil Rights Act of 1964 and the VAWA, yet the Court decided Congress acted within the scope of its Commerce Clause authority in *Heart of Atlanta Motel* and outside its scope in *Morrison*.⁵⁵¹ Superficially, the difference in outcomes as between the Court's decisions in *Morrison* and *Heart of Atlanta Motel* seems to turn on an economic/non-economic dichotomy.⁵⁵² However, comparing *Heart of Atlanta Motel* with *Morrison* reveals the economic/non-economic di-

545. Compare *Morrison*, 120 S. Ct. at 1748-55 (relying on *Lopez* and the substantial effects test to strike down the VAWA as beyond Congress' authority under the Commerce Clause), and *Lopez*, 514 U.S. at 553-568 (discussing the substantial effects as it evolved from earlier twentieth century Commerce Clause cases and applying the test to strike down the GFSZA as beyond Congress' power under the Commerce Clause), with Epstein, 71 NOTRE DAME L. REV. at 167-92 (analyzing the Court's opinion, concurrences and dissents in *Lopez* and concluding that the Court's opinion approves of New Deal jurisprudence that created the substantial effects test and suggesting that the Court's failure to overturn past cases such as *Wickard* preserves a large, federal administrative state).

546. 379 U.S. 241 (1964).

547. *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 256-58, 261-62 (1964).

548. *Heart of Atlanta Motel*, 379 U.S. at 252-53.

549. *Id.* at 253, 256-62.

550. *Morrison*, 120 S. Ct. at 1759-1764 & nn.3-8 (Souter, J., dissenting).

551. Compare *Heart of Atlanta Motel*, 379 U.S. at 241-44, 247-48, 255-57, 261-62 (upholding Civil Rights Act of 1964 under which Congress could regulate, under the Commerce Clause, conduct of motel operator even though conduct occurred completely intrastate), with *Morrison*, 120 S. Ct. at 175-54 (striking down VAWA, which attempted to regulate conduct occurring completely intrastate, as an impermissible exercise of Congress' power under the Commerce Clause).

552. *Morrison*, 120 S. Ct. at 1750.

chotomy as no more than a commercial/non-commercial setting distinction.⁵⁵³

In *Heart of Atlanta Motel* the Court set forth the following test with no reference to the economic or non-economic character of the activity: "[t]he determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more states than one' and has a real and substantial relation to the national interest."⁵⁵⁴ In *Heart of Atlanta Motel*, the activity regulated was technically engaging in racial discrimination while running a hotel catering to interstate travelers.⁵⁵⁵ The Court found that the Civil Rights Act articulated a setting, interstate commerce, in which Congress could regulate racial discrimination.⁵⁵⁶ Yet, the clear goal of the public accommodations provisions of the 1964 Civil Rights Act was to allow Congress to control non-economic, private conduct of individuals — i.e. racial discrimination.⁵⁵⁷ In *Morrison*, the Court focused on the violent nature of the conduct regulated and characterized gender-motivated crimes as non-economic activity.⁵⁵⁸ The Court concluded its effects on interstate commerce were too attenuated to substantially affect interstate commerce.⁵⁵⁹ In other words, the Court found no commercial nexus between violence against women and interstate commerce, despite a voluminous congressional record purporting to show the contrary.⁵⁶⁰ The commercial nexus requirement reveals the economic/non-economic dichotomy articulated in *Morrison* is really a different distinction when viewed in light of the Court's decision in *Heart of Atlanta Motel*: intrastate, non-economic, conduct outside a commercial setting in *Morrison* versus intrastate, non-economic conduct in a commercial setting in *Heart of Atlanta Motel*.⁵⁶¹ Thus, what appears superficially as a basic economic/non-economic activity distinction is really a commercial/non-commercial setting dichotomy.⁵⁶²

553. See *infra* notes 554-62 and accompanying text.

554. *Heart of Atlanta Motel*, 379 U.S. at 255.

555. *Id.* at 243, 247, 249.

556. *Id.* at 247, 257.

557. *Id.* at 247, 258.

558. *Morrison*, 120 S. Ct. at 1750-52.

559. *Id.* at 1751-52, 1754, 1758.

560. *Id.* at 1750-52. See *Id.* at 1760-63 & nn.3-8 (Souter, J., dissenting) (listing several Congressional hearings, reports, and other material purporting to link violence against women to effects on the economy).

561. *Morrison*, 120 S. Ct. at 1749-50, 1754; *Heart of Atlanta*, 379 U.S. at 247, 258. Compare *Morrison*, 120 S. Ct. at 1745-47, 1754 (showing violence against Brzonkala occurred at a university — a non-commercial setting), with *Heart of Atlanta Motel*, 379 U.S. at 243-45, 247-258 (showing racial discrimination occurred at a motel — a commercial setting).

562. Compare *Morrison*, 120 S. Ct. at 1745-50, 1754 (showing violence against Brzonkala occurred at a university — a non-commercial setting), with *Heart of Atlanta*

The commercial/non-commercial setting dichotomy does not represent a meaningful limit on Congress' Commerce Clause power because the dichotomy still preserves the substantial effects main analytical feature and thus fails to prevent Congress from reaching private intrastate, non-economic conduct.⁵⁶³ In short, despite *Morrison* and *Lopez*, the broad scope of the substantial effects test as articulated in the Court's New Deal cases allows Congress to exceed its limit of power granted under the Commerce Clause.⁵⁶⁴

B. DESPITE OVERRULING THE VAWA, *MORRISON* PRESERVED THE SUBSTANTIAL EFFECTS TEST'S MAIN ANALYTICAL FEATURE: THE AGGREGATION PRINCIPLE

In deciding *Morrison*, the Court continued its reliance on the substantial effects test articulated in its New Deal cases and thus did nothing to prevent Congress from reaching non-economic, or intrastate economic private conduct.⁵⁶⁵ The Court preserved the aggregation principle set forth in *Wickard*, while distinguishing the conduct at issue under the VAWA as non-economic.⁵⁶⁶ The principal dissent in *Morrison* would have upheld the VAWA under the substantial effects test because the focus of the substantial effects test is an activity's effect on interstate commerce regardless of its intrastate or interstate nature.⁵⁶⁷ The nature of the activity Congress sought to regulate no longer mattered after the Court decided *Jones & Laughlin Steel, Darby* and *Wickard*.⁵⁶⁸ The Court's New Deal cases made an activity's effect on interstate commerce the deciding factor in whether Congress could regulate a particular activity under the aegis of the Commerce Clause.⁵⁶⁹

Motel, 379 U.S. at 243-45, 247, 258 (showing racial discrimination occurred at a motel — a commercial setting).

563. See *infra* notes 566-624 and accompanying text.

564. See *Morrison*, 120 S. Ct. at 1749-50 (relying explicitly on *Lopez* to decide the Constitutionality of VAWA); Epstein, 71 NOTRE DAME L. REV. 167 (analyzing *Lopez* and concluding that the Court's failure to overrule the New Deal cases maintained an incorrect vision of government); Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999, 1011 (1996) (noting that the substantial effects test does not preserve a constitutional government).

565. See *infra* notes 566-624 and accompanying text.

566. Compare *Morrison*, 120 S. Ct. at 1750 (affirming Court's use of substantial effects test based on aggregate effects of conduct), with *Wickard*, 317 U.S. at 127-128 (noting that home-grown wheat for home consumption when aggregated constitutes an effect on interstate commerce that allows Congress to regulate home-grown wheat).

567. *Morrison*, 120 S. Ct. at 1759-64 (Souter, J., dissenting).

568. *Lopez*, 514 U.S. at 556, 558-59; Epstein, 71 NOTRE DAME L. REV. at 173.

569. *Lopez*, 514 U.S. at 558-59 (concluding that the current pattern of the Court's jurisprudence under the Commerce Clause is to focus on an activity's effect on interstate commerce.); Epstein, 73 VA. L. REV. at 1443-44 (noting the New Deal cases removed previous limitations on the scope of Congress' reach under the Commerce Clause).

In *Jones & Laughlin Steel*, the Court dealt with regulation of unfair labor practices by firms engaged in selling or buying products that traveled interstate commerce.⁵⁷⁰ In *Darby*, the Court dealt with regulation of wages and hours of firms engaged in buying and selling of products traveling in interstate commerce.⁵⁷¹ In *Wickard*, the Court dealt with regulation of a farmer's decision to grow wheat for home consumption.⁵⁷² These three cases represent the fountainhead of the substantial effects test and rely on a jurisdictional device Richard Epstein calls a legal fiction.⁵⁷³ Simply, Epstein argues the Court read into the Commerce Clause a new phrase: "Congress shall have the power to regulate commerce, and all matters affecting commerce with foreign nations, among the several states . . ." ⁵⁷⁴

In construing the National Labor Relations Act ("NLRA") in *Jones & Laughlin Steel*, the Court relied on the language of the NLRA conferring on the National Labor Relations Board ("Board") the power "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."⁵⁷⁵ The Court then used the NLRA's definition of affecting commerce to support its holding of constitutionality, stating the NLRA only reached industries active in interstate commerce and not all industry regardless of a labor practice's effect on interstate commerce.⁵⁷⁶ The character of the individual conduct receded in commerce clause analysis and the effect of an act on interstate commerce became, and still is under *Morrison* and *Lopez*, the relevant unit of analysis.⁵⁷⁷ By making the effect of an individual's conduct instead of the conduct itself the relevant unit of analysis, the Court ceded to

by reading the Commerce Clause as saying that Congress had the "power to regulate commerce, and all matters affecting commerce . . .").

