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# THE LIVING COMMERCE CLAUSE: FEDERALISM IN PROGRESSIVE POLITICAL THEORY AND THE COMMERCE CLAUSE AFTER *LOPEZ* AND *MORRISON*

Eric R. Claeys\*

*"Living Constitution" ideas are most often associated with individual-rights guarantees like equal protection and due process, but they were originally developed in the early twentieth century to revolutionize the law of the structural Constitution — including the Commerce Clause. In this Article, Professor Claeys interprets Progressive political theory, which played a crucial role in legitimating the expansion of the national government. As applied to federalism, Progressive living-Constitution theory required that the Commerce Clause be interpreted as a constitutional transmitter letting the national government regulate whatever the American people deem to be a national problem. He suggests that this notion of the "living Commerce Clause" played an important role in the development of Commerce Clause constitutional doctrine during the New Deal, and that it informs the hostility to recent narrow readings of the Commerce Clause like United States v. Lopez and United States v. Morrison.*

*Professor Claeys then uses these living Commerce Clause ideas to critique contemporary federalism case law and scholarship. At the level of doctrine, "living Commerce Clause" principles provide a sharper and clearer way to criticize Lopez and Morrison than the leading criticisms to date. At the level of interpretive theory, living Constitution theory highlights the strengths and weaknesses of a great deal of contemporary constitutional-law scholarship, which borrows from the Progressives' understanding of a living Constitution more than it realizes. Finally, at the level of politics, if one understands the influence of and problems with Progressive living Commerce Clause ideas, one is better prepared to judge the political character of government under the constitutional principle that the national government may regulate whatever the American people deem to be a national problem.*

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\* Assistant Professor of Law, St. Louis University. Thanks to Richard Brumbaugh for his editorial and research assistance. Thanks to Richard Epstein, Barry Cushman, Daniel Hulsebosch, John Copeland Nagle, Derek Jinks, Tom West, and Philip Hamburger for their comments and criticisms. Thanks also to participants at an informal workshop at St. Louis University School of Law and a Legal Scholarship workshop at the University of Chicago.

## INTRODUCTION

The constitutional law of individual rights is usually exciting and inspiring, but the law of the Commerce Clause, which empowers Congress to "regulate Commerce . . . among the several States,"<sup>1</sup> is often dry and boring. Just consider the Supreme Court's record on civil rights. In *Brown v. Board of Education*,<sup>2</sup> the Court announced in no uncertain terms that state segregation violated basic American guarantees of individual rights: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place."<sup>3</sup> By contrast, under the Commerce Clause, the Court upheld the Civil Rights Act of 1964 on *non-moral* grounds, namely "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse" — even though it recognized that Congress enacted the Act to respond to "what it considers to be a *moral* problem."<sup>4</sup> The Court condemned racial discrimination as a fundamental violation of individual rights, but it applauded Congress's response to that discrimination only with the enthusiasm of a macroeconomist.

There are a few ways to explain this incongruity, but surely one factor relates to "living Constitution" theory. Living Constitution theory plays a crucial role in individual-rights law, but little or no role in federalism. *Brown* promised to be momentous when Justice Burton objected during the first oral argument: "But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it was interpreted."<sup>5</sup> Commerce Clause case law lies at the other extreme. In *Wickard v. Filburn*,<sup>6</sup> the most influential Commerce Clause case ever since the New Deal, Justice Jackson's opinion for the Court discouraged *any* discussion of how the Clause relates to contemporary ideals, individual rights, or good government. "[W]ith the wisdom, workability, or fairness, of [Congress's] plan for regulation" under the Commerce Clause, he concluded, "we have nothing to do."<sup>7</sup>

For better or worse, Commerce Clause case law is now experiencing serious tensions because it has refused to confront the "wisdom, workability, or fairness" of federal regulation for more than two generations. In the last decade, the Supreme

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<sup>1</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>2</sup> 347 U.S. 483 (1954).

<sup>3</sup> *Id.* at 495.

<sup>4</sup> *Heart of Atlanta Motel, Inc.*, 379 U.S. 241, 257 (1964) (emphasis added).

<sup>5</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 573 (1975); see also *Brown*, 347 U.S. at 492 ("[W]e cannot turn back the clock to 1868 when the [Fourteenth] Amendment was adopted . . . . We must consider public education in the light of its full development and its present place in American life.").

<sup>6</sup> 317 U.S. 111 (1942).

<sup>7</sup> *Id.* at 129.

Court has invalidated two federal laws on the ground that they exceed Congress's powers under the Commerce Clause. In *United States v. Lopez*,<sup>8</sup> the Supreme Court held that the Commerce Clause does not cover a federal gun-free school-zone law,<sup>9</sup> and in *United States v. Morrison*,<sup>10</sup> the Court held the Clause does not cover a statute federalizing the tort of sexual assault.<sup>11</sup> The debate about these cases thus far has been strangely disjointed. In *Lopez*, for instance, the dissenters' main *legal* criticism centered on abstruse economic causation questions — whether gun violence near local schools depresses the American economy.<sup>12</sup> But as the political, judicial, and academic reactions to *Lopez* have suggested, the debate between the *Lopez* majority and dissenters is primarily *political*. Prominent United States Senators want to deny nominees confirmation if they have the “wrong” views about federalism.<sup>13</sup> The *Lopez* and *Morrison* dissenters treat these cases as judicial activism.<sup>14</sup> Meanwhile, respected academics regard these decisions as the harbingers of a “constitutional revolution” that threatens to “redraw the constitutional map as we have known it.”<sup>15</sup>

So what if we were to learn that, once upon a time, Commerce Clause argument *was* political, and *was* connected to the reform ideas associated with “the living Constitution”? In this Article, I propose to show that Commerce Clause legal doctrine has been shaped by living Constitution theory much more than is currently appreciated. It is my thesis that *Lopez* and *Morrison* have disturbed widely held but long-forgotten assumptions about the Commerce Clause legal doctrine. There are in fact two separate justifications for post-New Deal doctrine: a legal, process-oriented, and value-neutral justification, and a political, living Constitution justification. The two justifications complemented one another from the New Deal until *Lopez*. Since *Lopez*, however, these justifications are no longer complementing each other, and they may even be working at cross purposes.

On its surface, Commerce Clause doctrine — the “rational basis” test — seems to focus on technical ideas about economics and institutional competence. Now that we live in an interconnected industrial national economy, Congress is supposed to

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<sup>8</sup> 514 U.S. 549 (1995).

<sup>9</sup> *Id.* at 551 (invalidating 18 U.S.C. § 922(q) (1994)).

<sup>10</sup> 529 U.S. 598 (2000).

<sup>11</sup> *Id.* at 601 (invalidating 42 U.S.C. § 13981 (1994)).

<sup>12</sup> *See Lopez*, 514 U.S. at 616–25, 631–44 app. (Breyer, J., dissenting).

<sup>13</sup> *See Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight and the Courts, Senate Judiciary Comm.*, 107th Cong. 1 (2001) [hereinafter *Judicial Nomination and Confirmation Process*] (statement of Sen. Charles E. Schumer) (announcing that the Senate intended to probe “the significance of the Supreme Court’s recent federalism decisions for the judicial selection process”).

<sup>14</sup> *See Lopez*, 514 U.S. at 605–06 (Souter, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905), and reliance on “the notions of liberty and property characteristic of laissez-faire economics”).

<sup>15</sup> Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052–53 (2001).

be more competent than the federal courts at distinguishing between national problems and local problems. Thus, the "rational basis" test instructs courts to defer to federal regulations of interstate commerce whenever Congress has any rational basis for believing that the activity covered by the law affects interstate business in any way.<sup>16</sup>

But at its core, the rational basis test symbolizes a political principle essential to the New Deal administrative state. This is the idea that national problems deserve national legislative solutions. This idea comes out not so much in the test's *justifications* as in its *results*. The Supreme Court did not strike down a single federal law under the Commerce Clause from 1937 to 1995. During that period, a large segment of the legal and political communities grew comfortable with the notion that the Commerce Clause gives Congress something close to a general-welfare power. *Lopez* and *Morrison* are controversial because they highlight the discrepancy between this political idea and the standard legal justifications for rational basis review. By insisting that Congress does not have a general-welfare power, these decisions have threatened an important commitment held in many political circles.

Most lawyers understand and know how to work with rational basis legal arguments. Few understand where the rational basis test comes from. Hardly any know how or why it relates to the political principle that Congress should have a general-welfare power. To fill that gap in our understanding, this Article shows how the rational basis test developed as the end result of two generations of agitation by Progressive and New Deal political reformers. This Article closely studies the Progressive Era because it was the Progressives who first developed the theoretical case for the claim that national problems deserve national solutions. To make this case, they also invented what we now know as "living Constitution" theory. Living Constitution theory now makes the Equal Protection and Due Process Clauses<sup>17</sup> transmitters for evolving conceptions of equality and privacy. In Progressive political and constitutional theory, the Commerce Clause served the same function for the American people's opinions about their evolving general and national interests. As the American people decided, as one people, that they wanted to eradicate slavery, secession, and the excesses of industrial capitalism, the Commerce Clause "grew" by leaps and bounds to give Congress the power to confront each of these challenges.

The most surprising result of this story is that the rational basis test is in many respects an accident, a second-best compromise. Progressive and New Deal

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<sup>16</sup> See *Lopez*, 514 U.S. at 556–57.

