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CONFLICTING COMMERCE CLAUSES: HOW *RAICH* AND *AMERICAN TRUCKING* DISHONOR THEIR DOCTRINES

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INTRODUCTION

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ."[1] So decided the Framers of our nation's constitution, as they sought to divide powers in a federalist system and wrote what is known today as the Commerce Clause. The Commerce Clause has been central to Supreme Court decisions regarding federalism since its inception in the United States Constitution. It explicitly allocates power to Congress for regulating interstate commerce and, thus, is a classic source of authority for federal statutes.[2] Over time, however, the Supreme Court also has developed the "dormant Commerce Clause" as a negative implication from the clause's text.[3] The dormant doctrine is based on the reasoning that if the federal government has the ability to regulate interstate commerce, conversely, state government must *not* have that ability.[4] As with all constitutional doctrines, the Court has developed and refined the ordinary Commerce Clause and dormant Commerce Clause doctrines over time.

Recently, the Supreme Court has decided two cases that involved the Commerce Clause. In *Gonzales v. Raich*, the Court approved congressional authority to enforce a federal statute in the name of regulating interstate commerce.[5] In *American Trucking Ass'ns, Inc. v. Michigan Public Service Commission*, the Court found that a state regulation did not violate the dormant Commerce Clause.[6] Together, these cases portray the Court's modern understanding of the two legal doctrines rooted in the Commerce Clause.

This Note will first look to the history of each Commerce Clause doctrine to suggest their connection to each other, or lack thereof, in Supreme Court jurisprudence.[7] It will then analyze the highlighted cases in relation to long-term and current trends in the doctrines' development. The Note will argue that the two cases independently reflect grievous flaws in their respective doctrines.[8] A comparison of these

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[1] U.S. CONST. art. I, § 8, cl. 3.

[2] *See infra* Part I.A.1. This Note will distinguish the Commerce Clause doctrine addressing congressional authority as the "ordinary Commerce Clause."

[3] *See infra* Part I.B.1.

[4] *See infra* Part I.B.1.

[5] 545 U.S. 1, 32–33 (2005).

[6] 545 U.S. 429, 438 (2005).

[7] *See infra* Part I.

[8] *See infra* Part II.A–B.

cases will reveal that the Commerce Clause doctrines also are out of sync with each other, despite being understood as reciprocal theories of law stemming from the same exact text.[9] Finally, this Note will suggest a possible revision of these doctrines that would solve the problems inherent in the Supreme Court's modern understanding of the Commerce Clause.[10]

I. ANALYSIS OF EACH DOCTRINE'S HISTORY AND RELATION TO THE MOST RECENT CASES

To fully analyze the implications of the *Raich*[11] and *American Trucking*[12] decisions for their respective doctrines, a brief review of each doctrine's history is necessary. Throughout our Constitution's history, the Supreme Court's focus on the Commerce Clause has been constant, but the Court's interpretations of the clause have varied.[13] These various interpretations compound to form trends from one Supreme Court era to the next; yet, within the general trends, one can often find aberrational opinions and decisions throughout the Court's development of a constitutional doctrine.[14] Of the two cases this Note primarily examines, *Raich* will serve as an aberration from a modern trend,[15] and *American Trucking* will serve as an extension of a historical trend.[16] Despite this difference, both cases reflect a potential for sloppy interpretation of the Commerce Clause made possible by the Court's past development of doctrine.

A. Ordinary Commerce Clause Jurisprudence

The text of the Commerce Clause explicitly allows Congress the authority to regulate interstate commerce.[17] The Supreme Court's definition of commerce "among the several States" has varied over time, and the historic trend has been an expansion of what regulation is said to target interstate commerce.[18] In that sense, *Raich* follows the broad historical trend; however, it conflicts with the most recent precedent.

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[9] *See infra* Part II.C.

[10] *See infra* Part III.

[11] Gonzales v. Raich, 545 U.S. 1 (2005).

[12] Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005).

[13] Although interpretations have varied under both doctrines associated with the clause, ordinary Commerce Clause interpretations have varied in a consistent direction, *see infra* Part I.A.1, whereas dormant Commerce Clause interpretations have varied more sporadically, *see infra* Part I.B.1.

[14] *See, e.g.*, *infra* note 25 and accompanying text.

[15] *See infra* Part I.A.2.

[16] *See infra* Part I.B.2.

[17] *See supra* note 1 and accompanying text.

[18] *E.g.*, Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1193 (1986) (noting a "century of regulatory expansion"). For seminal cases along the spectrum of this trend, see, for example, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *See also infra* Part I.A.1.

1. History of Ordinary Commerce Clause Jurisprudence

Early Supreme Court decisions regarding the Commerce Clause addressed general questions such as whether the clause covered activity that indirectly affected interstate commerce and whether congressional actions constituted regulation of such commerce.[19] In the case of *Gibbons v. Ogden*, the Supreme Court considered the issue of what type of "commerce" the clause covered.[20] The Court in *Gibbons* rejected an argument that the clause confined Congress's powers to interstate transportation of only *goods*, and did not extend them to the transportation of *people* across state bounds.[21]

Although the Court's definition of interstate commerce was confined to matters of interstate transportation for many years,[22] *Gibbons*'s narrow expansion of congressional authority under the Commerce Clause ultimately was the beginning of a greater aggrandizement. Yet, before the Supreme Court expounded upon congressional Commerce Clause authority, it limited that authority in the case of *Hammer v. Dagenhart*.[23] *Hammer* did not overturn the *Gibbons* holding outright.[24] Instead, it distinguished the *Gibbons* case, holding that production of goods was not interstate commerce like their transportation, regardless of whether those goods might be transported out of state later.[25]

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[19] *E.g.*, *Gibbons*, 22 U.S. (9 Wheat.) 1. For a summary of the facts and holding in this case, see *infra* note 21.

[20] *Gibbons*, 22 U.S. (9 Wheat.) 1. Many scholars view *Gibbons* as the first in a number of landmark cases that have defined Commerce Clause jurisprudence over time. *See generally* Edmund W. Kitch, *Regulation and the American Common Market*, *in* REGULATION, FEDERALISM AND INTERSTATE COMMERCE 7, 17–45 (A. Dan Tarlock ed., 1981) (providing a general history of the dormant Commerce Clause).

[21] *Gibbons*, 22 U.S. (9 Wheat.) at 140. The court in *Gibbons* found that a New York statute granting exclusive rights to steamboat business was unconstitutional, reasoning that the statute directly conflicted with federal licenses of the same rights. *Id.* at 240. Interestingly, this subject matter seems to fall squarely within the Supreme Court's modern dormant Commerce Clause jurisprudence. *See infra* text accompanying notes 56–58. The dormant Commerce Clause—yet undeveloped at the time of *Gibbons*—would seem to reject the statute regardless of competing federal regulation, *see infra* notes 59–60 and accompanying text, but the *Gibbons* opinion stressed this conflict explicitly. *Gibbons*, 22 U.S. (9 Wheat.) at 240. The opinion also noted, "Commerce among the states, cannot stop at the external boundary line of each state .... It is not intended to say that these words comprehend that commerce, which is completely internal .... Such a power [of Congress] would be inconvenient, and is certainly unnecessary." *Id.* at 194. On its face, this language seems to permit unfettered state regulation of any and all commerce that physically transpires only within the state's bounds—a notion later contravened in dormant Commerce Clause cases in the 1920s. *See infra* Part I.B.1.

[22] *See infra* text accompanying note 25.