570. *Jones & Laughlin Steel*, 301 U.S. at 22-24.

571. *Darby*, 312 U.S. at 108-13.

572. *Wickard*, 317 U.S. at 128-30.

573. *Lopez*, 514 U.S. at 556, 595, 599; Epstein, 73 VA. L. REV. at 1444. See Anna Johnson Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271-282 (2000) (noting that once the Supreme Court approved national control over strictly local conduct, it read out of the Commerce Clause the word 'interstate').

574. Epstein, 73 VA. L. REV. at 1444 (emphasis added).

575. *Jones & Laughlin Steel*, 301 U.S. at 30.

576. *Id.* at 31. "The term affecting commerce means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Id.*

577. *Jones & Laughlin Steel*, 301 U.S. at 37. The Court noted that "[a]cts [affecting interstate commerce] are not rendered immune because they grow out of labor disputes." *Id.* at 31-32. See *Morrison*, 120 S. Ct. at 1751-54 (analyzing conduct regulated under the VAWA in terms of its effect on interstate commerce); *Lopez*, 514 U.S. at 550, 559, 561, 568 (analyzing conduct regulated under the GFSZA in terms of its effect on interstate commerce); Epstein, 73 VA. L. REV. 1443-44 (discussing the New Deal cases and noting that the Court allowed Congress to regulate not commerce but any activities broadly affecting commerce).

Congress a sweeping federal regulatory power persisting to this day.⁵⁷⁸ In essence, under the substantial effects test, the word "commerce" in the Commerce Clause means affecting commerce.⁵⁷⁹ In *Jones & Laughlin Steel*, because a work stoppage at the Aliquippa Works would affect interstate commerce by stopping manufactured goods from entering interstate commerce, Congress could regulate.⁵⁸⁰

The Court's analysis in *Darby* only reinforces the substantial effects fiction.⁵⁸¹ The Court in *Darby* noted the Fair Labor Standards Act ("FLSA") was "nominally a regulation of the commerce its motive [being] the regulation of wages and hours of persons engaged in manufacturing . . . within the state."⁵⁸² Part of *Darby's* rationale relied on effects one-step removed from those stated in *Jones & Laughlin Steel*.⁵⁸³ The effects the *Darby* Court pointed to were alleged ripple effects in the market that goods produced under non-federal labor standards would have.⁵⁸⁴ Congress could control the *Darby* Company's wage and hour structure because if Congress could not, then *Darby's* goods would travel into interstate commerce and, theoretically, exert adverse competitive pressure on goods produced by similar companies under the federal labor standards.⁵⁸⁵ Thus, if any question remained after *Jones & Laughlin Steel* of the proximity of the activity to the substantial effect required for Congress to act under the substantial effects test, *Darby* answered by saying that the activity did not need to directly affect commerce, and Congress could regulate the activity if it could be theoretically traced to an ultimate factor, which directly impinged on interstate competition.⁵⁸⁶ The *Darby* Court not only reinforced the holding in *Jones & Laughlin Steel*, but set the stage for even further expansion of federal reach in *Wickard*, the case

578. Cramer, Note, 53 VAND. L. REV. at 283-84, Epstein, 73 VA. L. REV. at 1443; Lawson, 107 HARV. L. REV. 1231, 1236; Pilon, 40 N.Y.L. SCH. L. REV. at 1005. See *supra* notes 576-77 and accompanying text.

579. *Lopez*, 514 U.S. at 555.

580. *Jones & Laughlin Steel*, 301 U.S. at 41-43.

581. Epstein, 73 VA. L. REV. at 1444, 1447-1452.

582. *Darby*, 312 U.S. at 113.

583. Compare *id.* at 117-24 (analyzing FLSA and *Darby's* conduct violating that act and noting that the FLSA aimed to regulate goods manufactured before or even if the manufacturer did not intend to ship them in interstate commerce), with *Jones & Laughlin Steel*, 301 U.S. at 22-24, 27-28, 31, 43 (noting that Congress could regulate collective bargaining at *Jones & Laughlin Steel* because *Jones & Laughlin* shipped its products in interstate commerce).

584. *Darby*, 312 U.S. at 114.

585. *Id.* at 109, 115, 122. Congress exerted its control by preventing *Darby* from shipping goods in interstate commerce produced under non-federal wage rates and hours. *Id.* at 122, 125-26.

586. *Darby*, 312 U.S. at 117-18. Epstein noted that the Court accepted the "substantive case for the statute at face value . . ." Epstein, 73 VA. L. REV. at 1448.

Chief Justice Rehnquist in *Lopez* described as “the most far reaching example of Commerce Clause authority over intrastate activity.”⁵⁸⁷

In *Wickard*, the Court extended Congress’ reach under the substantial effects to consumption of home-grown wheat.⁵⁸⁸ Unlike *Jones & Laughlin Steel* and *Darby*, the regulated individual conduct involved no sale or transaction in commerce at all.⁵⁸⁹ Again, the Court engaged in a theoretical exercise, concluding the “volume and variability [of] home-consumed wheat would have a substantial influence on price and market conditions.”⁵⁹⁰ Thus, Congress could control an individual’s decision to plant and consume wheat wholly intrastate simply because of the possible effect such decisions by a large number of individuals might have on the national market price for wheat.⁵⁹¹ With the Court’s decision in *Wickard*, whether the activity in question directly related to interstate commerce no longer mattered.⁵⁹² Under *Wickard*, the Court solidified the substantial effects fiction and an activity’s supposed effect on interstate commerce became everything.⁵⁹³ Despite the Court’s rejection of Congress’ attempts to regulate intrastate conduct based on the aggregate effects on interstate conduct of gender-motivated violence and guns in schools in *Morrison* and *Lopez*, the effects of an activity Congress seeks to regulate and not the activity itself remains the relevant unit of analysis.⁵⁹⁴

In *Morrison*, the Court relied directly on *Lopez*’s formulation of the substantial effects test.⁵⁹⁵ In *Lopez*, the Court stated the substantial effects test only allowed Congress to constitutionally pass “regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] in-

587. *Lopez*, 514 U.S. at 551, 560. Compare *Darby*, 312 U.S. at 117-26 (relying on among other cases, *Jones & Laughlin Steel*, to uphold federal regulation of intrastate conduct allegedly affecting interstate commerce — wages and hours — under the FLSA), with *Wickard*, 317 U.S. at 115, 118, 128-129 (upholding federal regulation of intrastate commerce allegedly affecting interstate commerce — home-grown and consumed wheat — under the Agricultural Adjustment Act of 1938).

588. Epstein, 73 VA. L. REV. at 1450.

589. *Id.*

590. *Wickard*, 317 U.S. at 128.

591. *Id.* at 127-28.

592. Epstein, 73 VA. L. REV. at 1450.

593. *Wickard*, 317 U.S. at 127-28. The Court focused on a supposed aggregate effect on interstate commerce of many farmers doing what *Filburn* did. *Id.*

594. See *Morrison*, 120 S. Ct. at 1749-54 (noting that Petitioner’s sought to uphold the VAWA as “regulation of activity that substantially affects interstate commerce”); *Lopez*, 514 U.S. at 560 (noting that activities substantially affecting interstate commerce can be regulated). See also Epstein, 71 NOTRE DAME L. REV. at 173 (analyzing *Lopez* and noting individuals not engaged in any interstate trade are subject to federal regulation merely because they engage in conduct made a part of a class of federally regulated activity Congress says affects commerce).

595. *Morrison*, 120 S. Ct. at 1749.

terstate commerce."⁵⁹⁶ The *Lopez* Court, however, also admitted that determining what was commercial as opposed to non-commercial was legally uncertain and imprecise.⁵⁹⁷ The uncertainty stems from the fact that the substantial effects test reaches both economic and non-economic activities and thus, rejects principled distinctions reflecting a difference between commerce and other activities, such as the production-commerce distinction.⁵⁹⁸ Indeed, private, intrastate non-economic activities such as consuming home-grown wheat, establishing working conditions and Morrison's assault on Brzonkala could not seriously be considered "commerce among the several states."⁵⁹⁹ Yet, the New Deal cases upheld federal statutes regulating non-economic, intrastate activities but *Morrison* struck down a federal statute regulating non-economic, intrastate activities while preserving the substantial effects test.⁶⁰⁰ The Court hung its decision in *Morrison* on a flimsy commercial/non-commercial setting distinction, which failed to explain the opposite outcomes in cases presenting the same basic pattern of Congress attempting to solve a national problem with a national solution.⁶⁰¹ In effect, *Morrison* represents no change from the New Deal cases where the Court unleashed Congress' vast power to reach all manner of non-economic activity under the Commerce Clause.⁶⁰² The opposing holdings of *Morrison* and *Wickard*, *Darby* and *Jones & Laughlin Steel* underscore the elastic nature of the substantial effects test and its betrayal of the Framers' vision of limited government.⁶⁰³

596. *Lopez*, 514 U.S. at 561.