<sup>17</sup> U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, cl. 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

politicians developed rational basis ideas about an interconnected economy, but they relied much more heavily on "living Commerce Clause" ideas to agitate for a wide range of national policies. But as appealing as these living Commerce Clause ideas were to politicians, they were much more problematic than rational basis ideas to constitutional lawyers. The idea of a living and evolving Commerce Clause comes close to suggesting that Congress has a catch-all general-welfare power. That suggestion runs against the basic structure of the Constitution, particularly Article I, which limits congressional powers by enumerating them. The Supreme Court repudiated living Commerce Clause ideas in the watershed New Deal cases, but allowed most of President Roosevelt's agenda to go forward under rational basis principles. We now follow and live under the rational basis test because it gives Congress something close to a general-welfare power, without forcing judges to confront the uncomfortable implications of that power.

This story of the rise and fall of the living Commerce Clause makes several substantial contributions to constitutional law scholarship. First, at the simplest level, it helps answer the question whether *Lopez* and *Morrison* have launched a judicial counter-revolution. Mark Tushnet and other scholars have started a serious academic discussion about whether *Lopez* and *Morrison* mark the start of a rollback of the New Deal or the beginning of a constitutional "regime change" within Bruce Ackerman's theory of "constitutional regimes" and "constitutional moments."<sup>18</sup> The simplest way to settle this debate is to view *Lopez* and *Morrison* in the context of the political struggle over the scope of American federalism. *Lopez* and *Morrison* are controversial, but not because they roll back the rational basis test or the New Deal. A large segment of American politics operates on the assumption that Congress has the power to legislate on whatever the American people deem to be a national problem. For several generations, the rational basis test has allowed courts to sanction that legislation without facing whether Congress's laws and their decisions are erasing the division between national and state power presupposed in Article I. *Lopez* and *Morrison* are controversial because they force this latent tension out into the open.

Second, if, as I suggest, *Lopez* and *Morrison* mark the start of a new chapter in the debate over the proper scope of Congress's regulatory powers, this Article gives constitutional theorists new legal arguments to use in that debate. As already explained, Commerce Clause doctrine has always been slightly out of place in comparison with more "cutting edge" constitutional doctrines. The Supreme Court applies "living Constitution" principles readily in individual-rights law, but it shifts

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<sup>18</sup> See Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 30 (1999) [hereinafter Tushnet, *New Constitutional Order*]; Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996) [hereinafter Tushnet, *Living*]; see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

to the technical, economic, and value-neutral terminology of the rational basis test when it moves to the Commerce Clause.

If living Constitution theory is so well accepted elsewhere, why not throw out the rational basis test and ground Commerce Clause interpretation in living Constitution ideas? Why not criticize *Lopez* and *Morrison* on the ground that these decisions are out of touch with the American people's evolving conceptions of commerce and their collective national interests? Such a criticism would be particularly powerful now. Living Constitution theory is much better accepted today than it was during the Progressive Era, both in the case reports and in contemporary constitutional theory. At the end of the day, I do not find such arguments persuasive, but I do find them formidable, more so than the criticisms leveled against *Morrison* and *Lopez* to date.

Finally, the rise and fall of the living Commerce Clause has some important lessons to teach us about the relationship between constitutional law and politics. When we think about our deepest constitutional commitments, we may think of the Equal Protection and Due Process Clauses, but there are probably very few of us who think of the Commerce Clause. Nevertheless, living Commerce Clause ideas have an important influence on the character of American government today. Along the same lines, modern constitutional interpretation theory borrows more heavily on Progressive living Constitution theory than it realizes. Most ambitiously, Bruce Ackerman's *We the People* series proposes that American constitutional law takes its normative bearings from a series of "constitutional moments" that create new constitutional "regime principles" ratified in watershed political crises like the New Deal.<sup>19</sup> Ackerman's theory and other such theories draw heavily from the legacy of Progressive living Constitution ideas. If we understand the influence of and problems with Progressive living Constitution theory, we may put ourselves in a better position to judge both the merits of constitutional theories like Ackerman's and the character of the national government we live under today.

The argument in this Article proceeds as follows. The first four parts of this Article recount the development of Commerce Clause doctrine from 1900 to *Lopez*, emphasizing along the way the features relating to the Progressives' vision of a living Commerce Clause. Part I explains the key doctrinal and theoretical elements of pre-1900 Commerce Clause case law. Part II explains the Progressives' theory of federalism and shows how academics used it to critique nineteenth-century Commerce Clause doctrine. Part III shows how living Commerce Clause ideas were repudiated in key federal initiatives during the New Deal, and then how the rational basis test emerged as a second-best substitute for these ideas. Part IV suggests that living Commerce Clause ideas are resurfacing now in cases such as *Lopez* and *Morrison*. Finally, Parts V through VII consider the implications of the rise and fall of the living Commerce Clause for the ongoing debate over *Lopez* and *Morrison*.

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<sup>19</sup> See ACKERMAN, *supra* note 18, at 266–68.

I. THE COMMERCE CLAUSE IN THE NINETEENTH CENTURY:  
BEFORE THE LIVING COMMERCE CLAUSE

To understand how the Progressives sought to remodel the federal-state landscape, one must first understand how that landscape looked to them. From the Founding until at least 1920, the Commerce Clause referred to trade, transportation, and communication that took place across state lines. In the 1824 case *Gibbons v. Ogden*,<sup>20</sup> Chief Justice John Marshall interpreted the terms of this Clause, which by its terms confers on Congress power to regulate "Commerce . . . among the several States,"<sup>21</sup> to mark off three categories of economic regulation.<sup>22</sup> "Interstate commerce" excluded activities that were not "commerce:" the local productive activities, like manufacture, agriculture, and the labor associated with them, that create goods and services for trade. It also excluded "commerce" that was not "interstate": the trade, transportation, and communications that stayed within a state's borders.<sup>23</sup> Thus, Congress could not license or otherwise regulate in-state lotteries,<sup>24</sup> but it could regulate and even bar the shipment of lottery tickets between states.<sup>25</sup> These three categories would guide the case law for another century.

To establish these categories, Marshall applied what we would now call textual and structural principles of interpretation. He thought his constructions of "Commerce" and "among the several States" accorded with what he called "their natural sense," assuming the Founders "to have intended what they said."<sup>26</sup> In addition, Marshall was sensitive to the structural consequences of the principle of enumerated powers. He recognized that the Necessary and Proper Clause (also known as the Sweeping Clause) gives Congress power to "make all laws which shall be necessary and proper" for the carrying out of its enumerated powers<sup>27</sup> and that the Supremacy Clause makes Congress supreme within the fields within which it is empowered to act.<sup>28</sup> But the Sweeping and Supremacy Clauses protected

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<sup>20</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>21</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>22</sup> *Gibbons*, 22 U.S. at 194–96 (interpreting "among the several States"); see also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1394 (1987) (discussing Marshall's interpretation).

<sup>23</sup> See, e.g., *United States v. E.C. Knight*, 156 U.S. 1, 13–16 (1892) (holding that a sugar trust was involved in manufacturing and not interstate commerce); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–96 (1824) (holding that completely internal commerce is not covered by the Commerce Clause); see also Richard A. Epstein, *Fidelity Without Translation*, 1 GREEN BAG 2d 21, 25 (1998).

<sup>24</sup> See *The License Tax Cases*, 72 U.S. (5 Wall.) 462, 470–71 (1866).

<sup>25</sup> See *Champion v. Ames*, 188 U.S. 321, 352–54 (1903).

<sup>26</sup> *Gibbons*, 22 U.S. at 188.

<sup>27</sup> *Id.* at 187 (quoting U.S. CONST. art. I, § 8, cl. 18).

<sup>28</sup> *Id.* at 210 (discussing U.S. CONST. art. VI, cl. 2).



Congress's powers only within the fields properly marked off for it by Article I of the Constitution. Each enumeration of a legislative power in Article I, section 8, he admonished, "presupposes something not enumerated."<sup>29</sup> By vesting specific legislative powers in Congress, Article I automatically reserves a remainder of general legislative powers to the states.<sup>30</sup>

But these broad outlines of federal and state power were not self-executing. In *Gibbons*, Chief Justice Marshall began his opinion by emphasizing that in hard cases the Commerce Clause would have to be construed as "an investment of power" by the American people "for the general advantage," to be construed not only "by the language of the instrument which confers them" but also "with the purposes for which they were conferred."<sup>31</sup> The Clause marked off the broad boundaries between congressional and state regulation; it was the federal judiciary's job to develop constitutional law doctrines that would maintain the substance of these boundaries.<sup>32</sup> Thus, courts often emphasized that "commerce among the states [was] not a technical legal conception, but a practical one, drawn from the course of business."<sup>33</sup> To nineteenth century judges, this remark meant that courts should look at the practical consequences of a federal law before determining whether it regulated interstate trade as *Gibbons* allowed or local trade or production as *Gibbons* prohibited.<sup>34</sup>

To give content to *Gibbons*' vision, federal courts thus developed a doctrinal test to distinguish between laws that "directly" affected interstate commerce and laws that affected it only "indirectly." The former were proper objects of federal regulation; the latter proper objects of state regulation. This "effects" test first surfaced in *Gibbons*, a preemption case, and early dormant Commerce Clause cases following *Gibbons*,<sup>35</sup> but the Court imported these distinctions into its positive Commerce Clause cases after the Civil War when litigants first cited the clauses to challenge federal enactments.<sup>36</sup>

To be sure, this effects test begged important questions. It was a fact-intensive test; the Court observed that the "precise line" between indirect and direct effects "can be drawn only as individual cases arise."<sup>37</sup> But generally speaking, if a federal law regulated a combination of interstate trade and one of the other two classes,

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<sup>29</sup> *Id.* at 195.

<sup>30</sup> *See id.* at 197-98, 203 ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.").