[23] 247 U.S. 251, 272 (1918) (finding no authority for a federal statute that, in effect, prohibited child labor within states under the reasoning that the labor produced goods in interstate commerce), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[24] *Id.* at 269–72.

[25] *Id.* Some scholars have attributed this variation from the *Gibbons* opinion to the political

Not until the case of *United States v. Darby* did the Supreme Court resume a greater trend of aggrandizing congressional power to regulate under the Commerce Clause.[26] Contrary to the *Hammer* Court's approach to precedent, the *Darby* opinion expressly rejected the holding of *Hammer* as binding precedent.[27] *Darby* created the basis for further aggrandizement of congressional power through the Court's explicit holding:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.[28]

This expansive definition of legitimate ends provided liberal deference to congressional actions and contrasted starkly with the Court's previous opinions.

The Court quickly cemented its holding in *Darby* with its opinion in *Wickard v. Filburn*, in which it reiterated the principle that Congress may regulate intrastate activity.[29] But *Wickard* also took congressional authority a step further. The Court held that federal regulation regarding farming quotas was valid as applied to an individual state farmer under the Commerce Clause, by focusing on the "aggregate" effect of the activity.[30] The Court drew upon the aggregate effect theory in later cases to uphold congressional action targeting various objectives under the guise of interstate commerce regulation.[31]

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popularity of laissez-faire economics at the time. *See, e.g.*, Rabin, *supra* note 18, at 1229; Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1072–73 (1992). Indeed, the language of the *Hammer* opinion more than suggests such motivation. *Hammer*, 247 U.S. at 269–70 ("In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities.").

[26] *Darby*, 312 U.S. 100. Over a century after the Court decided *Gibbons*, the *Darby* case upheld the Fair Labor Standards Act of 1938. That act prohibits interstate shipment of goods produced by employees working in conditions that do not satisfy certain requirements. *Id.* at 112–13 (citing 29 U.S.C.A. § 215(a)(1) (West 1998)).

[27] *Id.* at 115–17.

[28] *Id.* at 118 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

[29] Wickard v. Filburn, 317 U.S. 111, 123–24 (1942).

[30] *Id.* at 127–29.

[31] For example, the Court addressed racist practices in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964): "[I]nterstate commerce may be impeded or distorted substantially if local sellers of interstate food are permitted to exclude all Negro consumers. Measuring . . . by the *aggregate effect* of a great number of such acts of discrimination, I am of the opinion

Most recently, the Rehnquist Court attacked the broad aggrandizement of congressional authority under the Commerce Clause.[32] It did so by *distinguishing* precedent and requiring a subject matter of economic activity.[33] This movement began with the case of *United States v. Lopez*, in which the Court found that federal prohibition of gun possession in school zones was not properly addressed within the powers provided by the Commerce Clause.[34] In requiring a substantial connection between the regulated activity and interstate commerce, the Rehnquist Court denied Congress the power to support any conceivable regulation with an attenuated and extremely indirect effect on interstate commerce.[35] Thus, *Lopez* seems to have established a long overdue limit upon congressional authority under the Commerce Clause.[36]

2. Comparing *Raich* to Relevant Precedent

As the final ordinary Commerce Clause decision of the Rehnquist Court, *Gonzales v. Raich* undoubtedly stands apart from its immediate predecessors. In this case, the Court was faced with production and consumption of marijuana for medical purposes that occurred completely within one state.[37] Such medicinal use was permitted by state statute, but the federal government charged that the growth and use of marijuana was a violation of the Controlled Substances Act.[38] The defendants claimed that regulation of their activity by the *federal* government was unconstitutional.[39] Writing

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that Congress has constitutional power to regulate in this area." *Id.* at 276 (emphasis added). This expansive reasoning was reapplied in *Katzenbach v. McClung*, 379 U.S. 294 (1964), which found "ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it." *Id.* at 300.

[32] *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 134–41 (2004).

[33] *See id.* at 136 ("'[C]ommerce' . . . comprehends all 'economic activity.'"). The failure to overrule expansive precedent outright left the door open for *Raich* to reinstate it. *See infra* Part I.A.2.

[34] United States v. Lopez, 514 U.S. 549 (1995); *see also* United States v. Morrison, 529 U.S. 598 (2000) (holding that the Violence Against Women Act was not authorized by the Commerce Clause because it did not regulate any activity that substantially affected interstate commerce).

[35] *Lopez*, 514 U.S. at 567–68. *See generally* Gordon G. Young, *The Significance of Border Crossings:* Lopez, Morrison *and the Fate of Congressional Power to Regulate Goods, and Transactions Connected with Them, Based on Prior Passage Through Interstate Commerce*, 61 MD. L. REV. 177, 193 (2002) (suggesting *Lopez* and *Morrison* reflect a trend toward limiting congressional regulatory authority).

[36] *See* Young, *supra* note 32, at 136.

[37] Gonzales v. Raich, 545 U.S. 1, 5 (2005).

[38] *Id.* at 5, 14 (citing 21 U.S.C. §§ 812(c), 841(a)(1), 844(a) (2000)).

[39] *Id.* at 15. It seems important here to stress the exact issue that the Supreme Court

for a six-justice majority, Justice Stevens concluded in his opinion that the Controlled Substances Act was constitutional as applied to the defendants, arguing that the Commerce Clause allowed such regulation of state activity.[40]

In supporting congressional regulation with an attenuated connection to interstate commerce, the decision in *Raich* unapologetically conflicts with what many scholars viewed as the most recent trend in ordinary Commerce Clause jurisprudence.[41] Even the media were quick to point out the reversal that *Raich* reflected in the current flux of the Court's historic Commerce Clause jurisprudence.[42] If for no other reason, the case is striking because its result by nature requires an unexpectedly expansive interpretation of Commerce Clause powers. Yet, *Raich* is surprising for more reasons than the case's outcome.

Much of the language found in *Raich* seemingly runs counter to the Court's most recent opinions on Commerce Clause issues.[43] Particularly curious is the Court's reliance on *Wickard* despite the passage of time and the decisions of other cases that altered and redefined the meaning of the Commerce Clause: "*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[44] While drawing analogies between *Raich* and *Wickard*, the majority arguably ignored the limits most recent cases imposed upon congressional regulation in favor of more

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addressed in *Raich*. The case did not expressly concern the rightness or wrongness of medicinal marijuana; it addressed only whether the federal government's regulation of this intrastate production and use was within the powers granted to Congress in the Constitution. *Id.* at 5. This is not to say that the subject matter of the case is completely irrelevant. Indeed, the stigma that accompanies marijuana use may have played a significant role in the case's outcome, but the majority opinion simply never recognized this role. *See infra* note 109.

[40] *Raich*, 545 U.S. at 22.

[41] *See generally* Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After* Lopez *and* Morrison, 11 WM. & MARY BILL RTS. J. 403 (2002) (arguing that *Lopez* and *Morrison* indicated a surprising deviation from the Court's prior Commerce Clause cases).

[42] *See, e.g.*, Linda Greenhouse, *Justices Say U.S. May Prohibit the Use of Medical Marijuana*, N.Y. TIMES, June 7, 2005, at A1 ("The sharpest dispute was over the meaning of two of the core decisions of the Rehnquist Court's approach to federalism. Both struck down federal laws, the Gun-Free School Zones Act and the Violence Against Women Act, on the ground that they exceeded Congressional authority . . . ."); Editorial, *Not About Pot*, WASH. POST, June 8, 2005, at A20 ("The result is a six-justice majority that stands strongly against a revolutionary approach to commerce clause jurisprudence.").