597. *Id.* at 566-67.

598. *Id.*; Epstein, 73 VA. L. REV. at 1450; Lawson, 107 HARV. L. REV. at 1234.

599. *Morrison*, 120 S. Ct. 1745-46; Epstein, 73 VA. L. REV. at 1451.

600. Compare *Morrison*, 120 S. Ct. at 1754, 1759 (striking down Congressional regulation of intrastate activity Congress said affected interstate commerce), with *Wickard*, 317 U.S. at 128-30 (finding Congress could regulate home-grown and consumed wheat because Congress concluded that a large number of home-growers-and-consumers affected commerce by growing wheat that could enter the market and thereby substantially affect price and market conditions), *Darby*, 312 U.S. at 121-26 (finding Congress could regulate wages and hours in manufacturing because Congress found that a lack of a national standard for wages and hours allowed non-complying manufacturers to exert an effect on interstate commerce when they shipped their goods interstate), and *Jones & Laughlin Steel*, 301 U.S. at 30-31, 36-43 (finding Congress could regulate manufacturers' labor practices and union activity because Congress was regulating intrastate activities that substantially affected interstate commerce).

601. See *supra* notes 561-62 and accompanying text.

602. See *supra* note 600 and accompanying text. See also *Lopez*, 514 U.S. at 596, 600 (Thomas, J., concurring) (characterizing Congress' power under the Commerce Clause after the New Deal cases as "sweeping").

603. See *supra* note 600 and accompanying text. See also Pilon 40 N.Y.L. SCH. L. REV. at 1003, 1005-06, 1011 (noting that after the New Deal cases, Congress could regulate virtually anything and that the post-New Deal vision of the Constitution, persisting in *Lopez* as the substantial effects test does not protect the Framers' idea of limited government).

C. WHY THE SUBSTANTIAL EFFECTS TEST REPRESENTS NO
PRINCIPLED LIMIT ON FEDERAL POWER

The Framers's understanding of the Commerce Clause represents a principled limit on the Commerce Clause because it is in line with the fundamental idea underlying federalism, protection of individuals from an intrusive and oppressive federal government.⁶⁰⁴ Madison noted the powers delegated to the federal government under Article I, section 8 were not meant to enlarge the powers of the federal government.⁶⁰⁵ The Commerce Clause and the other enumerated powers in Article I, section 8 only meant to allow the federal government to facilitate a better mode of administration to promote union among the states.⁶⁰⁶ The Commerce Clause's main unifying function was to prevent state balkanization by making regular the flow of commerce among the states.⁶⁰⁷ The Commerce Clause, as an expression of a limited enumerated power, did not extend beyond intercourse between the states, leaving intrastate economic and non-economic conduct outside federal control.⁶⁰⁸ The substantial effects test articulated by the Court during the New Deal and upheld in *Morrison* is incorrect because it contravenes the role of federal government contemplated by the Framers, allowing the federal to control almost all aspects of Americans' daily lives, perpetuating an unconstitutional, unmanageable and unaccountable federal administration.⁶⁰⁹

604. See *infra* notes 605-24 and accompanying text. See also David G. Willie, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1080-81 (1996) (noting that the purpose of federalism is to protect fundamental liberties by forcing state and local governments to compete against one another for citizens' affections, the principle motivating factor being fear of losing citizens to other local jurisdictions with laws more protective of individual rights; also noting that for federalism's protections against tyranny to work, the federal government, as contemplated by the Framers, cannot be permitted to usurp state control of intrastate activities).

605. THE FEDERALIST No. 41, at 256, No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961).

606. THE FEDERALIST No. 45, *supra* note 605, at 293.

607. U.S. CONST., art. I, section 8, cl. 3 (giving Congress the power to regulate commerce among the several states); Roger Pilon, *Preface* to THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1, 5-6 (Cato Inst. 1998) (noting the Commerce Clause's primary purpose was to confine state power in order to secure individual's ability to freely trade goods and services across state lines); Epstein, 73 VA. L. REV. at 1454 (concluding that the purpose of the enumerated power in the Commerce Clause power was only to allow Congress to prevent state balkanization of interstate markets); Pilon, 40 N.Y.L. SCH. L. REV. at 1005; (stating the Commerce Clause only meant to give Congress the limited power to make regular commerce between the states).

608. THE FEDERALIST No. 45, *supra* note 605, at 292-93 (noting that the powers enumerated to the federal government are "few and defined" and that most affairs concerning the "lives, liberties and properties of the people" in the states are left outside of federal government control).

609. See *Morrison*, 120 S. Ct. at 1749 (relying on *Lopez* and the substantial effects test to analyze the constitutionality of VAWA); *Lopez*, 514 U.S. at 599-600 (Thomas, J.,

The substantial effects test as applied since its creation in the New Deal cases through *Morrison* presents an inconsistency that prevents the test from forming any principled limit on the Congress' power under the Commerce Clause.⁶¹⁰ As stated in *Lopez*, the Court usually defers to Congressional findings accompanying legislation.⁶¹¹ In *Lopez*, the Court explicitly did not question the rationale of *Jones & Laughlin Steel*, *Darby*, *Wickard* and *Heart of Atlanta*, all of which deferred to Congressional findings to uphold federal legislation under the Commerce Clause.⁶¹² In *Morrison*, the Court failed to defer to substantial legislative findings when it struck down the VAWA.⁶¹³ In striking down the VAWA, the Court noted that "the existence of Congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."⁶¹⁴ Yet, in light of the Court's failure in *Lopez* to reject the deferential standard of review of *Jones & Laughlin Steel*, *Wickard*, *Darby* and *Heart of Atlanta*, the Court in *Morrison* failed to offer Congress any guidance as to what

concurring) (noting that the United States could not, during oral argument, articulate any limits on Congressional power under the substantial effects test); Lewis B. Kaden, *Politics, Money, and State Sovereignty*, 79 COLUM. L. REV. 847 (1979) reprinted in part in MODERN CONSTITUTIONAL THEORY: A READER 271, 272-275 (John H. Garvey et al. eds., 1999) (noting that as size of federal government has increased, federalism constraints on political power have waned resulting in decreased accountability between Congress and electorate); Lawson, 107 HARV. L. REV. at 1231, 1233-37 (noting post New-Deal state is unconstitutional and reaches into virtually every aspect of our lives); Pilon, 40 N.Y.L. SCH. L. REV. at 1003, 1005 (noting New Deal jurisprudence destroyed doctrine of enumerated powers and allowed federal government to regulate almost anything); Cramer, Note, 53 VAND. L. REV. at 283 (noting currently over 3000 federal crimes exist).

610. See *infra* notes 611-24 and accompanying text.

611. *Lopez*, 514 U.S. at 573, 579.

612. *Lopez*, 514 U.S. at 573-574 (noting that deference to Congressional findings regarding legislation under the Commerce Clause began with *Jones & Laughlin Steel*, and continued apace through *Darby*, *Wickard*, *Heart of Atlanta Motel* through *Lopez* in which the majority, despite striking down an exercise of Congressional power under the Commerce Clause, did not question New Deal and post-New Deal Commerce Clause precedents). See *infra* note 613 and accompanying text.

613. Compare *Morrison*, 120 S. Ct. at 1752-53 (rejecting Congressional findings of a substantial effect on interstate commerce as dispositive in regard to the constitutionality of federal legislation under the Commerce Clause), with *Heart of Atlanta Motel*, 379 U.S. at 252-258, 261-62 (relying on and deferring to Congressional findings in upholding Civil Rights Act of 1964 as a proper exercise of federal power under the Commerce Clause), *Wickard*, 317 U.S. at 128-130 (deferring to primary purpose of Agricultural Adjustment Act of 1938 in holding that Congress' power under the Commerce Clause reaches home-grown and home-consumed wheat), *Darby*, 312 U.S. at 109-110, 115, 116, 121 123 (deferring to Congressional findings in upholding the Fair Labor Standards Act, designed to regulate the conditions under which manufacturers produce goods), and *Jones & Laughlin Steel*, 301 U.S. at 30-31 (accepting uncritically Congress' rationale for regulating terms of employment between union members and manufacturers — i.e. that the terms of employment affected commerce, which in turn allowed Congress to regulate under the Commerce Clause).

614. *Morrison*, 120 S. Ct. at 1752.

findings on what types of activities the Court would consider controlling for purposes of constitutionality of legislation passed under the aegis of the Commerce Clause.⁶¹⁵ Congress only knows from *Morrison* that the particular findings it made regarding the VAWA would not pass muster under the substantial effects test.⁶¹⁶ The substantial effects test thus requires a continuous, ad hoc oversight of Congressional Commerce Clause legislation by the Court.⁶¹⁷ The substantial effects test dictates such review because under the substantial effects test the Court has failed to meaningfully root its Commerce Clause jurisprudence on any fixed bottom.⁶¹⁸

The only lodestar the Court had under the effects test prior to *Lopez* and *Morrison* was rational basis review — a standard of deference to Congressional findings that allowed Congress to define the scope of its own power.⁶¹⁹ After *Lopez* and *Morrison*, review under the substantial effects test still amounts to a kind of rational basis review, albeit one with bite.⁶²⁰ The tension created between *Lopez* and *Morrison*, which refused to defer to Congressional findings while striking down legislation under the Commerce Clause, and such cases as *Wickard* and *Heart of Atlanta Motel*, which did defer to Congressional findings while upholding legislation under the Commerce Clause, indicates a Commerce Clause jurisprudence with no principled limits.⁶²¹ What the Court's Commerce Clause jurisprudence under the substantial effects test created and perpetuated is an overreaching

615. See *infra* notes 616-18 and 621 and accompanying text.

616. *Morrison*, 120 S. Ct. at 1752-55.