<sup>31</sup> *Id.* at 189.

<sup>32</sup> *See, e.g.*, Epstein, *supra* note 22, at 1395-99.

<sup>33</sup> *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905).

<sup>34</sup> *See id.*; Epstein, *supra* note 22, at 1397-98, 1403-05.

<sup>35</sup> *E.g.*, *Sherlock v. Alling*, 93 U.S. 99, 103 (1876); *Gibbons*, 22 U.S. at 195.

<sup>36</sup> *See* Barry Cushman, *Formalism and Realism in the Commerce Clause*, 67 U. CHI. L. REV. 1089, 1116-26 (2000).

<sup>37</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935).

federal judges tried to determine whether its primary effect was to regulate the former (in which case it was constitutional) or the latter (in which case part or all of the law was unconstitutional). This test gave the Supreme Court a way to scrutinize federal laws that regulated a mixture of intrastate and interstate activities. The Court used these distinctions in its Sherman Act precedents, for instance, to distinguish between monopolies over manufacture and monopolies over interstate commerce in already-manufactured goods.<sup>38</sup> The test also gave the Court a “sham transaction” doctrine to apply when Congress enacted a law that in form regulated interstate trade but in substance tried to control intrastate manufacturing conditions. Thus, Congress could bar the interstate shipment of potentially dangerous foods,<sup>39</sup> and it could bar the interstate delivery of prostitutes,<sup>40</sup> but it could not require local manufactures to follow national child labor rules as a condition of selling in interstate commerce. The Court determined that such a child labor law was unconstitutional because its “natural and reasonable effect” was to target “matters purely local,” namely conditions of manufacture.<sup>41</sup>

Nevertheless, this “effects” test was abstract.<sup>42</sup> The test held together because most nineteenth-century federal judges subscribed to a shared set of political opinions about federalism that explained what purposes the Commerce Clause was supposed to further. Different cases emphasized different reasons, but one theme came out clearly. Ironical though it may sound, the Commerce Clause was designed to promote *vigorous* federal government, by *limiting* that government to its proper fields. *Gibbons* extolled the “genius and character of the whole government” because “its action is to be applied . . . to those internal concerns which affect the States generally; but not to those which are completely within a particular State.”<sup>43</sup> It would be not only “unnecessary,” said Marshall, but even “inconvenient” for the federal government to exercise the latter powers, which “can be most advantageously exercised by the States themselves.”<sup>44</sup> One widely cited dormant Commerce Clause case, *Kidd v. Pearson*, was even more blunt: If the Commerce

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<sup>38</sup> Compare, e.g., *Addyston Steel & Pipe Co. v. United States*, 175 U.S. 211 (1899) (upholding the prosecution of an interstate cartel in metal piping), with *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (declaring unconstitutional the prosecution of a sugar-manufacture monopoly); see also Cushman, *supra* note 36, at 1094–99; Epstein, *supra* note 22, at 1427–29, 1435–40.

<sup>39</sup> See *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57–58 (1911) (holding that confiscation under the Food and Drug Act of adulterated eggs sold in interstate commerce was constitutional).

<sup>40</sup> See *Hoke v. United States*, 227 U.S. 308, 321–23 (1913).

<sup>41</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 275–77 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941). In *Hammer*, the Court relied not only on the Commerce Clause but also on the Tenth Amendment. See *id.* at 277.

<sup>42</sup> See Epstein, *supra* note 22, at 1433–34 (criticizing *E.C. Knight* for its abstractness).

<sup>43</sup> *Gibbons*, 22 U.S. at 195.

<sup>44</sup> *Id.* at 194, 203.

Clause swept too far, "[t]he result would be . . . that the duty would devolve on Congress to regulate all of these [local] delicate, multiform, and vital interests — interests which in their nature are, and must be, local in all the details of their successful management."<sup>45</sup> "[I]t would be difficult to imagine," the *Kidd* Court warned, "[a] situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the constitution intended."<sup>46</sup>

*Kidd* restated a principle of political economy that was considered sound enough to have the status of a permanent truth and sensible enough to constitutionalize against the whims of Congress and state legislatures. Different regulatory problems might challenge the distinctions between national and local in different ways. But by and large, local governments were more effective at addressing economic problems that demanded attention to local details, and the people were more happy and less jealous of government when the government regulating their lives, liberty, and property was next door, not hundreds of miles away. These themes traced back to *The Federalist Papers*.<sup>47</sup> As one case explained while extending the Commerce Clause to cover interstate telephone regulation, Commerce Clause powers were comprehensive enough to "keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."<sup>48</sup> Such decisions assumed that statutory laws could be adapted to help the Commerce Clause and the permanent principles of politics it codified keep pace with technological progress. They did not anticipate that the clause itself could be adapted to make the Constitution keep pace with a radical new theory of political progress.

## II. THE PROGRESSIVE ERA: THE LIVING COMMERCE CLAUSE EMERGES

Toward the end of the nineteenth century, the Commerce Clause became embroiled in the political turmoil of the Progressive Era. This was a time of ferment in politics. With the Civil War long over, the frontier closed, and the country

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<sup>45</sup> *Kidd v. Pearson*, 128 U.S. 1, 21 (1888), cited in *Newberry v. United States*, 256 U.S. 232, 257 (1921); accord *Hammer*, 247 U.S. at 272–73; *United States v. E.C. Knight Co.*, 156 U.S. 1, 14–15 (1895).

<sup>46</sup> *Kidd*, 128 U.S. at 122; see also *Cushman*, *supra* note 36, at 1122–25 (discussing *Kidd* and congressional regulation of local interests).

<sup>47</sup> See, e.g., *THE FEDERALIST* NO. 17, at 119 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961) ("It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object."); *THE FEDERALIST* NO. 45, at 261 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

<sup>48</sup> *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877).

connected by a transcontinental railroad system, the country faced a new wave of questions about whether and how to regulate its booming economy. As contentious as Progressive politics were, this era was a time of even more radical ferment in academia. States and private donors were founding a wave of new modern research universities. These universities housed a new breed of academic, who defined and studied new social-science disciplines profoundly influenced by Darwin's theory of evolution.<sup>49</sup>

During this period, leading academics and public intellectuals developed a top-to-bottom critique of nineteenth-century American politics and constitutional law. This critique began from the premise that the United States operates under a "living Constitution." According to this premise, the American people comprise an organic, evolving whole. The Constitution's structure and its ends adapt to conform to changing popular opinions about national goals and fundamental American rights. Nineteenth-century constitutional law, including the law of the Commerce Clause, had to be transformed because it did not recognize the realities of government under a living Constitution.

#### *A. Progress and the Living Constitution*

Living Constitution theory begins and ends with the concept of "progress," the source of all political obligations.<sup>50</sup> Under this theory, the human experience is an unceasing struggle between a people's liberty and their collective interests.<sup>51</sup> This emphasis on change distinguished Progressive political theory from the political thought that informed the original Constitution, which presupposed that the Constitution anticipated and checked most of the permanent problems in modern politics. For instance, according to Frank Goodnow, professor of constitutional law at Columbia University and the founding president of the American Political Science Association,<sup>52</sup> because "[t]he basis of political society was later seen to be, as it probably always was, historical development," adherence to "absolute political

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<sup>49</sup> See DAVID A. RICCI, *THE TRAGEDY OF POLITICAL SCIENCE* 29–56 (1984).

<sup>50</sup> I am indebted to Charles Kesler and John Marini for their help in explaining Progressive principles of history and politics. See, Charles R. Kesler, *Woodrow Wilson and the Statesmanship of Progress*, in *NATURAL RIGHT AND POLITICAL RIGHT: ESSAYS IN HONOR OF HARRY V. JAFFA* 103 (Thomas B. Silver & Peter W. Schramm eds., 1984); JOHN MARINI, *THE POLITICS OF BUDGET CONTROL* 39–48 (1992). For another insightful account of these themes, see Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American-State Building*, 11 *STUD. AM. POL. DEV.* 191 (1997).

<sup>51</sup> See WOODROW WILSON, *THE NEW FREEDOM* 47–49 (1913).

<sup>52</sup> Dennis J. Mahoney, *A Newer Science of Politics: The Federalist and American Political Science in the Progressive Era*, in *SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING* 250, 252 (Charles R. Kesler ed., 1987).

ideals . . . at all times and under all conditions is productive of harm rather than good."<sup>53</sup> Previous American thinkers and statesmen often failed to grasp this truth, claimed Goodnow, "prior to the formulation of the evolutionary theory of development in the world of science."<sup>54</sup>

Reconceived in evolutionary terms, then, political life is an adaptive process, in which a people continuously redefines its collective interests better to secure the conditions of its freedom. As explained by Woodrow Wilson while he was still President of Princeton University and perhaps America's most preeminent professor of government: "A constitutional government is one whose powers have been adapted to the interests of its people and to the maintenance of individual liberty."<sup>55</sup> Progress thus signifies a process of social adaptation corresponding to Darwin's rules for biological adaptation — in Wilson's words, "development and accommodation to environment."<sup>56</sup> If a society does not adapt, develop, and accommodate, it "stagnates,"<sup>57</sup> "decay[s],"<sup>58</sup> or even dies.

Because living Constitution theory holds that politics is organic and changing, it places great weight on citizens' shared moral beliefs. The members of a society display their political faculties when they discern the particular problems of their day and collectively adapt their shared political principles to solve those problems.<sup>59</sup> As Wilson explained: "Every generation . . . sets before itself some favorite object which it pursues as the very substance of its liberty and happiness. The ideals of liberty cannot be fixed from generation to generation; only . . . the large image of what it is."<sup>60</sup> What Wilson said of liberty applies just as well to government and politics generally.