[43] Some deviation from the decisions and language in *Lopez* and *Morrison* might be expected, as Justice Stevens wrote neither of those opinions. Indeed, he dissented from the majority in both cases. United States v. Morrison, 529 U.S. 598, 628, 655 (2000); United States v. Lopez, 514 U.S. 549, 602 (1995). His proclaimed adherence to those decisions from which he very recently dissented is noteworthy and stands in stark contrast to the decisions themselves

[44] *Raich*, 545 U.S. at 18.

general trends of expanding regulatory power.[45] By distinguishing the conflicting precedent of recent cases, the majority in *Raich* cut short what some scholars had deemed a revolution for federalism.[46] The majority, however, did not even expressly recognize its own actions, choosing instead an approach that ignored the possibility of contradiction.

In her dissenting opinion, Justice O'Connor argued not only that the majority's opinion contradicted recent precedent but also that its interpretation of recent precedent was nonsensical when carried to its logical conclusion:

> [T]he Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce.[47]

Likely due to arguments such as these, the majority opinion in *Raich* seems not to focus on preserving more recent opinions; instead, it stresses the holdings made at a time when congressional power through the Commerce Clause remained seemingly unlimited.[48]

In its focus on the precedent of earlier Commerce Clause decisions and disregard for more recent cases, *Raich* is best viewed as an aberration from the most recent trend in doctrinal development and a return to older, less restrained views of congressional authority.[49] As such, the case provokes new questions as to the current meaning of the clause and shrouds in uncertainty the direction its development will take in the future. Although only time will tell the precise impact of *Raich* in these regards, the great importance of the case to the Court's ordinary Commerce Clause jurisprudence is unmistakable.

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[45] *Id.* at 23 ("To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases.... Those two cases, of course, are *Lopez* and *Morrison*." (citations omitted)).

[46] *See, e.g.*, Craig M. Bradley, *What Ever Happened to Federalism?*, TRIAL, Aug. 2005, at 52, 52 ("[T]he Court strangled in its infancy the so-called federalism revolution that began a mere 10 years ago . . . .").

[47] *Raich*, 545 U.S. at 46 (O'Connor, J., dissenting) (citation omitted).

[48] *See supra* notes 28–31 and accompanying text. Some suggest the real, hidden motivation behind this counter-doctrinal decision can be found upon a close inspection of the majority's opinion. *See, e.g.*, Douglas W. Kmiec, Gonzales v. Raich: Wickard v. Filburn *Displaced*, 2004 –2005 CATO SUP. CT. REV. 71, 91 (stressing the significance of the Court's fear that allowing medical marijuana will lead to the legalization of recreational use); *see also infra* note 109.

[49] *See supra* note 46 and accompanying text.

B. Dormant Commerce Clause Jurisprudence in the Supreme Court

Cases such as *Wickard*,[50] *Lopez*,[51] and *Raich*[52] fall into one of two constitutional doctrines tied to the Commerce Clause. Whereas those cases address the reach of Congress in regulating activity among states, other cases have addressed the seemingly complementary notion of state regulation in this regard. The latter group falls under the Court's "dormant" Commerce Clause jurisprudence, termed as such because it is based solely on an implication from the text of the clause, rather than the text itself.[53]

1. History of Dormant Commerce Clause Jurisprudence

The dormant Commerce Clause is now understood as a mandatory negative implication from the text of the Commerce Clause that states may not regulate interstate commerce if Congress holds that power.[54] Perhaps due to the lack of express contextual grounding, the Supreme Court initially struggled to clearly define any constant doctrine regarding state regulation of interstate commerce.[55] Indeed, *Gibbons v. Ogden* was one of the first cases in which the Court addressed subject matter that seems to fall clearly within modern dormant Commerce Clause jurisprudence.[56] Yet, as previously noted,[57] the Court hearing that early case did not consider any negative aspect of the clause's text, as it does in modern cases; instead, it focused on an argument that federal regulation of interstate commerce was exclusive and supreme, or at least preemptive.[58] In this way, *Gibbons* demonstrates how the initial evolution of dormant Commerce Clause theory was neither as quick nor as clear as the evolution of ordinary Commerce Clause doctrine.

Confusion and indecision regarding state regulation of interstate commerce plagued the Court for many years. Over time, it developed a test that was applied in search of invalid state regulation of interstate commerce.[59] That test found a violation of the dormant Commerce Clause when state activity "directly" burdened interstate

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[50] Wickard v. Filburn, 317 U.S. 111 (1942).

[51] United States v. Lopez, 514 U.S. 549 (1995).

[52] *Raich*, 545 U.S. 1.

[53] *See* Freeman v. Hewit, 329 U.S. 249, 252 (1946) ("In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." (citations omitted)), *abrogated by* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[54] *Id.*

[55] For an argument that dormant Commerce Clause theory remains the confused product of a series of disjointed decisions, see Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 126–30.

[56] 22 U.S. (9 Wheat.) 1 (1824).

[57] *See supra* note 21.

[58] *E.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 210–22. "In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 211.

[59] *See, e.g.*, Shafer v. Farmers Grain Co. of Embden, 268 U.S. 189 (1925) (prohibiting regulation of wheat purchases within state for interstate shipment because it was a direct burden).

commerce.[60] A refined version of that analysis can be found in the case of *Di Santo v. Pennsylvania*.[61] In that case, the Court considered a state law requiring a license for businesses offering transportation tickets between Pennsylvania and foreign countries.[62] Although *Di Santo* did not concern commerce among multiple states in America, it nevertheless portrayed the Court's then-developed test, which found state regulation invalid when its burden on interstate commerce was sufficiently direct.[63]

Di Santo is also noteworthy in that it contains the seed for a shift in the Court's dormant Commerce Clause jurisprudence.[64] In this case, Justice Stone dissented and rebuked the value of a test for directness in burden:

> In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.[65]

Subsequent cases echoed that dissenting proclamation, but in those cases Justice Stone wrote for the majority. One such case, *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[66] is now credited with extinguishing the direct burden test.[67] That case proposed a rule allowing states to regulate interstate commerce that Congress was unable to adequately address.[68] Although this new formulation sought to expressly address the line between state and federal regulatory powers through judicial discretion, it did not create a definite standard by which states might evaluate their actions.[69] Thus, the confusion continued to some extent.

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[60] *Id.*

[61] 273 U.S. 34 (1927), *abrogated by* California v. Thompson, 313 U.S. 109 (1941).

[62] *Id.* at 35.

[63] *Id.* at 41.

[64] *Di Santo* also unambiguously rejected intent as a determinative factor when searching for a violation of the dormant Commerce Clause, thereby further developing the applicable test. *Id.* at 37 ("A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed.").

[65] *Id.* at 44 (Stone, J., dissenting).

[66] 325 U.S. 761 (1945).

[67] *See, e.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1183–84 (1986) (noting the importance of *Southern Pacific* in advocating a new test but questioning the actual implementation of that test in subsequent cases).

[68] *Southern Pacific*, 325 U.S. 761.

[69] *See* Regan, *supra* note 67, at 1182–84 (noting the shortcomings of the Court's balancing test).