617. Steven G. Calabresi, *Symposium: Reflections on United States v. Lopez: "A Government Of Limited And Enumerated Powers": In Defense Of United States v. Lopez*, 94 MICH. L. REV. 752, 810-11 (1996) (noting that the Court will need to provide frequent invalidations of Congressional legislation, like the GFSZA at issue in *Lopez*, that threatens federalism in order to prevent Congress' continuous usurpations of enumerated powers from gaining wide-spread legitimacy).

618. Pilon, 40 N.Y.L. SCH. L. REV. at 1011.

619. Willie, 70 TUL. L. REV. at 1087-91.

620. *Morrison*, 120 S. Ct. at 1749-55 (applying *Lopez* and rejecting federal legislation under Commerce Clause in spite of Congressional findings); Willie, 70 TUL. L. REV. at 1090-91 (noting that the Court in *Lopez* appeared to apply a heightened level of scrutiny when analyzing federal legislation under the Commerce Clause).

621. See Thomas W. Merrill, *Toward A Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y. 31, 33 (1998) (noting the Court failed to set forth a principled understanding of the Commerce Clause when it decided *Lopez*). Compare *Morrison*, 120 S. Ct. at 1752-54 (striking down the VAWA as an unconstitutional exercise of Congress' Commerce Clause power, despite Congressional findings of gender-motivated violence's substantial effect on interstate commerce), and *Lopez*, 514 U.S. at 564-68 (striking down the GFSZA as an unconstitutional exercise of Commerce Clause power and noting that Congress is not normally required to legitimate its exercise of the Commerce power with particularized findings), with *Heart of Atlanta Motel*, 379 U.S. at 252-258, 261-62 (relying on and deferring to Congressional findings in upholding Civil Rights Act of 1964 as a proper exercise of federal power under the Commerce Clause), and *Wickard*, 317 U.S. at 128-130 (deferring to primary purpose of Agricultural Adjust-

federal government wholly inconsistent with that intended by the Framers.⁶²² By contrast, a Commerce Clause jurisprudence rooted in the Framers' meaning of the Commerce Clause will create a consistent Commerce Clause jurisprudence because it rests on the straightforward understanding of commerce contemplated by the Clause.⁶²³ The Framers intended the Commerce Clause to allow Congress to control no more than trade or intercourse of goods and services between the states.⁶²⁴ Pre-New Deal case law demonstrated a consistent pattern of jurisprudence designed to uphold federalism's guarantee to protect individuals from an overreaching federal government.⁶²⁵

D. PRE-NEW DEAL CASE LAW AND A PRINCIPLED UNDERSTANDING OF THE COMMERCE CLAUSE

Justice Thomas argued in his concurrence in *Lopez* that the Court needs to return to a more original understanding of the Commerce Clause because the substantial effects test does not place any real limit on Congress' power.⁶²⁶ The New Deal cases in which the substantial effects test came to fruition relied on a theory of government that arrogated to the federal government the authority to impose national solutions for national problems, in the face of the jurisdictional restraints of the Constitution.⁶²⁷ This view of the role of federal government has spread from imposing social controls at the federal level to address perceived injury to the national economy through competition, to attempts by federal Congress to impose social controls on individual behavior wholly removed from economic concerns as

ment Act of 1938 in holding that Congress' power under the Commerce Clause reaches home-grown and home-consumed wheat).

622. Epstein, 71 NOTRE DAME L. REV. at 183, 191; Lawson, 107 HARV. L. REV. at 1231, 1231 n.1, 1233-37; Pilon, 40 N.Y.L. SCH. L. REV. at 1005, 1011.

623. U.S. CONST., art. I, section 8, cl. 3 (giving Congress the power to regulate commerce among the several states); Pilon, *supra* note 607, at 5-6 (noting the Commerce Clause's primary purpose was to confine state power in order to secure individual's ability to freely trade goods and services across state lines); Epstein, 73 VA. L. REV. at 1454 (concluding that the purpose of the enumerated power in the Commerce Clause power was only to allow Congress to prevent state balkanization of interstate markets); Pilon, 40 N.Y.L. SCH. L. REV. at 1005; (stating the Commerce Clause only meant to give Congress the limited power to make regular commerce between the states).

624. See Epstein, 71 NOTRE DAME L. REV. at 189-92 (suggesting that Justice Thomas' concurrence in *Lopez* got it right by advocating a return to the Commerce Clause's original meaning — i.e. overruling post-1937 precedents); Epstein, 73 VA. L. REV. at 1443-55 (reviewing how the New Deal cases transformed the meaning of the Commerce Clause and suggesting that pre-New Deal case law — the "old view" of the Commerce Clause — represents the correct scope of Congress' power under the Commerce Clause).

625. See *infra* notes 626-720 and accompanying text.

626. *Lopez*, 514 U.S. at 584, 589 (Thomas, J., concurring).

627. Epstein, 73 VA. L. REV. at 1452; Lawson, 107 HARV. L. REV. at 1231, 1233-49.

exemplified by *Lopez* and *Morrison*.⁶²⁸ To date, the Court has resisted a further expansion of federal power under the substantial effects test, yet a change of one vote on the Court could demolish the fragile bulwark against complete federalization of every area of law that *Lopez* and *Morrison* represent.⁶²⁹ Justice Thomas argued in his concurrences in *Lopez* and *Morrison* that complete federalization of virtually every area of law is possible under current Commerce Clause jurisprudence based on the substantial effects test, and thus, a new “standard more consistent with the original understanding” of the commerce power should replace the substantial effects test.⁶³⁰ A standard of Commerce Clause jurisprudence consistent with the Clause’s original meaning is correct because it comports with the Constitution’s basic premise of limited federal power as reflected in *Gibbons* through the Court’s pre-New Deal case law.⁶³¹

1. *The Meaning of Gibbons v. Ogden*

The substantial effects test as created by the New Deal cases and articulated by the Court thereafter departs sharply from its correct meaning as applied in *Gibbons* and cases following until *Jones & Laughlin Steel* in 1937.⁶³² Chief Justice Marshall penned *Gibbons* in 1824, but the meaning of the decision is still in dispute.⁶³³ The post-

628. *Compare Darby*, 317 U.S. at 109, 122 (reviewing FLSA and noting that the FLSA aimed to prevent the substandard labor conditions from spreading through interstate commerce and dislocating goods produced under better labor conditions), *with Morrison*, 120 S. Ct. at 1745, 1747-48 (reviewing 42 U.S.C. § 13981 and noting its purpose was to provide a “federal civil remedy for victims of gender-motivated violence”), *and Lopez*, 514 U.S. at 551 (noting GFSZA made possession of a firearm within one thousand feet of a school zone a federal offense).

629. *Morrison*, 120 S. Ct. at 1759; *Lopez*, 514 U.S. at 551, 567-68. Both were 5-4 decisions. *Morrison*, 120 S. Ct. at 1745, 1759; *Lopez*, 514 U.S. at 550-51, 615. Justices Breyer, Souter, Stevens and Ginsburg dissented both in *Morrison* and *Lopez*. *Morrison*, 120 S. Ct. at 1759 (Souter, J., dissenting, joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting); *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting, joined by, Stevens, J., Souter, J. and Ginsburg, J., dissenting).

630. *Morrison*, 120 S. Ct. at 1759 (Thomas, J., concurring); *Lopez*, 514 U.S. at 600-01 (Thomas, J., concurring).

631. *See infra* notes 632-720 and accompanying text

632. *See* Epstein, 73 VA. L. REV. at 1400, 1443, 1447, 1450. Epstein rejected the traditional view that cases between 1887-1936 departed from *Gibbons*’ view of Commerce Clause which returned with *Jones & Laughlin Steel* in 1937. *Id.* at 1407-08, 1442, 1443. Justice Breyer’s dissent in *Lopez*, characterized that same period as a “wrong turn subsequently corrected.” *Lopez*, 514 U.S. at 631 (Breyer, J., dissenting).

633. GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 159 (Foundation Press, 13th ed. 1997). *Compare Morrison*, 120 S. Ct. at 1759, 1766 (Souter, J., dissenting) (citing *Gibbons* in support of his conclusion that Congress’ power to regulate individual conduct under the VAWA did not exceed its power granted under the Commerce Clause), *and Lopez*, 514 U.S. at 615, 631 (Breyer, J., dissenting) (citing *Gibbons* in support of his conclusion that Congress’ power to regulate individual conduct under the GFSZA did not exceed its power granted under the Commerce Clause), *with Lopez*,

Jones & Laughlin Steel meaning of *Gibbons* relies upon a view of Congress' power under the Commerce Clause as "plenary [and] unsusceptible to categorical exclusions" ⁶³⁴ Supporters urge that Congress' power under the Commerce Clause thus extends to any national problem requiring a national solution that Congress rationally finds imposes a burden on interstate commerce. ⁶³⁵ While Justice Marshall did speak of a plenary power in *Gibbons* he did so within the context of the meaning of the words in the Commerce Clause. ⁶³⁶ The power conferred on Congress was plenary in the sense that nothing could limit it save its Constitutional bounds. ⁶³⁷ Justice Marshall recognized the constitutional bounds of enumerated powers in *Marbury v. Madison*, ⁶³⁸ when he stated all clauses in the Constitution were intended to have an effect. ⁶³⁹ Discussing the structure of the Constitution, Marshall stated that constructions that rendered words or clauses of the constitution meaningless contravened the purpose of the document. ⁶⁴⁰ Marshall further noted that the "original and supreme will" of the people organized the government and delegated certain limited powers to it in the Constitution. ⁶⁴¹ The Framers wrote the Constitution in order that government would not mistake or forget its limited role. ⁶⁴² If the limits proscribed are not respected, then the distinction between a government with limited and unlimited powers disappears. ⁶⁴³ Thus, the bounds of government power are the text and structure of the Constitution, and set against this background the meaning of *Gibbons* is clear: the Commerce Clause empowers Congress to regulate commercial intercourse between states and not local conduct or events, regardless of their effect on interstate commerce. ⁶⁴⁴

Justice Thomas and Professor Epstein argue from similar positions regarding the meaning of the Commerce Clause itself, both tex-

514 U.S. at 593 (Thomas, J., concurring) (stating "[i]n my view, the dissent is wrong about the holding and reasoning of *Gibbons*").

634. *Morrison*, 120 S. Ct. at 1766-67 (Souter, J., dissenting). Justice Souter noted, "[t]his was the view expressed throughout the latter part of the [twentieth] century . . ." *Id.* at 1766 (Souter, J., dissenting).

635. Brief for the United States at 20-21, *Morrison*, (Nos. 99-5 and 99-29). The Government only cited *Gibbons* once, and merely in a string cite given as support for the proposition that Congress' commerce power is 'broad and sweeping.' *Id.* at 21.

636. *Gibbons*, 22 U.S. (9 Wheat) at 196-97.

637. *Id.*

638. 5 U.S. (1 Cranch) 137 (1803).

639. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).

640. *Marbury*, 5 U.S. (1 Cranch) at 173.

641. *Id.* at 176.

642. *Id.*

643. *Id.* at 176-77.

644. *Lopez*, 514 U.S. at 585, 593-96 (Thomas, J., concurring); Lawson, 107 HARV. L. REV. at 1231, 1236; Pilon, *supra* note 607, at 5-6.

tually and contextually.⁶⁴⁵ Justice Thomas began his analysis in *Lopez* by noting the meaning of commerce as defined by several sources in existence at the time of the founding.⁶⁴⁶ Justice Thomas concluded based on these early sources that commerce, manufacturing and agriculture were separate things.⁶⁴⁷ Commerce meant trade, intercourse, traffic, and exchange and not control over individual intrastate conduct “substantially affecting” interstate commerce.⁶⁴⁸ Thus, the proper exercise of Congress’ power under the Commerce Clause comprehends only laws governing commercial intercourse between states and not activities intrastate leading up to that intercourse.⁶⁴⁹

The placement of the Commerce Clause within Article I, section 8 of the Constitution, reinforces this conclusion because if Congress could reach any and all activity commercial in nature many of the enumerated powers in Article 1, section 8 would be rendered surplusage.⁶⁵⁰ The commerce clause conferred upon Congress one of a few powers delegated by the states to Congress in order to maintain “a more perfect union” and ensure liberty for the people.⁶⁵¹ The states granted the power to regulate commerce among them to Congress because individuals participating in the national market should not run afoul of restrictions placed on goods or services shipped to individuals in other states.⁶⁵² Chief Justice Marshall’s opinion in *Gibbons* represents this view of limited federal power and not the expansive federal power currently allowed under the substantial effects test.⁶⁵³

645. *Lopez*, 514 U.S. at 585-589 (Thomas, J., concurring); Epstein, 73 VA. L. REV. at 1393-1399.

646. *Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring).

647. *Id.* at 586-87 (Thomas, J., concurring).

648. *Id.* at 586-88 (Thomas, J., concurring); *Gibbons*, 22 U.S. (9 Wheat.) at 189; THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961); Epstein, 73 VA. L. REV. at 1394; Lawson, 107 HARV. L. REV. at 1234, 1236; Pilon, *supra* note 606, at 5-6.

649. Brief of the Institute for Justice and The Cato Institute as Amici Curiae in Support of Respondent at 11, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5 and 99-29) (Richard A. Epstein counsel of record) (hereafter “Brief Amici Curiae”).

650. *Lopez*, 514 U.S. at 588-89 (Thomas, J. concurring) (discussing Article I, section 8 and concluding that enumerating several specific powers made no sense if Congress could regulate any and all activity); *Marbury*, 5 U.S. (1 Cranch) at 174 (finding that Congressional Act, contrary to Constitution, would render certain clauses surplusage if Congressional Act allowed to stand); Epstein, 73 VA. L. REV. at 1395-96 (noting that Article I, section 8 provided Congress with only discrete, enumerated powers, and a reading of the Commerce Clause allowing the federal government to regulate anything contradicts the purpose of enumeration).

651. U.S. CONST. pmbl. See THE FEDERALIST NO. 2, at 39 (John Jay) (Clinton Rossiter ed., 1961) (noting the purpose of the Constitution is liberty and union); Willie, 70 TUL. L. REV. at 1081 (stating purpose of federalism as expressed in Constitution is to protect fundamental liberties).

652. Brief Amici Curiae at 11, *Morrison* (Nos. 99-5 and 99-29).

653. *Lopez*, 514 U.S. at 593-597 (Thomas, J., concurring).

In *Gibbons*, Chief Justice Marshall struck down a law preventing a New Jersey citizen offering his services to New York citizens wishing to travel between the two states via steamboat.⁶⁵⁴ By doing so, *Gibbons* merely articulated and exemplified the true meaning of the Commerce Clause as a limited power intended only to allow Congress to "facilitate national markets by preventing state balkanization."⁶⁵⁵ Cases succeeding *Gibbons* until *Jones & Laughlin Steel* in 1937 maintained the line between commerce and other economic conduct, and prevented Congress from reaching non-economic activity.⁶⁵⁶

2. Cases Following *Gibbons* and Congress' Reach Under the Commerce Clause

Unlike the current substantial effects test as represented in *Morrison*, cases following *Gibbons* articulated the correct extent of Congress' reach under the Commerce Clause by focusing on the nature of the activity Congress sought to control.⁶⁵⁷ In *United States v. Dewitt*,⁶⁵⁸ the Court struck down a federal statute because it regulated individual economic conduct internal to the states.⁶⁵⁹ The Court found the law preventing individuals from selling illuminating oils of certain grades an attempt by Congress to utilize a police power denied to it under the Commerce Clause.⁶⁶⁰ Chief Justice Chase regarded the rationale behind his decision so obvious, that he did not feel the need to explain his decision further.⁶⁶¹ Very simply, Justice Chase reasoned under the Constitution, Congress did not have the authority to reach internal economic conduct.⁶⁶²

Later, in *Kidd v. Pearson*,⁶⁶³ the Court affirmed Justice Chase's rationale by holding a state law did not violate the Commerce Clause because the law prohibited private, intrastate conduct and did not attempt to regulate the physical passage of goods between states.⁶⁶⁴ Justice Lamar relied on *Gibbons* in reaching his holding and stated the commerce power "[did] not comprehend the purely internal domestic commerce . . . carried on between man and man within a State."⁶⁶⁵

654. *Gibbons*, 22 U.S. (9 Wheat.) at 1-2, 186, 189-90, 221, 239-40.

655. Epstein, 73 VA. L. REV. at 1454.

656. *Id.* at 1410.

657. See *infra* notes 659-720 and accompanying text.

658. 76 U.S. (9 Wall.) 41 (1869).

659. *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 42-45 (1869)

660. *Dewitt*, 76 U.S. (9 Wall.) at 44-45.

661. *Id.* at 43, 45.

662. *Lopez*, 514 U.S. at 597 (Thomas, J., concurring) (interpreting *Dewitt*, 76 U.S. (9 Wall.) 41 (1869)).

663. 128 U.S. 1 (1888).

664. *Kidd v. Pearson*, 128 U.S. 1, 15-26 (1888).

665. *Kidd*, 128 U.S. 1, 15, 16-17.