The Progressives thus saw a problem in American federalism where their predecessors thought there was none. In the Progressives' diagnosis, American federalism had to be reorganized to make way for two new facets of the emerging American political consciousness. First, citizens were gradually but perceptibly transferring their political allegiances from the states to the federal government. Progressives thought Americans were gradually relinquishing their identities as members of forty-odd separate states to enter into a single national political consciousness. As the American national identity became more tightly-knit and mature, the federal government would replace the states in many areas as the

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<sup>53</sup> FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 3 (1911).

<sup>54</sup> *Id.*; see also Gillman, *supra* note 50, at 214–16.

<sup>55</sup> WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 2 (1908).

<sup>56</sup> WILSON, *supra* note 51, at 45; see also Gillman, *supra* note 50, at 215–16; Charles R. Kesler, *Separation of Powers and the Administrative State*, in *THE IMPERIAL CONGRESS* 20 (Gordon S. Jones & John A. Marini eds., 1988).

<sup>57</sup> WILSON, *supra* note 55, at 29.

<sup>58</sup> *Id.* at 196.

<sup>59</sup> See WILSON, *supra* note 51, at 35, 47–48.

<sup>60</sup> WILSON, *supra* note 55, at 4.

immediate government for the people of America.<sup>61</sup>

Second, by the beginning of the twentieth century, the American people were collectively demanding a new program of social reform to protect them from the excesses of industrial capitalism. This reform program was the latest manifestation of the people's progressive quest to attain a state of perfect collective liberty. In Progressives' view, the original Constitution may have secured political freedoms for the American people by guaranteeing individual rights against the arbitrary actions of a lawless king and oppressive parliament. But a century later, times had changed. Political rights were not in jeopardy; economic rights were. Herbert Croly, founder of the *The New Republic* and a leading advisor to Theodore Roosevelt, explained in *The Promise of American Life* that by 1909, "the discontented poor are beginning to charge their poverty to an unjust political and economic organization, and reforming agitators do not hesitate to support them in this contention."<sup>62</sup>

### *B. The Commerce Clause in the Living Constitution*

To carry out this program of social reform, Progressive theorists developed a thoroughgoing critique of the American constitutional order. In their diagnosis, the Constitution as originally drafted failed to live up to the necessities that a living Constitution must meet in a world shaped by progress and adaptation. To Croly, the American nation was a "living formative political principle."<sup>63</sup> To Woodrow Wilson, the Constitution was "not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age."<sup>64</sup> As a vehicle of life, the Constitution had to be read as a vehicle for social and political change. As the will of the American people changes, claimed Wilson, there will be "normal and legitimate alterations of . . . constitutional understanding"<sup>65</sup> because "governments have their natural evolution and are one thing in one age, another in another."<sup>66</sup>

Living Constitution theory served as a blueprint not only for political reform but also for a new theory for constitutional interpretation. Frank Goodnow wrote his treatise *Social Reform and the Constitution* to propose a new theory watering down ordinary rules of *stare decisis* as applied to constitutional law.<sup>67</sup> He did so to establish as a "rule that constitutions, which are practically unamendable, should be . . . so interpreted by judicial decision as to be susceptible of a continuous and

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<sup>61</sup> See WILSON, *supra* note 55, at 46-49; HERBERT CROLY, *THE PROMISE OF THE AMERICAN LIFE* 265-88 (N.E. Univ. Press, 1989) (1909); GOODNOW, *supra* note 53, at 6-15.

<sup>62</sup> CROLY, *supra* note 61, at 20.

<sup>63</sup> *Id.* at 272.

<sup>64</sup> WILSON, *supra* note 55, at 69.

<sup>65</sup> *Id.* at 50.

<sup>66</sup> *Id.* at 54; see also Gillman, *supra* note 50, at 217-18.

<sup>67</sup> See GOODNOW, *supra* note 53, at 5.

uninterrupted development.”<sup>68</sup>

Within a living Constitution interpretation, the Commerce Clause serves as the organ in the living Constitution that transmits the people’s growing conception of national identity to the national government. Woodrow Wilson, like others, recognized that, at the Founding, “strictly speaking,” only “[t]he actual interchange of goods . . . is commerce, within the narrow and specific meaning of the term.”<sup>69</sup> But that original meaning was no longer relevant to the country’s political conditions by 1908: “[T]he subject-matter of that definition is constantly changing, for it is the life of the nation itself.”<sup>70</sup> Goodnow agreed. He read the Commerce Clause as “[t]he great exception to the rule that the powers granted to the federal government were rather special than general in character.”<sup>71</sup> “It is the one clause in the constitution,” he predicted, “which lends itself most readily as a means for the reconstitution of our political system in accordance with changing economic needs.”<sup>72</sup>

### *C. Changed Circumstances and Federal Economic Regulation*

Because the Progressives did not tie the meaning of the Commerce Clause down to any fixed ideas about trade or state lines, they had to breathe new meaning into the clause by divining what “interstate commerce” meant to the American people in their day. Generally, they held, interstate commerce encompassed those fields covered by the growing American national identity. Woodrow Wilson observed: “The federal government has only the regulation of those matters in which there is manifestly and of necessity a common interest.”<sup>73</sup> Because the American people had formed a common interest in the economic turmoils of their time, economic issues were now ripe for general federal regulation.

The Progressives acknowledged that the Commerce Clause had been drafted narrowly, but thought the Founders would have wanted a more expansive Commerce Clause if they thought the states would have ratified one. Wilson did not even acknowledge the principles of political economy and federalism that informed *The Federalist Papers* and decisions like *Gibbons* and *Kidd*. Instead, Wilson simply thought the Founders had no “reasons of theory” for so limiting the scope of federal powers, only expedient “reasons of fact.”<sup>74</sup> Originally, the states’ “comparative geographical isolation, and their difference in economic and social conditions,” explained Frank Goodnow, “naturally had the effect of causing the states, as these

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<sup>68</sup> *Id.* at 6.

<sup>69</sup> WILSON, *supra* note 55, at 185.

<sup>70</sup> *Id.* at 173.

<sup>71</sup> GOODNOW, *supra* note 53, at 35.

<sup>72</sup> *Id.* at 36.

<sup>73</sup> WILSON, *supra* note 55, at 41.

<sup>74</sup> *Id.* at 44.

communities came to be called, to regard the maintenance of a large degree of local independence as of the greatest importance."<sup>75</sup> Thus, Wilson concluded, the Founders would have created a plenary national government if they could have,<sup>76</sup> but they were frustrated by "the jealous politicians of the self-conscious little commonwealths" that were the original thirteen states.<sup>77</sup>

Thus, while the Commerce Clause was originally designed for the political purpose of fighting state protectionism,<sup>78</sup> the Progressives' challenge was to reinterpret the Clause "by the exigencies and the new aspects of life itself."<sup>79</sup> The constitutional trick was to determine precisely how times had changed and how the Commerce Clause had grown to cover interests more encompassing than antiprotectionism. Wilson, like others, began by establishing that "radical changes since 1787 . . . operated to draw the nation together, to give it the common consciousness . . . which will eventually impart to it in many more respects the character of a single community."<sup>80</sup> "The gradual spread of the English language," Goodnow noted, "has brought about a complete unity in speech."<sup>81</sup> Wilson observed that before Daniel Webster's oration in the Webster-Hayne Debate, "[t]he nation lay as it were unconscious of its unity and purpose, and he called it into full consciousness."<sup>82</sup> The slavery question, the secession question, and the Civil War "more than any other called the nation to consciousness and to action."<sup>83</sup> When the frontier closed in 1890, these Progressive "processes which knit close and unite all fibres into one cloth [were] now everywhere visible to anyone who [would] look beneath the surface."<sup>84</sup>

At the dawn of the twentieth century, having overcome these geographic and political challenges to its identity, the United States was ready to face the next challenge — in Woodrow Wilson's words, "first or last, the whole economic movement of the age."<sup>85</sup> In response to this movement, the Progressives generally agreed that the Industrial Revolution had blurred the lines between local and national economic regulation. As Herbert Croly described it: "[T]he increased efficiency of organization in business and politics, the enormous growth of an

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<sup>75</sup> GOODNOW, *supra* note 53, at 9.

<sup>76</sup> The makers of the Constitution had "from the first looked forward to" the hope that "we shall consciously become a single community." WILSON, *supra* note 55, at 51. A great deal of modern historical scholarship on the Founding borrows on this theme. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787* (1972).

<sup>77</sup> WILSON, *supra* note 55, at 45.

<sup>78</sup> In Wilson's words, "the warfare of selfish commercial regulation." *Id.* at 185.

<sup>79</sup> *Id.* at 192.

<sup>80</sup> *Id.* at 46.

<sup>81</sup> GOODNOW, *supra* note 53, at 10.

<sup>82</sup> WILSON, *supra* note 55, at 49.

<sup>83</sup> *Id.* at 48.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 178.



irresponsible individual money-power, the much more definite division of the American people into possibly antagonistic classes . . . these new conditions and demands have been by way of upsetting once more the traditional national balance."<sup>86</sup>

In these circumstances the Progressives concluded, like Croly, that the Constitution "will have to dispense with the distinction between state and interstate commerce."<sup>87</sup> If not, Croly warned, the Commerce Clause would frustrate "the exercise of any really effective responsibility and power by the central government."<sup>88</sup> Frank Goodnow agreed, advising that "political centralization is necessary if political systems are to be in accord with recognized economic facts."<sup>89</sup> It was unfortunate, he commented, that nineteenth-century states' rights ideas "resulted in a constitutional tradition which is apt not to accord to the federal government powers it unquestionably ought to have the constitutional right to exercise."<sup>90</sup>

#### *D. States' Rights*

As Croly, Goodnow, and Wilson's remarks make clear, the Progressives clearly wanted to erase the line between interstate commerce and intrastate commerce. But what about the line between these two classes of activities and the local activities that produced goods and services for commerce? And what about criminal law, family law, and the many other areas of local law that, while not regulating "economic" matters per se, still mold citizens into industrious and productive members of the society in which they live? These questions did not arise during the Progressive Era, but they were the focus of attention during the New Deal. Now they are the objects of urgent consideration after *Lopez* and *Morrison*.