More recently, the case of *Pike v. Bruce Church, Inc.*[70] provided what many scholars hailed as the answer to calls for a clear test for dormant Commerce Clause violations.[71] The case established the following two-tiered test to determine whether state activity affecting interstate commerce was constitutional: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[72] This test preserved the possibility for constitutional state regulation clearly provided for in the *Southern Pacific* test but provided clarity that *Southern Pacific* lacked.[73] Furthermore, the Court in *Pike* looked beyond whether the state regulation was even-handed and held incidental burdens on commerce unconstitutional under an additional tier,[74] thereby establishing its significance in the greater analysis. The Court has reinforced this tiered analysis in subsequent decisions.[75]

Besides establishing a clear, tiered analysis, *Pike* also hinted at a new factor to be considered in searching for violations of the Commerce Clause: benefit to the state in question.[76] Recent opinions released by the Court confirm that favoritism in state legislation is a key ingredient for a violation of the dormant Commerce Clause.[77] *C & A Carbone, Inc. v. Town of Clarkstown*, is a recent case that demonstrates the pervasive importance of favoritism in the Court's analysis.[78] In that case, the Court incorporated the formulation of *Pike* to restate its modern view of dormant Commerce Clause analysis as follows: "For this inquiry, our case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce; and second, whether the ordinance imposes a burden on interstate commerce that is 'clearly

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[70] 397 U.S. 137 (1970) (considering whether an Arizona requirement that a cantaloupe grower package his product in order to ship it was an unconstitutional burden on interstate commerce).

[71] *See, e.g.*, Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 223 n.21 (noting *Pike* as the court's "most famous formulation" of the dormant Commerce Clause standard and *Southern Pacific* as *Pike*'s "ultimate progenitor").

[72] *Pike*, 397 U.S. at 142.

[73] *Southern Pacific* addressed the two tiers later enumerated in *Pike* in a less coherent fashion, noting first that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure . . . regulate [interstate commerce]." 325 U.S. at 767, and later that "reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved." *Id.* at 768–79.

[74] *Pike*, 397 U.S. at 146 ("Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved.").

[75] *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389–90 (1994).

[76] *Pike*, 397 U.S. at 145 ("[I]t is not easy to see why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops . . . .").

[77] *See generally* Regan, *supra* note 67, at 1182–84 (noting that protectionism or discrimination could be reasons for the court to find a violation).

[78] 511 U.S. at 390.

excessive in relation to the putative local benefits.'"[79] In this way, *Carbone* made explicit a motive that some had already suspected was behind the Court's analysis.[80]

From *Gibbons* to *Carbone*, the implications of the Commerce Clause for state regulation have varied greatly. To be sure, the Court's dormant Commerce Clause jurisprudence differs greatly from the more one-sided and predictable developments seen in cases addressing federal regulation.[81] Nevertheless, trends within the history of that jurisprudence do exist, and the most recent is the Court's express distaste for states' protectionism of local business.[82]

2. Comparing *American Trucking* to Relevant Precedent

Unlike *Raich*, *American Trucking Ass'ns, Inc. v. Michigan Public Service Commission*[83] seems to fit neatly in the line of modern cases addressing dormant Commerce Clause claims. The case involved a state law that imposed a one-hundred-dollar annual fee on all trucks making intrastate deliveries within state bounds.[84] The fees in question then helped fund the state's monitoring of the trucks on its roads.[85] In an appellate brief, the petitioner noted that the law applied equally to those trucks making both interstate and intrastate deliveries.[86] The petitioner further argued that such trucks typically created far less intrastate traffic than trucks committed entirely to intrastate traffic.[87] Ultimately, the Court rejected the claim of a violation.[88]

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[79] *Id.* (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) and quoting *Pike*, 397 U.S. at 142).

[80] For an article predating *Carbone* and arguing that preventing state protectionism is the Court's primary goal in modern dormant Commerce Clause cases, see Regan, *supra* note 67, at 1206.

[81] *See supra* Part I.A.1.

[82] Forgiving momentarily the arguably tenuous finding of a negative inference from the Commerce Clause, dormant Commerce Clause jurisprudence seems more closely connected to the implied text than is the case in ordinary Commerce Clause jurisprudence. Whereas the dormant doctrine maintains focus on more substantial effects on "interstate commerce," the ordinary Commerce Clause stretches that term's definition to its limit and beyond. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 123–24 (1942). Nevertheless, the increasing focus on protectionism when applying the dormant Commerce Clause is alarming due to what this trend suggests about the doctrine's future development, even though the more simplistic search for any burden has not yet been rejected outright.

[83] 545 U.S. 429 (2005).

[84] *Id.* at 431.

[85] *Id.*

[86] Brief for the Petitioners at 2–4, Am. Trucking Ass'ns, v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005) (No. 03–1230).

[87] *Id.* at 8. Thus, the petitioner argued that the fee discriminated because it was not applied in accordance with the disparate traffic each type of truck produced. *Id.*

[88] *American Trucking*, 545 U.S. at 438.

As in similar cases leading up to *American Trucking*, the Court based its finding on a search for benefit to state business and discrimination against interstate commerce.[89] The Court generally justified its analysis not in the Constitution's text, but rather in its established holding that the Constitution "'was framed upon the theory that the peoples of the several states must sink or swim together.'"[90] From that basic proposition, the Court continued to cite a string of cases in piecemeal to achieve support for its modern dormant Commerce Clause test.[91] This approach allowed the Court to present *American Trucking* as a simple reiteration of the dormant Commerce Clause doctrine it had previously defined.[92] The case, however, has a greater meaning for the doctrine than it may seem to have at first glance.

That the *American Trucking* Court never initially found the fee in question even had a definite effect on interstate commerce is particularly noteworthy.[93] Indeed, only after it analyzed the possibility of discrimination did the Court question whether the case presented a burden on interstate commerce, and even then the Court mentioned it only in passing.[94] The absence of any search for an actual burden on interstate commerce is noteworthy because this question alone seemingly would decide earlier cases that required a burden before addressing its directness.[95] By focusing on an analysis of discrimination and favoritism without addressing whether the fee actually affects interstate commerce, *American Trucking* reflects the true motivation behind the

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[89] *Id.* at 433–37.

[90] *Id.* at 433 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)).

[91] *Id.* (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99–100 (1994); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Cent. Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948)). Part of the reason the Court cites to so many cases for different principles is that its interpretation of the dormant Commerce Clause has varied so greatly depending on the subject matter of each case. *See generally* Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 414 (1998) ("[T]he Court's analysis of the various cases presumably depends at least in part upon the substantive category into which the case is placed. That the analytical approach used by the Court should depend upon the substantive area affected creates the possibility for confusion.").

[92] Yet another indicator of the Court's belief that the case presented an issue previous law had clearly determined was the general brevity of the majority opinion, at less than eight full pages. *American Trucking*, 545 U.S. at 431–38; *cf.* Gonzales v. Raich, 545 U.S. 1, 5–33 (2005) (majority opinion spanning twenty-nine pages).

[93] In *Carbone*, the Court noted as a preliminary matter that the case presented a burden on interstate commerce. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389 (1994) ("At the outset we confirm that the flow control ordinance does regulate interstate commerce, despite the town's position to the contrary."). Although the case is known for the analysis it applied from that point on, the existence of a burden in that case was noted as a logical prerequisite to that analysis. *Id.*

[94] *American Trucking*, 545 U.S. at 438 ("In sum, petitioners have failed to show that Michigan's fee . . . either burdens or discriminates against interstate commerce . . . .").

[95] *See, e.g.*, Torao Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 428 n.1 (1948) (Reed, J., dissenting).

Court's dormant Commerce Clause analysis. That motivation is a desire to prevent states from instituting measures protective of their own economic interests.[96]

Through its nearly exclusive focus on discrimination in *American Trucking*, the Court again refined its interpretation of the dormant Commerce Clause. It applied previously established analysis in such a way as to give the factor of favoritism an effect that overshadows other more essential considerations.[97] Thus, the importance of the case arises not from any new law or rule it provides through its outcome, but rather from the implications of its language and analytical structure.[98] *American Trucking*, unlike *Raich*, has received no significant immediate attention from scholars or the media.[99] Nevertheless, its significance to the modern theory of the dormant Commerce Clause is also great, albeit in a more subtle aspect of the opinion.