He also relied on *Gibbons* when stating the “popular” and common sense notion that commerce and manufacturing were distinct from each other.⁶⁶⁶ Further, the *Kidd* Court followed *Gibbons* by recognizing the one simple rationale explaining why the states gave to Congress a supreme power to regulate commerce among them: to prevent “conflicting and discriminating state legislation.”⁶⁶⁷ In other words, the only power the Commerce Clause gives to Congress is to preserve a union of several sovereign states by preventing economic balkanization through devices, such as the New York statute considered in *Gibbons*, restrictive of interstate trade.⁶⁶⁸ In *E.C. Knight*, the Court clearly articulated its position that the Commerce Clause limited Congress’ reach to interstate commerce and not to other activities, be they commercial or non-commercial in nature.⁶⁶⁹

In *E.C. Knight*, the Court expressed the Commerce Clause’s limitation on federal power as the manufacturing-commerce distinction, an expression that followed Chief Justice Marshall’s view of the commerce power adumbrated in *Gibbons* and enduring until its demise at the hands of the *Jones & Laughlin Steel* Court in 1937.⁶⁷⁰ *E.C. Knight* enunciated the manufacturing-commerce distinction in the context of construing a federal statute, the Sherman Antitrust Act, passed expressly to regulate commerce among the states.⁶⁷¹ The Pennsylvania sugar cartel prosecuted by the United States in *E.C. Knight* engaged in intrastate, private conduct with a potential for substantially affecting commerce.⁶⁷² Indeed, the United States relied on a rationale similar to the substantial effects test when it argued that “the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable . . . and therefore the [federal] government” could regulate the companies imposing this effect on the whole nation through interstate commerce.⁶⁷³ Chief Justice Fuller recognized, in the government’s ar-

666. *Id.* at 20.

667. *Id.* at 20, 21.

668. THE FEDERALIST NO. 42, *supra* note 648, at 267, No. 45, *supra* note 605, at 292-93; Epstein, 73 VA. L. REV. at 1401, 1454; Pilon, 40 N.Y.L. SCH. L. REV. at 1005.

669. *United States v. E.C. Knight Co.*, 156 U.S. 1, 9-18 (1895).

670. Brief Amici Curiae at 9, *Morrison* (Nos. 99-5 and 99-29); Epstein, 73 VA. L. REV. at 1410.

671. *E.C. Knight*, 156 U.S. at 9-18.

672. See *United States v. E.C. Knight Co.*, 60 F. 306, 306-07 (C.C.E.D. Pa.), *aff'd*, 60 F. 934 (3d Cir. 1894), *aff'd*, 156 U.S. 1 (1895) (discussing the conduct prosecuted by the United States under the Sherman Antitrust Act and noting that one company, via contracts with other sugar producers in the United States, sought to gain control of ninety-eight percent of the then existing sugar refining capacity in America).

673. Compare *Lopez*, 514 U.S. at 555-59 (clarifying the substantial effects tests as it developed from *Jones & Laughlin Steel* and concluding that Congress could regulate

gument, an attempt to create a chain of inferences from an intrastate activity such as manufacturing to the ultimate effect such activities might have on the interstate market.⁶⁷⁴ The effect the government sought to justify in its prosecution of the Pennsylvania sugar companies was the national market price for sugar.⁶⁷⁵ Chief Justice Fuller considered even this relatively important effect secondary because the price of a product changing due to decreased supply caused by near monopolistic control of manufacturing is not primarily intercourse or trade between states, and thus, not subject to regulation by the federal Congress.⁶⁷⁶ Chief Justice Fuller's manufacturing-commerce distinction crystallized the meaning of commerce among the several states, of which Chief Justice Marshall in *Gibbons* stated:

Comprehensive as the word among is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration [of the power in Article 1, section 8] presupposes something not enumerated. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself.⁶⁷⁷

All Chief Justice Fuller did in *E.C. Knight* was succinctly state the same principle more directly: "Commerce succeeds to manufacture, and is not a part of it."⁶⁷⁸ Congress could not have power over the acts of the individuals exchanging shares to create one large sugar manufacturing enterprise because their conduct did not attempt to do so through interstate commerce.⁶⁷⁹ In maintaining the distinction between commerce and other forms of profit seeking activity, Chief Justice Fuller followed Chief Justice Marshall's lead in *Gibbons* by rejecting an expansive interpretation of the Commerce Clause that would allow the federal government to regulate intrastate conduct

activities under the Commerce Clause that substantially affected interstate commerce), with *E.C. Knight*, 156 U.S. at 12, 13 (noting the Government's argument that Congress could regulate an attempt to monopolize the manufacture of sugar in the United States because of the effect such a monopoly could have on the population through interstate commerce).

674. *E.C. Knight*, 156 U.S. at 12-13. The Court noted "[t]he power to control the manufacture of a given thing . . . affects [commerce] only incidentally and indirectly." *Id.* at 12.

675. *E.C. Knight*, 156 U.S. at 3-4. Compare this to the government's costs of crime argument in *Morrison*, citing various statistics allegedly showing how much violence against women "cost" the national economy every year. Brief for the United States at 5-7, *Morrison* (Nos. 99-5 and 99-29). See Justice Souter's acceptance of this argument in his dissent. *Morrison*, 120 S. Ct. at 1759-64 (Souter, J., dissenting). Justice Breyer's dissent in *Lopez* made a similar argument regarding nationwide costs of school violence. *Lopez*, 514 U.S. at 622-23 (Breyer, J., dissenting).

676. *E.C. Knight*, 156 U.S. at 12.

677. *Id.* at 9, 12-13; *Gibbons*, 22 U.S. (9 Wheat) at 194-95.

678. Brief Amici Curiae 9, *Morrison* (Nos. 99-5 and 99-29); *E.C. Knight*, 156 U.S. at 12; Epstein, 73 Va. L. Rev. at 1432-33.

679. *E.C. Knight*, 156 U.S. at 17.

"whose ultimate result may affect external commerce . . ." ⁶⁸⁰ Cases decided after *E.C. Knight*, but before *Jones & Laughlin Steel*, continued to limit the federal government's control under the Commerce Clause to interstate commerce, refusing to extend federal control to activities other than interstate commerce. ⁶⁸¹

In *E.C. Knight*, the Court interpreted the Commerce Clause in favor of the States while a in later case, *Houston East and West Texas Railway Co. v. United States*, ⁶⁸² ("*Shreveport Rate*"), the Court interpreted the Commerce Clause in favor of federal control by upholding the Interstate Commerce Act against a challenge that the Interstate Commerce Commission improperly acted to regulate intrastate rail rates in Texas. ⁶⁸³ Epstein explained that *E.C. Knight's* attempt to interpret the Commerce Clause in terms of "direct" versus "indirect" impacts on interstate commerce did not rise to the occasion of fully protecting the Commerce Clause's main tenet, to regulate only "commerce among the several states" against later attacks. ⁶⁸⁴ Despite this flaw in *E.C. Knight's* rationale, Chief Justice Fuller established a workable and lasting interpretation of the scope of federal power under the Commerce Clause with his manufacturing-commerce distinction. ⁶⁸⁵ Evidence of this fact comes from *Shreveport Rate* itself, which did not, despite upholding federal reach into an intrastate activity, abandon the view that federal power to control intrastate activities did not extend beyond the unique problems of governing more modern interstate transportation networks. ⁶⁸⁶

Shreveport Rate appears superficially to support the "affecting commerce" rationale articulated in the New Deal cases and after. ⁶⁸⁷ Indeed, Justice Hughes phrased his rationale in terms of a "a close and substantial relation to interstate traffic" and a "close and substan-

680. *Id.* at 9, 15-16. The *Gibbons* Court stated, "[n]o direct general power over these objects is granted to Congress." *Gibbons*, 22 U.S. (9 Wheat.) at 203.

681. Epstein, 71 NOTRE DAME L. REV. at 190-91 (concluding the Court should abandon the substantial effects as articulated in *Lopez* and overrule Commerce Clause cases creating the test from 1937 forward); Epstein, 73 VA. L. REV. at 1442, 1454 (noting pre-New Deal jurisprudence was "workable").

682. 234 U.S. 342 (1914).

683. *Houston E. and W. Texas Ry. Co. v. United States*, 234 U.S. 342, 345, 347, 350-55, 360 (1914).

684. U.S. CONST. Art. I, § 8, cl. 3; Epstein, 73 VA. L. REV. at 1435.

685. Epstein, 73 VA. L. REV. at 1434-35, 1442.

686. *Id.* at 1420-21.