Progressive thought had two separate answers to this question — one immediate and incremental, another theoretical and radical. Both deserve serious examination, because both inform political and legal thought now. Progressivism's basic theoretical stance toward federalism has a great deal of influence in modern liberalism, both in politics and constitutional law. But Progressive ideas could also be used to make a "states' rights" critique of the modern liberal project. Such a critique has taken hold in modern conservatism, crowding out the federalist principles of *The Federalist Papers* and cases like *Gibbons* and *Kidd* in the process. Thus, not only did the Progressives found a new and successful political movement, they also founded a new opposition to that movement. They helped erase the

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<sup>86</sup> CROLY, *supra* note 61, at 269.

<sup>87</sup> *Id.* at 357.

<sup>88</sup> *Id.* at 351.

<sup>89</sup> GOODNOW, *supra* note 53, at 7.

<sup>90</sup> *Id.* at 11.

Founders' political vocabulary for federalism, which might have provided a stronger critique of their project.<sup>91</sup> In this respect the Progressives enjoyed the same devious and spectacular success that Jean-Jacques Rousseau enjoyed in continental Europe. Rousseau's liberal students used his principles to launch the French Revolution, while his conservative students propounded romanticism, nationalism, and historicism to resuscitate throne-and-altar conservatism after that revolution.<sup>92</sup> In both cases, the opponents of the new order failed to appreciate the extent to which they were fighting the new order according to new terms established by the architects of the new order.

Modern American conservatism builds on the states' rights tendencies in Progressivism, which were incremental and conservative in comparison with the expansion of federal regulation that would occur later during the New Deal. While the Progressives wanted to eliminate the lines between interstate and intrastate commerce, they expected the federal-state system to remain otherwise intact. Woodrow Wilson expressed some of these reservations. He acknowledged that "the states are our great and permanent contribution to constitutional development."<sup>93</sup> Herbert Croly warned of the disruptions of too-violent centralization: "Such as it is," he warned, "the American people are attached to [their] national tradition; and no part of it could be suddenly or violently transformed or mutilated without wounding large and important classes among the American people."<sup>94</sup> On that basis, he called "the abolition of American local political institutions" absurd.<sup>95</sup> Wilson felt strongly about this point because he believed that the states played two crucial roles in politics. They furnished the country with "an ideal means of integrating a vast and various population, adapting law to changing and temporary conditions."<sup>96</sup> In addition, Wilson believed, states molded their citizens' *mores* as the federal government never could. When state communities "sprung up of themselves, irrepressible, a sturdy, spontaneous product of the nature of men nurtured in a free air," they gave the American constitutional order an "extraordinary elasticity."<sup>97</sup> That elasticity made "our political system so admirable an instrument of vital constitutional understandings."<sup>98</sup>

Consequently, while Progressives argued for an expansion of federal power, they wanted to reserve to the states areas of law that formed character or required

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<sup>91</sup> See *supra* note 43–47 and accompanying text. Howard Gillman has made the same point generally. See Gillman, *supra* note 50, at 241–44.

<sup>92</sup> See Allan D. Bloom, *Rousseau — The Turning Point*, in *CONFRONTING THE CONSTITUTION* 211, 212–14 (Allan D. Bloom ed., 1990).

<sup>93</sup> WILSON, *supra* note 55, at 50.

<sup>94</sup> CROLY, *supra* note 61, at 268.

<sup>95</sup> *Id.* at 272–77.

<sup>96</sup> WILSON, *supra* note 55, at 50.

<sup>97</sup> *Id.* at 182–83.

<sup>98</sup> *Id.*

experimentation. Wilson, for one, believed "all the ordinary legal choices that shape a people's life," including family law ("the regulation of domestic relations"), labor law ("and of the relations between employer and employe[e]"), and criminal-law enforcement, were better left to the states.<sup>99</sup> Above all, states should continue to keep control over "[m]oral and social questions originally left to the several States."<sup>100</sup>

### *E. General Federal Power*

Because the Progressives' thought had this "states' rights" streak, they have been criticized by many liberals in many quarters. For instance, after canvassing the conservative tendencies in Wilson's thought, Eldon Eisenach criticizes Wilson's program for federalism as "reactionary" and suggests that it "fl[ies] in the face of more than two decades of economic teaching in America exposing the moral bankruptcy and intellectual absurdity of laissez faire."<sup>101</sup> Eisenach thus laments that "[n]o serious reform could be urged within the prevailing system of party and constitution, both of which Wilson so vigorously defended."<sup>102</sup>

Eisenach is dissatisfied with Wilson because he did not push hard and fast enough for what later became the New Deal. Nevertheless, Eisenach drastically underestimates how much Wilson and his compatriots contributed to the New Deal, by articulating the theoretical critique that led to the New Deal. The New Dealers established a new constitutional and political system for America. But their accomplishments would not have been possible if Wilson and his contemporaries had not gutted the theoretical foundations of the old system and laid a new foundation on which the New Dealers could build.

The main thrust of Progressive thought about federalism and nationalism was as radical as any New Dealer could want. On living Constitution premises, the Commerce Clause vests in Congress power to regulate any and every problem that occupies the interests and attention of the American people's political consciousness. Because this consciousness is the source of all authority in a living Constitution system, it justifies using national legislative power to tackle any national problem. Living Constitution theory reaches this far because it makes the American people's "will," its historical political consciousness, the foundation for political and constitutional authority. Under the Commerce Clause, Woodrow Wilson explained, "[t]he federal government has only the regulation of those matters in which there is manifestly and of necessity a common interest."<sup>103</sup>

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<sup>99</sup> WILSON, *supra* note 55, at 183.

<sup>100</sup> *Id.* at 195.

<sup>101</sup> ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* 125 (1994).

<sup>102</sup> *Id.* at 126.

<sup>103</sup> WILSON, *supra* note 55, at 41.

These interests emanate from the American people's collective faculty for making political judgments, which Wilson called the American people's "common political consciousness."<sup>104</sup> Before the people can give historical direction to their politics, they must enter into a state of close social identity. In Wilson's explanation, the people must have "a distinct consciousness of common ties and interests, a common manner and standard of life and conduct, and a practised [sic] habit of union and concerted action in whatever affect[s] it as a whole."<sup>105</sup> This commonality creates a powerful antithesis between the people's collective consciousness and their individual attachments to private interests. The idea is Hegelian: As animals show that they are animate when they overcome gravity to move, humans show that they are human when they overcome their individualistic and self-regarding animal passions to form a society, uniform modes of behavior, and above all common political opinions.<sup>106</sup> "Every man in a free country is, as it were, put upon his honor," Wilson explains, "to be the kind of man such a polity supposes its citizens to be: a man with his thought upon the general welfare, his interest consciously linked with the interests of his fellow-citizens."<sup>107</sup> If the individual members of the community do not sacrifice their selfish interests, they will be "inorganic, unthoughtful, without concert of action," suffering from "[t]he lethargy of an unawakened consciousness [and] the helplessness of unformed purpose."<sup>108</sup>

Because this consciousness determines which ends the country should pursue and how it should pursue them, it is the supreme authority in American politics. But because it makes the *American* people the supreme judge of what is of national interest or local interest, it builds huge prejudices against state and local regulation

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<sup>104</sup> *Id.* at 26.

<sup>105</sup> *Id.*

<sup>106</sup> See GEORGE WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 15 (J. Sibree trans., 1956). This antithesis is a central feature of Continental political thought. The antithesis was presented most powerfully and memorably in the writings of Jean-Jacques Rousseau. See, e.g., JEAN-JACQUES ROUSSEAU, *A Discourse on a Subject Proposed by the Academy of Dijon: What Is the Origin of Inequality Among Men, and Is It Authorized by Natural Law?*, in *THE SOCIAL CONTRACT AND DISCOURSES* 31, 59–60 (G.D.H. Cole trans., 1993) (insisting that man displays "spirituality of soul" by his "consciousness of [his] liberty" to perfect himself); JEAN-JACQUES ROUSSEAU, *The Social Contract*, in *THE SOCIAL CONTRACT AND THE DISCOURSES*, *supra*, at 179, 191–92 (proposing that man free himself by alienating all of his individual interests to the community to take part in the community's "unity, its common identity, its life, and its will"). Wilson incorporates this feature of Rousseau's thought because his theory of Progress follows Hegel's theory of History. In the well-formed state, Hegel claims, "the private interest of [the state's] citizens is one with the common interest of the state; when the one finds its gratification and realization of the other." HEGEL, *supra*, at 21.

<sup>107</sup> WILSON, *supra* note 55, at 23.