II. FABRICATION AND DISUNITY IN THE COMMERCE CLAUSE DOCTRINES REFLECTED IN *RAICH* AND *AMERICAN TRUCKING*

As with most any constitutional doctrine, the Supreme Court's interpretations of the Commerce Clause have drawn criticism throughout their development. Yet, criticism surrounding these particular doctrines has been heavier than for most. The Court's decisions regarding federal and state regulations under the clause seem particularly susceptible to such criticism for a number of reasons. Fallacy in each doctrine can be argued when examining *Raich*[100] and *American Trucking*[101] independently of one another; however, a comparison of the two cases[102] makes flaws in the Court's interpretations of the Commerce Clause all the more clear.

A. Independent Analysis of Fallacy in Raich

Through its dismissal of conflict in recent cases and focus on decisions that have aggrandized Commerce Clause powers, *Raich* serves as an intriguing example of modern Commerce Clause jurisprudence. In one sense, the case has created a clear problem for the establishment and adherence to precedent by ignoring the applicability of recent cases.[103] Although it has confused the recent trend in defining interstate commerce, the case also has revealed a greater problem by demonstrating the conceivable extent of valid congressional regulation under the clause.[104]

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[96] *See* Regan, *supra* note 67, at 1206.

[97] *American Trucking*, 545 U.S. at 433.

[98] These implications are addressed *infra* in Part II.B.

[99] *Cf.* Ken Thomas, *Michigan's Truck Fees Upheld: Supreme Court Says Tax Doesn't Deter Interstate Activity*, GRAND RAPIDS PRESS, June 21, 2005, at C3 (providing only a short summary of the case in a localized publication).

[100] *See infra* Part II.A.

[101] *See infra* Part II.B.

[102] *See infra* Part II.C.

[103] *See supra* note 43 and accompanying text.

[104] *See generally* Kmiec, *supra* note 48, at 72 (concluding that *Raich* displaced *Wickard*

1. Precedent Dishonored in *Raich*

The majority opinion in *Raich* distinguished recent precedent from the statute it addressed in an effort to render the disagreeable precedent inapplicable.[105] The opinion suggested that the statute in *Raich* encompassed a complex scheme of regulation that included intrastate activity, and the holdings of both *Lopez* and *Morrison* could not apply because those cases regulated intrastate activity in a more targeted and specific manner.[106] Yet, the attempt to distinguish those cases fails when considering the logical ramifications of the majority's understanding of their holdings.[107] There is a critical disconnect in the majority's reasoning that because the Controlled Substances Act encompasses intrastate activity, *Lopez* and *Morrison* allow regulation of the activity as an *essential* part of a greater scheme.[108] Whatever the motive for the Supreme Court's refusal to apply the law of those cases in *Raich*,[109] its decision is ultimately untenable.

The majority's insupportable denial of recent precedent in *Raich* effectually undermines the consistency and objectivity in judgment which are central to the Supreme Court's authority.[110] Scholars have not only questioned the reasoning of the majority opinion but also have immediately recognized that the decision is "flatly inconsistent with *Lopez* and *Morrison*."[111] This recognition of capriciousness in turn belittles the

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v. Filburn as the outer limit of congressional authority under the Commerce Clause).

[105] Gonzales v. Raich, 545 U.S. 1, 24–26 (2005). Interestingly, this attempt to distinguish precedent rather than overturn it mirrors the approach of *Hammer v. Dagenhart*—another ordinary Commerce Clause case in which the opinion similarly defied a recent trend in precedent and was ultimately overturned. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[106] *E.g.*, *Raich*, 545 U.S. at 17 ("[W]hen "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."'" (quoting United States v. Lopez, 514 U.S. 549, 558 (1995))).

[107] *See supra* note 47 and accompanying text.

[108] *See supra* note 47 and accompanying text.

[109] One motive seems particularly likely to be at play. Before distinguishing the precedent of *Lopez* and *Morrison*, the majority in *Raich* discussed at great length the history behind, not only the statute at hand, but the regulation of marijuana in general. *E.g.*, *Raich*, 545 U.S. at 14 ("In enacting the CSA, Congress classified marijuana as a Schedule I drug. . . . Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment."). Yet, the details of reasons for regulation of marijuana seem to deal more with the rightfulness of regulation in general, and they seem irrelevant in answering the question of which government (federal or state) might impose regulation. *Id.* The discussion of historic regulation of marijuana and supportive reasoning thus seems to betray an unspoken motive in the Court's ruling: a belief that prohibition of marijuana use or manufacture of any kind is justified however achieved.

[110] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (providing a general summation of the binding effect of *stare decisis*).

[111] *See* Bradley, *supra* note 46, at 52.

external credibility of the judicial system.[112] Furthermore, the Court's attempt to distinguish disagreeable precedent, rather than to overturn it outright, muddles the law regarding Commerce Clause authority.[113] By cementing in its jurisprudence holdings that stand at odds with each other, the Supreme Court has created decisive precedent to support both sides of the debate over interstate commerce in the future.

2. *Raich*'s Removal of Rational Limits on Commerce Clause Authority

By focusing on *Wickard*, *Raich* demonstrates the possibility for limitless congressional regulation that lies within the well-established history of Commerce Clause decisions, and it threatens to turn that possibility into a reality.[114] Even if the Court ultimately treats *Raich* as a meaningless deviation from the recent trend toward limiting congressional authority, the case implicates the possibility that such authority may stray even further from literal regulation of commerce "among the several states" at some point in the future.[115] In this sense, *Raich* epitomizes the potential to ground limitless congressional authority over states in historic Supreme Court precedent.

The infinite congressional authority that *Raich* portends threatens the very structure of federalism.[116] This threat is exactly what the decisions in recent precedent sought to eliminate by requiring that an activity's effect on interstate commerce be substantial before Congress might regulate it.[117] The merits of that requirement resound in Justice O'Connor's dissenting opinion in *Raich*: "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[118] The decision in *Raich*

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[112] For a summary of the importance of precedent in judicial decision-making and the effects of its use, see Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1158–67 (2005).

[113] *See, e.g.*, Kmiec, *supra* note 48, at 87–88.

[114] Justice O'Connor noted this threat in her dissent in *Raich*, stating that "the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision." *Raich*, 545 U.S. at 43 (O'Connor, J., dissenting).

[115] *See* Kmiec, *supra* note 48, at 72–75 (noting that the *Raich* decision has expanded the limits of federal power).

[116] Justice O'Connor noted this threat in her dissenting opinion: "If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers." *Raich*, 545 U.S. at 47 (O'Connor, J., dissenting).

[117] United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[118] *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). As Justice O'Connor notes, the virtues of federalism are undoubtedly strong and seem quashed by the holding in *Raich*. Beyond the ability of one state to experiment with innovative social and economic concepts, federalism also promotes efficient and responsive governance by increasing accountability. Along the same lines, federalism also provides benefits of participatory self-government and

casts doubt on whether federalism and its virtues will survive future federal regulations under the supposed Commerce Clause authority provided in that case.