687. Compare *Houston E. & W. Texas Ry. Co.*, 234 U.S. at 351, 355 (noting the Commerce Clause allows Congress to regulate interstate carriers operations occurring interstate that bear a "close and substantial relation to interstate traffic" or commerce), with *Lopez*, 514 U.S. at 555-59 (clarifying the substantial effects tests as it developed from *Jones & Laughlin Steel* and concluding that Congress could regulate activities under the Commerce Clause that substantially affected interstate commerce).

tial relation to interstate commerce."⁶⁸⁸ The Court in *Jones & Laughlin Steel* employed the same language, a "close and substantial relation to interstate commerce," and even cited *Shreveport Rate*, yet neither the principal dissent in *Morrison* nor the dissent in *Lopez* even cited *Shreveport Rate* while heavily citing *Jones & Laughlin Steel*, *Darby*, *Wickard* and other New Deal cases.⁶⁸⁹ Epstein accounts for this by pointing to a twisting of the rationale of *Shreveport Rate*.⁶⁹⁰

Despite its seeming implication of an "effects test," *Shreveport Rate* supported the root holding of *Gibbons* by stressing the nature of Commerce Clause as conferring a power on Congress to "secur[e] the freedom of interstate commercial intercourse from local control."⁶⁹¹ In *Shreveport Rate*, Justice Hughes stressed the fact that under the Court's opinion, the authority of Congress only reached to intrastate transactions of interstate carriers impinging upon the openness or flow of commerce between the states.⁶⁹² The result in *Shreveport Rate* did not dictate that the Commerce Clause allows Congress to reach all intrastate economic activity affecting commerce.⁶⁹³ Rather, *Shreveport Rate* stands for the proposition that, in this particular contest between state regulation of rail rates of interstate carriers and federal regulation aimed at creating a competitive solution to the problem of state discrimination in favor of local business interests, federal regulation won because the state regulation hindered the free flow of commerce between the states.⁶⁹⁴ Epstein concludes a proper reading of *Shreveport Rate* limits Congress' reach under the Commerce Clause to "transportation by rail, river, road . . . and air . . . commerce as traditionally understood, even though [Congress could] reach intrastate as well as interstate commerce with respect to those transportation facilities that were devoted to both."⁶⁹⁵ Like *Gibbons*, which comprehended navigation as part of the intercourse or commerce between the states in 1824, *Shreveport Rate* comprehended interstate rail transport as part of intercourse or commerce between the states in 1914.⁶⁹⁶ *Shreveport Rate*, like *Gibbons*, intended to "ensure free trade among

688. *Houston E. & W. Texas Ry. Co.*, 234 U.S. at 351, 355.

689. *Morrison*, 120 S. Ct. 1759-74 (Souter, J., dissenting); *Lopez*, 514 U.S. at 615-31 (Breyer, J., dissenting); *Jones & Laughlin Steel*, 301 U.S. at 37-38.

690. Epstein, 73 VA. L. Rev. at 1421, 1448-49.

691. *Houston E. & W. Texas Ry. Co.*, 234 U.S. at 350-51.

692. *Id.* at 345, 353-54.

693. Epstein, 73 VA. L. Rev. at 1420.

694. *Id.* at 1420-21.

695. *Id.* at 1421.

696. Compare *Houston E. & W. Texas Ry. Co.*, 234 U.S. at 345, 350-51 (discussing the nature of rail transport in the context of commercial intercourse subject to Congressional regulation under the Commerce Clause), with *Gibbons*, 22 U.S. (9 Wheat.) at 192-93 (concluding that navigation is commerce amenable to Congressional regulation under the Commerce Clause).

the states" by regulating, or making regular, "commerce among the states" by upholding an act of Congress aimed in that regard.⁶⁹⁷ Thus, *Shreveport Rate* is not an early version of the current substantial effects test used to strike down the VAWA in *Morrison* and articulated in *Jones & Laughlin Steel, Darby* and *Wickard*, which upheld laws with the antithetical aim of controlling individual conduct not related to the physical transport of goods or services between states.⁶⁹⁸ Evidence that the Court did not abandon the principled view of the Commerce Clause set forth in *Gibbons, E.C. Knight* and cases following until 1937 comes from *A.L.A. Schechter Poultry Corp. v. United States*,⁶⁹⁹ a case decided in 1935.⁷⁰⁰

In *Schechter Poultry*, the Court rejected as beyond the scope of Congress' power under the Commerce Clause the very same type of behavior regulation at issue in *Jones & Laughlin Steel, Darby* and *Wickard* when it struck down the National Industrial Recovery Act ("NIRA").⁷⁰¹ The United States attempted to use the effects rationale rejected by the Court in *E.C. Knight* when it argued that non-uniform wage and hour standards affected commerce because lower wage rates

697. Epstein, 73 VA. L. REV. at 1417, n.91 (discussing the intent of the original ICA); Roger Pilon, *The Purpose and Limits of Government*, in CATO'S LETTERS # 13 at 30 n.40 (Cato Inst. 1999) (discussing the meaning of the Commerce Clause as set forth in *Gibbons*).

698. See Epstein, 73 VA. L. REV. at 1420-21, 1443, 1445, 1447, 1451 (analyzing *Shreveport Rate* and concluding that its holding limited Congressional power to "commerce as traditionally understood"). Compare *Houston E. & W. Texas Ry. Co.*, 234 U.S. at 345, 351-55 (concentrating on the nature of the entity subject to regulation — interstate carriers — and concluding that federal control of intrastate rates, related to interstate rates, of interstate carriers was proper), with *Morrison*, 120 S. Ct. at 1749-54 (focusing on the effect of an activity — gender motivated violence — on interstate commerce that Congress sought to regulate under the Commerce Clause and stating that the test is one of substantial effects), *Wickard*, 317 U.S. at 128-30 (finding Congress could regulate home-grown and consumed wheat because Congress concluded that a large number of home-growers-and-consumers affected commerce by growing wheat that could enter the market and thereby substantially affect price and market conditions), *Darby*, 312 U.S. at 121-26 (finding Congress could regulate wages and hours in manufacturing because Congress found that a lack of a national standard for wages and hours allowed non-complying manufacturers to exert an effect on interstate commerce when they shipped their goods interstate), and *Jones & Laughlin Steel*, 301 U.S. at 30-31, 36-43 (finding Congress could regulate manufacturers' labor practices and union activity because Congress was regulating intrastate activities that substantially affected interstate commerce).

699. 295 U.S. 495 (1935).

700. Epstein, 73 VA. L. REV. at 1441.

701. Compare *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 495, 499, 519, 525-527, 542-46, 548 (declaring unconstitutional the NIRA, which attempted to regulate, via Codes of Fair Competition issued by the President, industry trade practices, wages, hours, and labor in general), with *Jones & Laughlin Steel*, 301 U.S. at 32-33 (discussing the NLRA as regulating collective bargaining) *Darby*, 312 U.S. at 111-12 (discussing the FLSA and regulation of wages and hours), and *Wickard*, 317 U.S. at 115, 127-29 (discussing the Agricultural Adjustment Act of 1938 and regulation of how much wheat a farmer could grow and for what purposes).

in some areas translated into downward pressure on prices in the interstate market.⁷⁰² The Court rejected the notion that such intrastate conduct associated with manufacturing that ultimately exerted an influence on one component of the multi-state market for chicken could bring Schechter Poultry and the Schechter family under federal jurisdiction.⁷⁰³ In *Schechter Poultry*, like in *Shreveport Rate*, the Court discussed intrastate activities affecting interstate commerce stating, "there is a necessary and well-established distinction between direct and indirect effects."⁷⁰⁴ Unlike the current substantial effects test, the *Schechter Poultry* Court maintained the distinction between interstate commerce subject to federal regulation and intrastate conduct subject only to state regulation, if any.⁷⁰⁵ Speaking as to why the Schechters' conduct was not subject to federal regulation and why the NIRA and the Code of Fair Competition for the Live Poultry Industry for the Metropolitan Area of New York City ("Live Poultry Code") promulgated thereunder violated the Constitution, Chief Justice Hughes stated that the conduct in question did not impinge the flow of commerce.⁷⁰⁶ Further, Chief Justice Hughes stated, "[i]f the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people"⁷⁰⁷

By repudiating the rationale of *Schechter Poultry*, the Court in *Jones & Laughlin, Darby*, and *Wickard* unleashed the hounds of the modern welfare state that sniff relentlessly into the daily activities of Americans having nothing whatsoever to do with interstate commerce, meaning the actual movement of goods, people and services between the states.⁷⁰⁸ Justice Thomas pointed to the problem inherent

702. Compare *Schechter Poultry*, 295 U.S. at 548-49 (rejecting the government's argument that because wages and hours of slaughterhouse employees could affect the price of chicken interstate, Congress could regulate such activities under the Commerce Clause), with *E.C. Knight*, 156 U.S. at 12, 13 (noting and rejecting the Government's argument that Congress could regulate an attempt to monopolize the manufacture of sugar in the United States because of the effect such a monopoly could have on the population through interstate commerce).

703. *Schechter Poultry*, 295 U.S. at 520, 548-49, 551.

704. *Id.* at 546.

705. *Schechter Poultry*, 295 U.S. at 548-50; Epstein, 73 VA. L. REV. at 1443.

706. *Schechter Poultry*, 295 U.S. at 541-43.

707. *Id.* at 546.