<sup>108</sup> *Id.* at 25.

into Progressive-style politics and constitutional interpretation. Progressive political theory starts from the assumption that historical forces are always acting to move the American people into an ever-closer national identity. Americans were separate and atomized "peoples" of several states at the Founding, but they have "grown" as they have enlarged the scope of their common interests and their common consciousness. Federal legislation is the sign of a healthy, "progressive" political order because Congress is presumably responding to an integrated and vibrant American will. Herbert Croly could thus confidently assert that "the Federal government belongs to the American people even more completely than do the state governments, because a general current of public opinion can act much more effectively on the single Federal authority than it can upon the many separate state authorities."<sup>109</sup>

Given how Progressives envisioned this national consciousness, it was probably inevitable that the nationalizing tendencies in their thought would swamp the states' rights tendencies. State authorities, by contrast, seem not progressive, but reactionary in comparison to this national will. Local legislation, by its very existence, competes against and undermines the conditions from which a national will can come into being. Woodrow Wilson claimed that the mere fact that there is a "conflict of laws" between states creates problems "in matters which vitally interest the whole country."<sup>110</sup> "[N]o State or region can wisely stand apart to serve any peculiar interest of its own," he warned, and the states' tendency to do so in his time "constitutes the greatest political danger of our day."<sup>111</sup> Along the same lines, Croly concluded that state governments were simply "not competent to deal effectively in the national interest and spirit with the grave problems created by the aggrandizement of corporate and individual wealth."<sup>112</sup>

However conservative they regarded the changes they were proposing,<sup>113</sup> the theory the Progressives cited to demand these changes could easily be used to justify any expansion of the scope of the national government. Thus, Frank Goodnow could claim that constitutional arrangements should be brought "into accord with existing facts rather than with some absolute political theory" whenever "the actual economic and social situation" dictates such a result.<sup>114</sup> Croly rejected contemporary Commerce Clause doctrine, stating: "The distinction between domestic and interstate commerce which is implied by the Constitutional distribution of powers is a distinction of insignificant economic or industrial importance; and its necessary legal enforcement makes the carrying out of an efficient national industrial policy

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<sup>109</sup> CROLY, *supra* note 61, at 278.

<sup>110</sup> WILSON, *supra* note 55, at 186.

<sup>111</sup> *Id.*

<sup>112</sup> CROLY, *supra* note 61, at 275.

<sup>113</sup> See, e.g., WILSON, *supra* note 55, at 194 ("Change as well as stability may be conservative.").

<sup>114</sup> GOODNOW, *supra* note 53, at 11.

almost impossible.”<sup>115</sup> Even Wilson, the supposed “reactionary,” described the Commerce Clause in sweeping terms:

Actual alterations of interest in the make-up of our national life, actual, unmistakable changes in our national consciousness, actual modifications in our national activities such as give a new aspect and significance to the well-known purposes of our fundamental law, should . . . be taken up into decisions which add to the number of things of which the national government must take cognizance and attempt to control.<sup>116</sup>

Whenever the American people think a problem is a national problem, it automatically demands a national legislative solution.

#### *F. Judicial Deference to Congressional Nationalism*

Once this political commitment to a national will was firmly in place, Progressive political theory also began to speak about the roles each of the branches should play in interpreting the Commerce Clause. The federal judiciary had two roles. One was to make sure that an expanding federal government did not interfere with individual rights.<sup>117</sup> The other and prior responsibility was to conform the country’s organic law to the people’s developing and adapting will. In Wilson’s view, courts were supposed to bring about “a slowly progressive modification and transfer of functions as between the States and the federal government along the lines of . . . that national consciousness which is the breath of all true amendment.”<sup>118</sup>

But what if the courts should refuse to go along with this process of historical growth, to adapt the constitutional case law to the times? In that unfortunate scenario, the other branches of government would have to put the courts in their place. Frank Goodnow considered it an essential part of his project to “consider what methods there are by which pressure may be brought to bear upon the courts to induce them either to abandon or not to adopt the conception that our constitutions postulate a fixed and unchangeable political system.”<sup>119</sup> Because

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<sup>115</sup> CROLY, *supra* note 61, at 351.

<sup>116</sup> WILSON, *supra* note 55, at 194–95.

<sup>117</sup> See, e.g., *id.* at 143 (“[The judiciary] is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.”).

<sup>118</sup> *Id.* at 194; see also *id.* at 170 (arguing “the courts have rightly endeavored to make the Constitution a suitable instrument of the national life, extending to the things that are now common the rules that it established for similar things that were common at the beginning.”).

<sup>119</sup> GOODNOW, *supra* note 53, at 6; see also *id.* at 16 (arguing that “[w]hat we need more than anything else . . . is a consistent theory of constitutional interpretation, which will permit of our orderly development as a nation in accordance with our economic and social needs,

political and social norms change, claimed Wilson, each federal officer has constitutional power corresponding to the extent to which he is "in most direct communication with the nation itself."<sup>120</sup> Because the courts have no direct contact with the national will, in cases of conflict the courts must defer to the President and Congress's expressed judgment about the scope of federal jurisdiction.

### *G. Commerce Clause Legal Doctrine During the Progressive Era*

Although these ideas began to influence how intellectuals and policy-makers viewed the various branches of the federal government, they did not take hold in the law immediately. To be sure, cracks began to appear in the basic categories of Commerce Clause regulation. Frank Goodnow concluded that the Supreme Court's antitrust case law had eliminated the boundaries between monopolies over interstate commerce and manufacture,<sup>121</sup> though it is probably fairer to say only that twenty years' worth of cases had blurred the lines to some extent.<sup>122</sup> The line between intrastate and interstate commerce also blurred as Congress regulated more and more conditions of railroad transportation. In particular, *The Shreveport Rate Cases*<sup>123</sup> upheld the power of Congress and the Interstate Commerce Commission (ICC) to regulate *intra*-state railroad rates to stop these runs from undermining ICC-prescribed rates for *inter*-state railroad runs.<sup>124</sup>

By and large, before the New Deal the Court's Commerce Clause case law kept the broad distinctions between local production, in-state commerce, and interstate commerce tolerably clear. As a 1921 case explained in *dicta*: "It is settled, e.g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacture, mining, etc., commerce could not exist but this fact does not suffice to subject them to the control of Congress."<sup>125</sup> Whatever academic scribblers were saying during the Progressive Era, the law would not change its basic direction until the New Deal.

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and is not confined within the political and legal conceptions of a century or more ago.").

<sup>120</sup> WILSON, *supra* note 55, at 109.

<sup>121</sup> See GOODNOW, *supra* note 53, at 80.

<sup>122</sup> See Cushman, *supra* note 36, at 1094–99; Epstein, *supra* note 22, at 1432–42.

<sup>123</sup> 234 U.S. 342 (1914).

<sup>124</sup> See *id.* at 354–55. That said, the *Shreveport Rate Cases* were not as exceptional to pre-New Deal lawyers as they seemed during and after the New Deal. As Barry Cushman has explained, to pre-New Deal lawyers, the *Shreveport* ruling applied only to common carriers, a narrow class of businesses constitutionally subject to rate regulation. See Cushman, *supra* note 36, at 1126–31; Epstein, *supra* note 22, at 1420–21.

<sup>125</sup> *Newberry v. United States*, 256 U.S. 232, 257 (1921).

### III. THE NEW DEAL: THE LIVING COMMERCE CLAUSE GOES UNDERGROUND

The New Deal inverted the basic orientation of Commerce Clause doctrine. As of 1932, it was still possible to say that the Commerce Clause was one of several limited and enumerated federal regulatory powers. A decade later it seemed fairer to say that the Commerce Clause gave the federal government unlimited and general powers.

Yet the Commerce Clause doctrine that came out of the New Deal was not quite the doctrine that the most ardent New Dealers hoped for. In the early stages of the New Deal, Progressive living Commerce Clause ideas left the academy, settled into the U.S. Statutes at Large, and were then repudiated by a federal judiciary much more conservative than the Roosevelt Administration and the New Deal Congress. The most ardent New Dealers hoped to use the New Deal legislative agenda to establish on principle that the American constitutional order was now run by a federal government of general regulatory powers. After the constitutional crisis of 1935 to 1937 had ended, the New Dealers won most of their legislative agenda, but not the principle. They could not win a legal mandate for the living Commerce Clause; they had to settle instead for concrete legislative victories and the process-oriented abstractions of the rational basis test.<sup>126</sup>

#### *A. The Rise and Fall of the Living Commerce Clause*

As the previous Part explained, the Progressives' interpretation of the Commerce Clause was simultaneously incremental and radical. The Progressives supported decisions like the *Shreveport Rate Cases*, which gave the federal government power to regulate intrastate railroad runs along with interstate railroad travel. Many opposed using federal power to regulate local manufacture, some opposed using it to regulate labor, and all disavowed using it to regulate domestic issues like moral questions and family law. At the same time, the historicist theory the Progressives developed to attack the line between intrastate and interstate commerce was much more radical and far-reaching in its implications than the incremental goals to which they applied it. Their vision of a living Commerce Clause created a plausible and principled argument, in politics and in constitutional law, for demanding national legislation to attack any issue regarded by the American people as a national problem.

Progressive ideas had considerable impact during the New Deal, because most of the ardent New Dealers cut their teeth on Progressive political and legal theory. Frank Goodnow's work continued to command respect into the middle of the

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<sup>126</sup> For other accounts of this period, see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 139–225 (1998).



twentieth century. Woodrow Wilson's star waned later, but he was revered during the New Deal. To many historians, he was "the president who played John the Baptist for Franklin D. Roosevelt"<sup>127</sup> and sympathetic opinion makers transmitted his idealism, his reform program, and his theory to students and readers for a generation after his Presidency.<sup>128</sup>

Most New Dealers probably agreed that the Commerce Clause needed to be expanded one or two steps further than the Progressives had taken it. Even if the Progressives had thought manufacture and labor should remain objects of local concern and regulation, a generation later times and the public mood had changed. The Great Depression showed that the entire American economy was interconnected. More fundamentally, from a political standpoint, because the Depression impressed upon the people that they sank or swam together in a huge national economy, it made the American economy a new object of the American national political consciousness.