B. Independent Analysis of Fallacy in American Trucking

Like *Raich*, *American Trucking* serves an important representative function for its respective Commerce Clause doctrine. Yet, *American Trucking* achieves this function as a natural progression from the sequence of decisions leading up to it,[119] whereas *Raich* represents the possibility of a new judicial theory stemming from historic precedent.[120] *American Trucking* is the most recent step in the trend toward a new dormant Commerce Clause doctrine.[121] As such, it takes the revolutionary analysis of *Carbone* that was already criticized as wayward and unsubstantiated,[122] and often misapplied,[123] and pushes it further through an exclusive focus on that case's principles. Fallacies contained in the *American Trucking* decision, therefore, are not unique in regard to recent cases dealing with the dormant Commerce Clause, but they are more clearly present in that case than in its predessors.[124]

The central flaw that the *American Trucking* opinion demonstrates in the Court's doctrinal analysis is its degree of separation from any text found in the Constitution.[125] The argument that modern dormant Commerce Clause doctrine lacks constitutional support is not groundbreaking.[126] One author summarized an arguable lack of constitutional support for the dormant Commerce Clause by noting, "the widespread endorsement of a judicially enforceable rule that state and local governments may not discriminate against interstate commerce appears, instead, to arise from the widespread perception that this rule is a very good idea."[127] Some scholars of today's dormant Commerce Clause doctrine take their criticism even further, arguing that the principle of a negative implication to the text of the clause is itself invalid.[128]

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protection against tyranny, which are less achievable under a national government due to the increase in scale and resulting wider disbursement of citizens. For a recent discussion of the debate over federalist principles, see Steven G. Calabresi, *"The Era of Big Government is Over,"* 50 STAN. L. REV. 1015 (1998) (reviewing ALAN BRINKLEY ET AL., NEW FEDERALIST PAPERS (1997)). In that article, Professor Calabresi reviews and criticizes a contemporary book defending the constitutional underpinnings of today's large national government. *Id.* In doing so, he provides an excellent argument for the undying nature of federalist principles in today's society and a call for their protection. *Id.*

[119] *See supra* note 91 and accompanying text.

[120] *See supra* notes 45–46 and accompanying text.

[121] *See supra* note 91 and accompanying text.

[122] *See, e.g.*, Heinzerling, *supra* note 71, at 219.

[123] *See, e.g.*, Rachel D. Baker, C & A Carbone v. Clarkstown*: A Wake-up Call for the Dormant Commerce Clause*, 5 DUKE ENVTL. L. & POL'Y F. 67, 83 (1995).

[124] *See supra* text accompanying notes 97–98 and accompanying text.

[125] *See supra* text accompanying notes 90–92.

[126] *E.g.*, Heinzerling, *supra* note 71, at 218–19.

[127] *Id.* at 219.

[128] *E.g.*, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J.

Indeed, *American Trucking* contains a concurring argument by Justice Thomas that the dormant Commerce Clause is completely a creation of the Court and has no place in judicial analysis.[129]

Analysis of the majority's opinion in *American Trucking* could support both of the arguments above. To begin with, the opinion lacks any citation to the Constitution for direct support, as is the norm for modern cases under the doctrine.[130] Although the Court cites to the Commerce Clause, it does so only in indirect connection to its own implications.[131] Yet, the implication of a reciprocal or "dormant" doctrine is not undoubtedly required by the Constitution's text. Quite simply, to give a power to a governmental body does not automatically require that the power be exclusive. Indeed, many powers are shared by multiple governmental bodies out of necessity, and the same is possible for the Commerce Clause.[132]

Although the Constitution does not necessarily require that the power to regulate interstate commerce be exclusive, there may still be a valid or practical use for the principle of exclusivity in this context. But recognition of the tenuous support for a dormant Commerce Clause doctrine is cause to guard against a meaning that even slightly exceeds the implied text. In its restricted focus on state protectionism, *American Trucking* indicates that the Court has begun to exceed the text it purports to imply.[133] The implication that states may not regulate interstate commerce does not overtly suggest the issue of protectionism, and that implication itself is not expressly supported in the Constitution.[134] Such attenuation in reasoning removes any analysis of the meaning in the Constitution's text from the Court's doctrine. Although most

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425, 435 (1982) (arguing that "[t]he time-honored rationales for traditional dormant commerce clause jurisprudence have become historical vestiges").

[129] Am. Trucking Ass'ns, v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Thomas, J., concurring). Justice Thomas's entire opinion reads: "I would affirm the judgment of the Michigan Court of Appeals because '"[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application," and, consequently, cannot serve as a basis for striking down a state statute.'" *Id.* (quoting Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part); Camps/Newfound/Owatunna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting)).

[130] *See* Heinzerling, *supra* note 71, at 219 & n.10.

[131] *American Trucking*, 545 U.S. at 433 ("[T]his Court has consistently held that the Constitution's express grant to Congress of the power to 'regulate Commerce . . . among the several states,' Art. I, § 8, cl.3, contains 'a further negative command, known as the dormant Commerce Clause.'" (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995))).

[132] For instance, both state and federal government have the power of eminent domain. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 615 (2d ed. 2002).

[133] *American Trucking*, 545 U.S. at 434. Indeed, the closing remarks of the majority's opinion betray this point when it concludes that the statute in question did not violate "the Commerce Clause in any other *relevant* way." *Id.* at 438 (emphasis added). That conclusion is curious in its suggestion that any violation of the Commerce Clause could be irrelevant to the Court's analysis.

[134] *See* Regan, *supra* note 67, at 1206.

scholars support the outcomes of *American Trucking* and like cases,[135] this "ends justify the means" mentality allows the Supreme Court to become something more than the arbiter of the Constitution,[136] thus disrupting the balance of our system of government.

C. Comparison of Commerce Clause Doctrines Applied in Raich *and* American Trucking

When two doctrines are understood to stem from reciprocal texts, one would expect these doctrines to allow negative inferences that withstand reasonable application. Such is not the case with the ordinary Commerce Clause and its dormant counterpart. When comparing the decisions and reasoning in *Raich* and *American Trucking*, the fallacies inherent in the Supreme Court's application of the Commerce Clause doctrines become clear. As this analysis shall reveal, the doctrines themselves are far from reciprocal; rather, they are so disjointed that implementing the inverse understanding of one doctrine to the other's context achieves nonsensical results.

1. Reciprocal Reasoning of *American Trucking* Applied in the Context of *Raich*

The near-exclusive focus on state protectionism in *American Trucking* is the trademark of the Court's latest dormant Commerce Clause jurisprudence.[137] Yet, as previously noted, this aspect of the Court's analysis is difficult to ground in the text of the clause or even a negative implication thereof.[138] This reality suddenly becomes obvious when considering the conceivable implications of the protectionism focus for the reciprocal doctrine.

The search for protectionist measures associated with modern dormant Commerce Clause analysis is not to be found in *Raich* or like cases for a good reason: it does not fit. If the dormant doctrine is truly founded in reasoning of negative implications,[139] then a guard against state-promoted protectionism by the dormant Commerce Clause would equate to permission of federally promoted protectionist measures. *Raich* and other similar cases, however, address only the broader issue of whether interstate commerce is being regulated, without ever considering whether Congress is favoring any particular state through its regulation.[140] This absence of permissive state favoritism in ordinary Commerce Clause jurisprudence can be explained by the same reason the Court and scholars approve of disallowing favoritism in the dormant Commerce Clause: a belief that protectionist measures are undesirable in any form.[141]

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[135] *See, e.g.*, Heinzerling, *supra* note 71, at 219.

[136] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[137] *See supra* Part I.B.

[138] *See supra* Part II.B.

[139] *See supra* note 54 and accompanying text.

[140] Gonzales v. Raich, 545 U.S. 1 (2005); *see also* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[141] *See, e.g.*, Heinzerling, *supra* note 71, at 219; Regan, *supra* note 67.