708. Epstein, 73 VA. L. REV. at 1441, 1443, 1451. Epstein asked "[c]ould anyone say with a straight face that consumption of home-grown wheat is 'commerce among the several states?'" *Id.* at 1451. See *Gibbons*, 22 U.S. (9 Wheat.) at 229 (noting that commerce is intercourse or the exchange of goods and services); Lawson, 107 HARV. L. REV. 1231, 1234, 1236 (noting the unconstitutionality of the post-New Deal administrative state and that the Commerce Clause does not give Congress the power to regulate "all activities affecting or affected by, Commerce"); Pilon, 40 N.Y.L. SCH. L. REV. at 1005-06

in the substantial effects test when he pointed to the aggregation principle of *Wickard* as providing Congress with the power to “regulate every aspect of human existence” because individual actions do not matter under the current test, but only the supposed aggregate effect on interstate commerce of many individuals across numerous state and local jurisdictions behaving in a similar manner.⁷⁰⁹ Epstein noted that the desire to control individual activity under one uniform standard flowed from the belief prevalent during the New Deal that the government “always acted in the public interest” and never out of motives related to interest group pressures.⁷¹⁰ The rationale of a benevolent federal government that could act to solve every national problem subverts the root of the Constitution, a government of enumerated and limited powers, and reveals that a test for constitutionality flowing from such a rationale cannot consistently limit the government power the test implicitly accepts.⁷¹¹ Recognizing this, Justice Thomas encourages the Court to abandon the substantial effects test and once again root commerce clause jurisprudence in a foundation based on the Constitution’s basic premise: a federal government of enumerated and limited powers.⁷¹² The Commerce Clause as interpreted from *Gibbons* until *Jones & Laughlin Steel* stood for the proposition that the federal government’s power only extended to the physical movement or flow of commerce.⁷¹³ The Clause does not confer power over intrastate activity that may ultimately exert some effect on any aspect of a multi-state market.⁷¹⁴ The Commerce Clause only contemplates control over interstate commerce, meaning activities such as “interstate transportation, navigation and sales.”⁷¹⁵

(noting that the modern welfare state arose after the Court authorized Congress to control anything affecting interstate commerce, “which in principle is everything”).

709. *Lopez*, 514 U.S. at 560-61 (discussing *Wickard* and the aggregation principle) (majority opinion); *Lopez*, 514 U.S. at 600 (Thomas, J. concurring) (discussing and criticizing the aggregation principle).

710. Epstein, 73 VA. L. REV. at 1451.

711. See *Lopez*, 514 U.S. at 552 (noting the Constitution created a Federal Government of enumerated powers); *Lopez*, 514 U.S. at 600 (Thomas, J., concurring) (noting that the aggregation principle of the substantial effects test “has no stopping point”); Pilon, *supra* note 697, at 30-31 (noting that Rexford Tugwell, a principle architect of the New Deal stated: “[t]o the extent that these [New Deal policies] developed, they were tortured interpretations of a document . . . intended to prevent them.” *Id.* (quoting Rexford G. Tugwell, *Rewriting the Constitution: A Center Report*, Center Magazine, March 1968, at 18); Pilon, 40 N.Y.L. SCH. L. REV. at 1005 (noting the Court eviscerated the doctrine of enumerated powers starting with *Jones & Laughlin Steel*).

712. *Morrison*, 120 S. Ct. at 1759 (Thomas, J., concurring); *Lopez*, 514 U.S. at 589 (Thomas, J., concurring).

713. Epstein, 73 VA. L. REV. at 1408, 1443, 1454.

714. THE FEDERALIST NO. 42, *supra* note 648, at 267; Epstein, 73 VA. L. REV. at 1407, 1454; LAWSON, 107 HARV. L. REV. at 1234.

715. Epstein, 73 VA. L. REV. at 1454.

As a principled limitation, the Court's pre-New Deal Commerce Clause jurisprudence limits government to a role consistent with the Framers' understanding of enumerated powers as a device for preserving autonomy of the individuals and the states.⁷¹⁶ Returning to the principles of this jurisprudence will not only protect the values the Framers sought to preserve, but will roll back the unconstitutional federal administrative state of today that throws obstacles in the face of a vigorous economy.⁷¹⁷ The Framers' federalist design sought to preserve liberty for all time.⁷¹⁸ The substantial effects test betrays the Framers' vision by allowing Congress to transcend its few and defined powers of Article I, section 8.⁷¹⁹ The original understanding of the Commerce Clause is the correct one because only it comports with the idea of life under a constitutional government.⁷²⁰

CONCLUSION

In *United States v. Morrison*,⁷²¹ the United States Supreme Court struck down the Violence Against Women Act ("VAWA")⁷²² as an impermissible use of Congress' power under the Commerce Clause.⁷²³ In doing so, the Court relied on the substantial effects test as articulated in its New Deal cases and set forth in detail in *United States v. Lopez*⁷²⁴ in 1995.⁷²⁵ While the *Morrison* decision seems to represent a limit on federal power, it does not limit federal power because it perpetuates unchanged the substantial effects test, which allows Congress to reach all manner of private, non-economic or intrastate economic conduct.⁷²⁶

This Note examined the rise of substantial effects test that the Court applied in *Morrison* and concluded first that the Court's attempt to bring the substantial effects test back to a commercial footing failed because the substantial effects test focuses on the commercial

716. Epstein, 71 NOTRE DAME L. REV. at 190-92.

717. *Id.*; Lawson, 107 HARV. L. REV. at 1231, 1234.

718. Epstein, 71 NOTRE DAME L. REV. at 191; Pilon, *supra* note 607, at 7.

719. See THE FEDERALIST NO. 45, *supra* note 605, at 292-93 (noting that the Constitution delegated to the federal government powers that "are few and defined," leaving the states to govern most objects or affairs regarding the life, liberty and property of the people); Lawson, 107 HARV. L. REV. at 1231, 1233-37 (noting post-New Deal state is unconstitutional and reaches into virtually every aspect of our lives); Pilon, 40 N.Y.L. SCH. L. REV. at 1003, 1005 (noting New Deal jurisprudence destroyed the doctrine of enumerated powers and allowed the federal government to regulate almost anything).

720. Pilon, 40 N.Y.L. SCH. L. REV. at 1011.

721. 120 S. Ct. 1740 (2000).

722. 42 U.S.C. § 13981 (1994).

723. See *supra* notes 119-24 and accompanying text.

724. 514 U.S. 549 (1995).

725. *United States v. Morrison*, 120 S. Ct. 1740, 1748-55 (2000).

726. See *supra* notes 538-603 and accompanying text.

setting of the activity and not the activity itself.⁷²⁷ Second, *Morrison* preserved the substantial effects test's main offending feature, a focus on the effects of an activity rather than the activity itself, thus continuing the faulty analysis of the Court's New Deal cases.⁷²⁸ Because of its focus on effects, the substantial effects test fails to place a principled limit on Congress' power under the Commerce Clause, and thus, a return to a test that refocuses Commerce Clause analysis on the activity itself and not its effects is in order.⁷²⁹ The Court can place a principled limit on federal power under the Commerce Clause by returning to an analysis more in line with its pre-New Deal Jurisprudence.⁷³⁰ By following *Gibbons v. Ogden*,⁷³¹ cases after *Gibbons* until 1937, and repudiating the substantial effects test, the Court can objectively measure Congressional action and only allow to stand statutes that regulate activities causing economic balkanization among the states.⁷³²

This Note does not disagree with the result in *Morrison*, but questions the Court's continued reliance on the substantial effects test to evaluate federal statutes passed under the aegis of the Commerce Clause.⁷³³ Essentially, the substantial effects test currently allows Congress to regulate a broad range of individual conduct, which conceivably could include violence against women.⁷³⁴ The substantial effects test allows Congress to regulate non-economic, non-commercial private behavior, thus it departs from the original understanding of the Commerce Clause as a very limited federal power meant only to prevent economic trade barriers between states.⁷³⁵ Because *Morrison* preserves the substantial effects test, it does not represent any real limit on federal power.⁷³⁶ If the Court is concerned about the reach of federal power into the lives of individuals, the Court ought to place a principled limit on federal power under the Commerce Clause by returning to a test more in line with its pre-New Deal understanding of the Commerce Clause.⁷³⁷

The modern federal regulatory state has grown obese on a diet of virtually unlimited power to legislate individual's lives. *NLRB v.*

727. See *supra* notes 538-66 and accompanying text.

728. See *supra* notes 566-603 and accompanying text.

729. See *supra* notes 604-24 and accompanying text.

730. See *supra* notes 626-720 and accompanying text.

731. 22 U.S. (9 Wheat.) 1 (1824).

732. See *supra* notes 713-20 and accompanying text.

733. See *supra* notes 538-64 and 566-603 and accompanying text.

734. See *supra* notes 566-603 and accompanying text.

735. See *supra* notes 604-720 and accompanying text.

736. See *supra* notes 604-24 and accompanying text.

737. See *supra* notes 659-720 and accompanying text

*Jones & Laughlin Steel Corp*⁷³⁸ served up the main course — the substantial effects test. By maintaining the substantial effects test, cases like *Morrison* only serve to temporarily suppress Congress' appetite for laws regulating intrastate conduct. Because the substantial effects test does not represent a principled limit on Congress' power under the Commerce Clause, it is time for the Court to put Congress on a new diet from an old recipe book: the plain meaning of the Commerce Clause as articulated by the Court in cases such as *United States v. E.C. Knight*⁷³⁹ and *Gibbons*. Until the Court re-establishes a rigorous, consistent Commerce Clause analysis, Congress will continue its drive "to regulate every aspect of human existence."⁷⁴⁰

Arthur B. Mark, III — '02

738. 301 U.S. 1 (1937).

739. 156 U.S. 1 (1895).

740. *United States v. Lopez*, 514 U.S. 549, 600-02 (1995) (Thomas, J., concurring).