While most New Dealers subscribed to Progressive principles about social reform and government, different actors applied these principles differently. On one hand, idealistic politicians and intellectuals hoped the New Deal would transform American government to conform to the real principles of politics as laid out by the Progressives. If politics were meant to facilitate social reform, and if constitutional institutions like federalism and separation of powers stood in the way of reform administered by vigorous national bureaucracies, better to admit candidly that these institutions were obsolete, abandon them, and found a new constitutional order in keeping with the true realities of historicist politics as discovered by Progressive political scientists. On the other hand, pragmatic officials — and especially the lawyers who had to defend the idealists' achievements in the courts — sympathized with their fellow travelers, but they had reservations about attacking the constitutional order head-on to achieve their ends.

This tension is evident in the Supreme Court's New Deal docket and some of the leading historiography about the New Deal.<sup>129</sup> As Arthur Schlesinger has noted, President Roosevelt's First New Deal, enacted in 1933, was drafted by "characteristically social evangelists."<sup>130</sup> Schlesinger said of one such lawyer that

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<sup>127</sup> ROBERT SOBEL, *COOLIDGE: AN AMERICAN ENIGMA* 194 (1998).

<sup>128</sup> See also THOMAS SILVER, *COOLIDGE AND THE HISTORIANS* 152–54 (1982) (criticizing progressive historians for characterizing early twentieth century politics too much in terms of class struggle).

<sup>129</sup> See, e.g., Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 249–55 (1994) (discussing the contrast between sweeping rhetorical legal strokes and "exquisite craftsmanship"). Cushman admires the lawyers more than the idealists because of their craftsmanship, but a strong case can be made that the idealists were more admirable for their candor and integrity in relation to their basic political commitments.

<sup>130</sup> 3 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 393 (1960).

he was "moved by a passionate feeling that the imperatives of history required drastic social reorganization, wanted to draft laws and fight cases in terms of prophetic affirmations [and] he resented the whole notion of pussy-footing around to avoid offending the stupid prejudices of reactionary judges."<sup>131</sup>

Lawyers, politicians, and bureaucrats moved by the "imperatives of history" are the kinds of officials who would be likely to interpret the Commerce Clause in living Constitution terms, as a symbol of the nation's evolving general interests. In all likelihood, they defined the broad political goals President Roosevelt's New Deal set out to achieve, and, as Schlesinger points out, they played a huge role in drafting the first New Deal.

By contrast, Roosevelt's Second New Deal, enacted in 1935, Schlesinger says, was drafted "characteristically [by] lawyers, precise and trenchant."<sup>132</sup> These lawyers' lawyers were careful "always [to] show[] a meticulous regard for legal continuities."<sup>133</sup> These are the lawyers who culled through the Supreme Court's pre-1937 Commerce Clause case law to find the precedents that would make the New Deal seem as un-revolutionary as possible. They may not have defined the New Deal's basic political commitments, but they invented the legal formulas that would help convert those commitments into a concrete record of legislative accomplishments.

The lawyers' lawyers certainly had more success in the Supreme Court during the New Deal. Living Constitution interpretations of the Commerce Clause failed colossally in the Court during the critical years of the New Deal, while more narrow interpretations convinced a Court majority to uphold President Roosevelt's agenda. The centerpiece of President Roosevelt's first New Deal was the National Industrial Recovery Act, which gave the President the power to establish fair-competition codes for any industry of his choosing. The preamble to this Act declared that the conditions of the Great Depression not only "burden[ed] interstate and foreign commerce" but also "affect[ed] the public welfare, and undermine[d] the standards of living of the American people."<sup>134</sup> The first declaration at least claimed to follow pre-New Deal "effects" doctrine; the other two declarations claimed for Congress a general-welfare regulatory power. A unanimous Supreme Court declared the Act unconstitutional on separation of powers and Commerce Clause grounds in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>135</sup>

The Bituminous Coal Conservation Act of 1935<sup>136</sup> was also written in living Constitution terms. The Act set price controls for the national coal market and tried

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<sup>131</sup> *Id.* at 395.

<sup>132</sup> *Id.* at 393.

<sup>133</sup> *Id.* at 395.

<sup>134</sup> National Industrial Recovery Act, ch. 90, 48 Stat. 195, 195 (1933).

<sup>135</sup> 295 U.S. 495 (1935).

<sup>136</sup> Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991.

to regulate wages and hours for coal workers. Its preamble claimed that "the general welfare of the Nation require[d]" such regulation because bituminous coal production was "affected with a national public interest."<sup>137</sup> For a generation, Progressives had used the "affected with a public interest" test, which had originally justified rate regulation only over legal monopolies, to regulate rates and business conditions for any business that threatened Progressive conceptions of the public interest;<sup>138</sup> the most ardent New Dealers extended this idea from property regulation to federalism by claiming that federal regulation was necessary whenever a local activity was "affected with a national public interest." When the Supreme Court considered the Bituminous Coal Act in *Carter v. Carter Coal Co.*,<sup>139</sup> this preamble provoked Justice George Sutherland enough to include in his opinion for the Court an eight-page civics lecture explaining why Congress did not have a catch-all power to regulate for the national interest or the general welfare.<sup>140</sup>

By contrast, the National Labor Relations Act,<sup>141</sup> the first New Deal law to survive Commerce Clause review in the Supreme Court, was written by legal craftsmen. This Act established the National Labor Relations Board and gave American employees a federal right to collective bargaining. Its preamble made no claim that labor relations were affected with a national interest; it only purported to find that labor strife obstructed the free flow of interstate commerce.<sup>142</sup> As Peter Irons recounted, the narrowness of these findings helped to convince Chief Justice Hughes and Justice Roberts to switch their votes from opposing federal jurisdiction over labor relations in *Carter* and *Schechter Poultry* to supporting it in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*<sup>143</sup>

If *Carter*, *Schechter Poultry*, and *Jones & Laughlin* are indicative, Congress and President Roosevelt had to abandon sweeping political claims to regulate problems of national interest. Instead, they learned to write statutes with dry economic findings explaining why the activities they wanted to regulate had an effect on interstate commerce. So disciplined, Congress and President Roosevelt's lawyers managed to shepherd the New Deal legislative agenda through the federal judiciary.

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<sup>137</sup> *Id.* at 991.

<sup>138</sup> *See, e.g., German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) (holding that the insurance business was "affected with a public interest" such that the Due Process Clause would not stop states from regulating insurance rates); *see also* GOODNOW, *supra* note 53, at 266–74 (examining the application of the "affected with a public interest" test).

<sup>139</sup> 298 U.S. 238 (1936).

<sup>140</sup> *See id.* at 289–97.

<sup>141</sup> National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69 (2000)).

<sup>142</sup> *See* National Labor Relations Act § 1, *quoted in* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 23 n.2 (1937).

<sup>143</sup> *See* PETER IRONS, *THE NEW DEAL LAWYERS* 244–46, 280–89 (1982).

*B. The Rise of the Rational Basis Test: A Second-Best Compromise*

In response to the New Deal lawyers' economic arguments, the federal judiciary developed a new economic and process-oriented Commerce Clause doctrine. This doctrine eventually settled into the form we now know as the rational basis test. Within the framework of the New Deal legislative agenda, the rational basis test generated all the judicial results that the New Deal "social evangelists" would have wanted if the federal courts had given credence to their vision of a living Commerce Clause. The statutes drafted in rational basis terms withstood judicial scrutiny better than the National Industrial Recovery Act and the Bituminous Coal Act, because they did not force federal judges to confront the question whether the Commerce Clause gives Congress a general-welfare power.

The key innovation in the rational basis test was to expand what it meant for an activity to "affect" interstate commerce. Chief Justice Charles Evans Hughes and Justice Benjamin Cardozo were most responsible for this innovation. During his first stint on the Court as an associate justice, Hughes had written the *Shreveport Rate Cases*, which gave the ICC power to set rates for local railroad runs on the ground that low local rates provided a competitive alternative to, and thus "affected," ICC-set rates for interstate railroad travel.<sup>144</sup> In dissent in the 1936 case *Carter v. Carter Coal Co.*,<sup>145</sup> Justice Cardozo proposed to lift this principle out of its context in interstate common-carrier regulation<sup>146</sup> and let Congress regulate any local activity that provided a competitive alternative to a federal scheme to regulate interstate commerce.<sup>147</sup> In the 1937 "switch in time" case *NLRB v. Jones & Laughlin Steel Corp.*, then Chief Justice Hughes followed Justice Cardozo's advice and used the same argument to uphold the National Labor Relations Act.<sup>148</sup>

Hughes and Cardozo's innovation reversed the basic orientation of pre-1937 doctrine by reversing the direction of the "effects" test. Roughly speaking, from *Gibbons* to the New Deal, the "effects" test tried to maintain a principled line between interstate commerce and local activities; after the New Deal, Hughes and

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<sup>144</sup> See *Shreveport Rate Cases*, 234 U.S. 342 (1914).

<sup>145</sup> 298 U.S. 238 (1936).

<sup>146</sup> See Cushman, *supra* note 36, at 1134 (discussing Justice Cardozo's dissenting opinion in *Carter v. Carter Coal Co.*); see also *supra* note 124.

<sup>147</sup> See 298 U.S. 238, 329 (1936) (Cardozo, J., dissenting) ("[T]he prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other.").

<sup>148</sup> See 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and abstractions, Congress cannot be denied the power to exercise that control."); see also Epstein, *supra* note 22, at 1443-54 (discussing the New Deal Commerce Clause cases).