More generally, the scope of the Court's ordinary Commerce Clause jurisprudence is simply far too vast to be applied as a reciprocal version of the dormant Commerce Clause and still maintain the current analysis of the ordinary doctrine. Although a dormant test that examines state regulation for *any* effect on interstate commerce may have some merit,[142] the Court's focus on protectionism targets a spectrum of state activity that is much narrower.[143] Such disjointed scopes cast further doubt on the doctrine's supposed reciprocity.

Although the Court in *American Trucking* necessarily seeks to derive support for its decision in the power granted by the Commerce Clause,[144] the Court's own direct interpretations of that text—in ordinary Commerce Clause cases—say nothing regarding state-protective activity. This disharmony in doctrines demonstrates that the Court's Commerce Clause jurisprudence is to some extent a contradictory fabrication.

2. Reciprocal Reasoning of *Raich* Applied in the Context of *American Trucking*

Just as certain arguments in the *American Trucking* opinion do not withstand scrutiny in cases like *Raich*, some ordinary Commerce Clause principles are clearly flawed when viewed within a dormant Commerce Clause analysis. Of principal note is the limitless definition of "interstate commerce" that *Raich* revives.[145] This element of ordinary Commerce Clause analysis seems particularly questionable when compared to the dormant Commerce Clause context.

Injecting the broad definition of interstate commerce into the dormant Commerce Clause doctrine would require a ridiculous shift in analysis. The Court currently restricts application of the doctrine to those situations that directly involve interstate transportation of goods and services,[146] but the understanding of interstate commerce found in *Raich* would require the court to consider whether a huge variety of state activity violates the dormant Commerce Clause.[147] For instance, if *Raich* is viewed as allowing the regulation in *Lopez* under a broader statutory scheme,[148] by the Court's reasoning of negative implications it would have to consider whether regulation of guns in schools on the state level violates the dormant Commerce Clause.[149] By the same reasoning, state statutes equivalent to the one struck down in *Morrison*[150] could

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[142] Indeed, Part III of this Note will argue for revision that achieves exactly that effect.

[143] *See supra* note 76 and accompanying text.

[144] Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 434 (2005).

[145] *Raich*, 545 U.S. at 17–19.

[146] *E.g.*, *American Trucking*, 545 U.S. 429; Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945); Di Santo v. Pennsylvania, 273 U.S. 34 (1927); Shafer v. Farmers Grain Co. of Embden, 268 U.S. 189 (1925).

[147] *Raich*, 545 U.S. at 17–19.

[148] *See supra* note 47 and accompanying text.

[149] United States v. Lopez, 514 U.S. 549, 551 (1995) (addressing the Gun-Free School Zones Act of 1990).

[150] United States v. Morrison, 529 U.S. 598, 601 (2000) (addressing the Violence Against Women Act).

present a serious issue of authority when applying the definition of interstate commerce found in some ordinary Commerce Clause cases. Clearly, such an all-encompassing restriction on state regulatory authority undermines our federalist system of government in a way too extreme even for today's Supreme Court.

Furthermore, the two-tiered structure of dormant Commerce Clause jurisprudence established in *Carbone*[151] and *Pike*[152] also makes little sense when carried over to the ordinary Commerce Clause context. The analysis of the ordinary doctrine contains only one of the two tiers—a search for discriminatory effect—and entirely avoids any sort of additional balancing test for incidental effects. Indeed, the test for federal authority of whether there is an *aggregate* economic effect found in *Wickard*,[153] and now *Raich*,[154] instead strongly suggests the complete unimportance of whether the effect is incidental. In this way, the application of *Raich*'s doctrine as a reciprocal of the doctrine in *American Trucking* again defies practical connection between the two.

Thus, although the majority in *Raich* argues its adherence to the Constitution's provision regarding interstate commerce,[155] it enforces a definition of that term so expansive that including it in the Court's dormant Commerce Clause doctrine is practically unthinkable. As another major inconsistency in the application of the Commerce Clause, the noncorrelative definitions of each doctrine demonstrate how the Court's interpretations have gone awry.

III. SUGGESTED REVISION FOR THE COURT'S COMMERCE CLAUSE DOCTRINES

Given the numerous problems of modern Commerce Clause cases outlined above, both doctrines under the clause demand repair. The disjointed nature of the doctrines stresses just how unsupported and muddled each of them is. The inconsistencies that plague the Court's current understanding of the Commerce Clause serve to emphasize the problems that underlie both of the doctrines said to stem from its text. Needed revision and the reasons for it are, therefore, somewhat self-evident. In short, the two doctrines of the clause would both benefit greatly from a mutual curtailment that allows their reciprocity to withstand critical scrutiny.

A. Ordinary Commerce Clause: Redefining "Interstate Commerce" and Adding a Second Tier of Analysis

The Court should first revise its definition of interstate commerce to include only regulation which creates a substantial effect,[156] regardless of whether the regulation in

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[151] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389–90 (1994).

[152] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[153] Wickard v. Filburn, 317 U.S. 111, 127–29 (1942).

[154] Gonzales v. Raich, 545 U.S. 1, 17–19 (2005).

[155] *Id.* at 25–26.

[156] *E.g.*, United States v. Morrison, 529 U.S. 598, 611 (2000); United States v. Lopez, 514 U.S. 549, 556–57 (1995).

question falls into a larger scheme. This would be possible through a reading of the immediate precedent leading up to *Raich* that differs from the majority's interpretation in that case.[157] Ideally, this revision would produce an analysis that looks very similar to that of the *Lopez* and *Morrison* cases.[158] The most direct and effective way of achieving that revision, therefore, is to overturn *Raich* outright. There seems no other way of completely removing the residual confusion and potential abuse of precedent in the future.[159]

In ordinary Commerce Clause cases in which regulation of an intrastate activity is only a part of greater regulation of a different matter, a balancing of federal and state interests is the clearest way to determine which entity has power, as opposed to a per se exception to state authority within the definition of Commerce Clause powers.[160] The addition of this balancing test would also serve as a counterpart to the second tier of analysis in recent dormant Commerce Clause cases,[161] thus eliminating another incongruence between the two reciprocal doctrines.[162]

A revised understanding of interstate commerce in the Court's ordinary Commerce Clause jurisprudence would resolve a major inconsistency between it and its sister doctrine. A requirement of substantial effect more closely resembles the already confined subject matter of the dormant Commerce Clause.[163] In this way, a reciprocal requirement that state regulation be allowed if it does not substantially affect interstate commerce fits well within established precedent.[164] Such coherence would resolve current confusion over the ordinary Commerce Clause doctrine and restore

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[157] *Raich*, 545 U.S. 1.

[158] The obvious problem with this approach is a conflict with *stare decisis*. The reasoning behind that principle, however, concerns the need for consistency in the Court's decisions in order to establish its authority as a reliable source of law. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (noting further that "the rule of *stare decisis* is not an 'inexorable command'"). *Raich* already disserves any authority derived from the Court's consistency to such an extent that reversal of that case would arguably negate any detriment to *stare decisis*, if not outweigh it.

[159] The pitfalls of attempts to revise doctrine through distinguishment can be found in this Note. For instance, the Court attempted to limit the meaning of "commerce" in *Hammer*, but that attempt failed when the decision was expressly overruled in *Darby*. *See supra* notes 27–28 and accompanying text. Likewise, *Lopez* and *Morrison* attempted to restrict congressional authority once more, *see supra* notes 34–35, but failed because they did not expressly overrule past precedent, leaving it to be adopted again in the future. *See supra* notes 43–44 and accompanying text.

[160] The design of such a per se rule, excepting the state's typical power to regulate matters within its bounds, seems to be what allowed the majority in *Raich* to provide the regulation in question with blanket protection from more intense scrutiny. *Raich*, 545 U.S. at 22.

[161] *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389 (1994); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[162] *See supra* text accompanying notes 137–40.

[163] *See supra* Part I.B.1.

[164] *See supra* Part I.B.

from endangerment the virtues of federalism.[165] A substantial effect test would also bring the doctrine into a stricter adherence to the Constitution's text and provide a clearer meaning and enhanced reliability to precedent in this context.[166]

B. Dormant Commerce Clause: Removing the Analysis of Protectionism

The fallacy contained in modern dormant Commerce Clause doctrine also calls for revision.[167] Quite simply, the Court should refrain from any analysis of state protectionism and should instead ask only whether the states are regulating interstate commerce. In essence, this revision would resemble a return to earlier cases in which the Court considered only whether regulation created a direct burden.[168] The best approach to this revision is to adopt a test for substantial economic effect, as this type of test has been applied successfully in past cases regarding the ordinary Commerce Clause.[169] It also would correspond directly to revisions of that doctrine suggested above.

Removing the protectionism focus would further resolve the inconsistencies contained in the law of the Commerce Clause.[170] This revision would simultaneously return the dormant Commerce Clause doctrine to firmer constitutional ground and allow all inferences of reciprocal reasoning to apply in ordinary Commerce Clause cases.[171] The per se invalidity of all substantial state regulation of interstate commerce also would likely keep satisfied the many scholars that support guards against protectionist measures,[172] as these measures would still be encompassed within the greater reach of a per se rule. These authors might argue states' regulation of interstate commerce that serves their benefit without harming others would be wrongly invalidated by this revision of doctrine.[173] However, the enhanced reliability and clarity in decision-making outweighs this risk, especially when considering that the revision's

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[165] *See supra* Part I.A.2.

[166] *See supra* Part I.A.2. In this vein, a clear overruling of certain arguments in *Raich* again would create more definite and desirable guidelines for future cases than would yet another attempt to distinguish. *See supra* note 159.

[167] *See supra* Part II.B.

[168] *E.g.*, Di Santo v. Pennsylvania, 273 U.S. 34, 37 (1927). Although there may be some merit to the arguments of Justice Stone that a test for directness is too vague to enforce, *see supra* note 65 and accompanying text, if rephrased in terms of substantial effect, courts would find application of the rule less problematic. *See supra* note 164 and accompanying text.

[169] *E.g.*, United States v. Morrison, 529 U.S. 598, 611 (2000); United States v. Lopez, 514 U.S. 549, 556–57 (1995). After all, applying the law to such fact-specific determinations of substantiality is a primary function of the courts, and in this situation, they could at least perform that function with the firm backing of reliable precedent and constitutional text.

[170] *See supra* Part II.C.

[171] *See supra* Part II.B.

[172] *See, e.g.*, Regan, *supra* note 67, at 1143 ("Proponents of motive review [within the Court's dormant Commerce Clause analysis] now argue nearly unopposed.").

[173] *See* Heinzerling, *supra* note 71, at 275 (arguing that, on the whole, "the nondiscrimination principle serves none of the objectives commonly cited in favor of it").

true effect is only to ensure that Congress, not the states, has the power to implement such beneficial regulation.

C. Shared Benefits of Revision

The combined effect of this revision with that of the ordinary Commerce Clause doctrine would be to afford each individual doctrine enhanced reliability through a firmer footing in precedent and the text of the Constitution. To that end, it would also free their mutual existence from the inconsistency that currently sabotages their reasoned application.[174] In restricting itself to a more literal interpretation of the clause's text, the Court would also protect against its own tendency to complicate and obscure established analysis to achieve outcomes it may deem desirable.[175] Desirable outcomes deserve less tenuous reasoning and more solid support in our Constitution's text than the Commerce Clause often provides.[176]

A final benefit of revision worth considering is the resulting simplification that would occur in subsequent doctrinal analysis. In returning both doctrines to the single question of whether an action substantially affects interstate commerce, the suggested revision provides a bright-line rule and makes the judicial system more transparent to the public.[177] Such transparency in turn would decrease litigation rooted in Commerce Clause arguments, and state and federal governments could more easily take necessary

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[174] *See supra* Part II.C. This inconsistency is arguably the primary problem with the two doctrines because it makes the Court's fabrications most visible and so contradicts the negative implications that are fundamental to the entire dormant Commerce Clause doctrine.

[175] Again, *Raich* arguably serves as one of the most recent and blatant examples of this "ends justify the means" reasoning. *See supra* note 109. Applying the suggested revisions to the analysis of that case would demand a different outcome in the name of preserving federalism; yet these revisions maintain the important constitutional check against state-sponsored protectionist measures.

[176] It goes without saying that the outcomes of cases such as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), were ultimately just and necessary. To focus on the favorable results those decisions created, however, is to ignore the parity of negative outcomes that also potentially follows from such loose interpretation of the Constitution. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674 (1990) ("A focus on the text alone, it is argued, is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress."). For instance, the same over-inclusive view conceivably might also allow the Court to approve federal Jim Crow laws in the name of interstate commerce regulation—an abominable outcome. Tightening the Court's interpretation of the Commerce Clause thus nets a zero effect on equitable considerations while preserving the principles of federalism, and it simultaneously empowers the court by strengthening its reliance on precedent. *See supra* note 110 and accompanying text.

[177] This broadly applicable test would further quell scholarly criticism over the great variation in analyses applied under each doctrine from one case to the next. *See, e.g.*, Tushnet, *supra* note 55, at 126–30.

steps to remain within the powers prescribed them through the Commerce Clause, independent of judicial guidance.[178]

CONCLUSION

This Note has demonstrated how *Raich* and *American Trucking* contain important implications for the meaning of their respective Commerce Clause doctrines.[179] Whereas *Raich* represents the revival of a doctrine cemented in historic precedent,[180] *American Trucking* serves as a continuation of a current doctrinal trend.[181] In these representative functions, each case demonstrates fallacy within the dormant and ordinary Commerce Clause doctrines.[182] The cases demonstrate contradiction in precedent, analytical formulations that are overly complex and variable, and a lack of firm and consistent support for the reasoning they implement.[183] A comparison of the cases further clarifies the problems in their doctrines, and it reveals that they are to some degree a fabrication of the Court because their reasoning cannot be mutually applied through the Court's purported theory of reciprocity.[184]

The Supreme Court should revise the "reciprocal" doctrines of the Commerce Clause and tailor them so that they do in fact relate in such a manner.[185] This effort would not only clarify the Supreme Court's analysis and create precedent it might easily follow but also return the Court to guidelines that more closely adhere to the meaning of our Constitution's text.[186] The principles of federalism are worth defending,[187] and revisions of the Commerce Clause doctrines such as those suggested in this Note are necessary to their survival.

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[178] To some extent, transparency in any Supreme Court doctrine will be difficult to achieve if only for the reason that the Court must interpret provisions of a document over 200 years old into to the law of modern American society. Yet, this difficulty only furthers the need for revisions such as those suggested in this Note, as any clarification of the Constitution's law is a valuable aid.

[179] *See supra* Part I.

[180] *See supra* Part I.A.2.

[181] *See supra* Part I.B.2.

[182] *See supra* Part II.A–B.

[183] *See supra* Part II.A–B.

[184] *See supra* Part II.C.

[185] *See supra* Part III.

[186] *See supra* Part III.

[187] *See supra* note 118 and accompanying text.