Cardozo's rendition of the test worked to engulf local activities. In pre-New Deal case law, the Commerce Clause both defined and limited the proper objects of federal commercial regulation. Congress could cite the Sweeping and Supremacy Clauses to support federal regulation, but only after it was clear the law's *primary* effect was to regulate interstate commerce.<sup>149</sup> After Hughes and Cardozo were through, by contrast, whenever a local activity has *any* "effect" on interstate activity, the Sweeping and Supremacy Clauses give Congress the push it needs to sweep that activity under the Commerce Clause.<sup>150</sup> As much as Hughes and Cardozo changed the "effects" test, post-New Deal Commerce Clause doctrine was still nowhere near as radical as the Progressives and New Deal evangelists' vision of a living Commerce Clause. To be sure, the new effects test was open-ended. Because any activity can have some effect on any other, the new effects test could be used, in principle, to cover any local activity with federal regulation. Because the test continued to distinguish between interstate commerce and local activities, however, it preserved the idea that the Commerce Clause was one of several limited and enumerated federal powers. Chief Justice Hughes emphasized this reservation. In *Jones & Laughlin Steel Corp.*, he warned that the effects test "may not be extended so as to embrace effects . . . so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."<sup>151</sup>

In any event, by the 1942 case *Wickard v. Filburn*,<sup>152</sup> the Court had built a new constitutional doctrine on the foundations of Hughes and Cardozo's innovation. *Wickard* proposed a standard explanation for "rational basis" review that discredited all of the important elements of nineteenth-century Commerce Clause doctrine. The first piece of this counter-narrative was to establish a new official meaning for "commerce." Writing for the Court, Justice Robert Jackson read *Gibbons v. Ogden* to say that Chief Justice Marshall first "described the federal commerce power with a breadth never yet exceeded."<sup>153</sup>

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<sup>149</sup> See *supra* notes 35–41 and accompanying text.

<sup>150</sup> See, e.g., *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1941) (citation omitted):

The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.

See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (asserting that the commerce power "is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it'" (quoting *Mondou v. New York, New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 51 (1912))).

<sup>151</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

<sup>152</sup> 317 U.S. 111 (1942).

<sup>153</sup> *Id.* at 120. Canvassing the Court's pre-1937 language, he cited the early cases

Next, Justice Jackson cited economic reasons why the Court needed to abandon the case law from *Gibbons* up to *Jones & Laughlin* and return to Chief Justice Marshall's original sweeping vision. By the 1930s, he claimed, it was no longer possible to draw meaningful distinctions between the local manufacture and the interstate sales of nationwide businesses, and it would have wreaked financial chaos to try. In a sophisticated and developed economy, there was no point in escaping the "economic" fact that all activities are economically interdependent. "Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted," he concluded, "questions of federal power cannot be decided simply by finding the activity in question to be 'production,' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'"<sup>154</sup>

Finally, Jackson cited political process reasons why, in this new economic order, the federal judiciary should defer to Congress's determinations about what does or does not "affect" interstate commerce. From *Gibbons v. Ogden* until 1937, deference had not been a strong theme in Commerce Clause case law. The Supreme Court had declined to interfere in close cases out of comity toward Congress, but it did not hesitate to exercise independent judgment to enforce the dividing lines between the federal and local.<sup>155</sup> In *Wickard*, however, Justice Jackson warned that "effective restraints on [the commerce power's] exercise must proceed from political rather than from judicial processes."<sup>156</sup> After all, economic policy choices "are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process."<sup>157</sup>

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emphasizing that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Id.* at 122 (quoting *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)). In pre-1937 terminology, this remark signaled that one would have to gauge the effects of the law on interstate commerce, intrastate commerce, and manufacture to determine which of the three it primarily regulated. *See supra* notes 35–41 and accompanying text. After *Wickard*, lawyers have read this remark far more expansively to signal that the Commerce Clause covers any and all local activities that could "affect" the interstate economy in any conceivable way. *See, e.g., United States v. Lopez*, 514 U.S. 549, 615, 618 (1995) (Breyer, J., dissenting).

<sup>154</sup> *Wickard*, 317 U.S. at 124; *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937):

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

<sup>155</sup> *See, e.g., Adair v. United States*, 208 U.S. 161, 177–78 (1908) (recognizing congressional discretion but finding labor law to be outside the Commerce Clause), *overruled by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

<sup>156</sup> *Wickard*, 317 U.S. at 120 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824)).

<sup>157</sup> *Id.* at 129; *see also Lopez*, 514 U.S. at 616–17 (Breyer, J., dissenting):

Courts must give Congress a degree of leeway in determining the existence of

*Wickard* proposed what are now the standard explanations for rational basis review. This explanation emphasizes economics- and process-based concerns. Still, the test allows in substance most of the political results that the Progressives and idealistic New Dealers hoped to achieve. Like living Constitution theory, it gives Congress expansive powers to regulate economic matters,<sup>158</sup> and it instructs federal courts to defer to Congress when Congress is determining the limits on its own jurisdiction.<sup>159</sup>

At the same time, the standard explanations for rational basis review avoided all the pitfalls that made living Commerce Clause ideas seem threatening to conservative politicians and judges during the New Deal. The living Commerce Clause would have given Congress power to regulate whatever captures the attention of the American *zeitgeist*; the rational basis test stays closer to the core meaning of “interstate commerce” by giving Congress power, at least in the first instance, only over gainful economic activities. The living Commerce Clause would have ordered federal courts to defer to Congress on all structural constitutional issues on the ground that courts are not in tune with the mandates of politics in a historicist society; the rational basis test gives the judiciary more polite excuses to defer to Congress, namely Congress’s superior institutional competence at fact-finding and policy-making. Most important of all, the living Commerce Clause clearly would have undermined the basic principle of limited and enumerated federal powers; the rational basis test preserved some semblance of continuity with Article I.

### *C. The Ambiguities in the Rational Basis Test After the New Deal*

Still, the rational basis test came with a price. Because it purported to be value-neutral and economic, it severed New Deal Commerce Clause constitutional law doctrine from the principles animating the New Deal political agenda. It thus concealed important theoretical tensions: Was the New Deal national expansion defined by the economics- and process-based arguments at work in the rational basis test? Or were these ideas just window dressing for the courts, in which case the *real* constitutional transformation occurred when political activists, inspired by living Constitution ideas, converted a federal government of limited powers into a national government of general powers?

In addition, the rational basis test did not eliminate the tensions between post-

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a significant factual connection between the regulated activity and interstate commerce — both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.

<sup>158</sup> See *supra* notes 101–16 and accompanying text.

<sup>159</sup> See *supra* notes 117–20 and accompanying text.

New Deal Commerce Clause doctrine and Article I of the Constitution; it only finessed them. The *Jones & Laughlin* Court disclaimed any intention to allow the new “effects” test to let Congress’s powers reach all aspects of local regulation. That was easy to say in 1937, when Congress and the President were agitating only for greater control of local economic issues. But what would follow if Congress should ever start legislating on social-reform issues that had at most only a tenuous connection to interstate business?

After the New Deal, when historians and constitutional theorists tried to assess the New Deal transformation, many observers interpreted the New Deal precedents in ways that would have pleased the “social evangelists” who sought to establish a “living Commerce Clause.” Most interpretations tended to respect the form of the rational basis test, but they did so in a way that gave that test a sweeping reach. The commentary on *Wickard* is illustrative. The case could be read to stand for the proposition that the federal judiciary should apply deferential rational basis review when the law under review regulates modern economic conditions. But, for at least two generations, most commentators read *Wickard* to stand for the broad principles that Congress has general regulatory powers and that the federal judiciary had “abandoned any effort to articulate and enforce . . . limits on congressional power” inherent in the Commerce Clause.<sup>160</sup>

On the other hand, while the Supreme Court continued to review Commerce Clause challenges deferentially, it did so strictly within the confines of the rational basis test. On occasion, the test led to strange conclusions, especially when the law at issue presented political issues more dramatic than the issues ordinarily raised by economic regulation. For instance, to uphold the Civil Rights Act of 1964, the Supreme Court went out of its way to avoid considering the *real* purpose of the Act, to repudiate and discredit private and state-sponsored discrimination on the basis of race. Instead, the Court declared the Act constitutional on the strange ground that local discrimination by segregated barbeques and other establishments might depress the national economy.<sup>161</sup> Of course the Court recognized that “Congress was also dealing with what it considered a moral problem,” but it nevertheless resolved the constitutional question by relying on “the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.”<sup>162</sup> In other cases, the Court often proclaimed that “the power to regulate commerce” was “broad indeed,” but it just as often hastened to add that this

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<sup>160</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 5-1, at 297 (2nd ed. 1988); see also 1 WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., *POLITICS AND THE CONSTITUTION: IN THE HISTORY OF THE UNITED STATES* 292 (1953); THOMAS R. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* (1956).

<sup>161</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964) (holding that “discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes”).

<sup>162</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).



power "has limits."<sup>163</sup>

Nevertheless, as time passed, these tensions faded out of mind. Members of Congress, federal prosecutors, and federal regulators probably became more and more accustomed to the idea that they could make policy on national problems whenever they thought those problems demanded a national solution. By the 1970s, Congress began to enact commercial regulations without legislative findings that the activity being regulated affected interstate commerce. Federal courts upheld the regulations anyway. In one case, a district court rejected a Commerce Clause challenge to an *in rem* seizure of a medical device, under a statute that had *no* nexus to interstate commerce of any kind, simply by deferring to Congress's judgment that it would be "cumbersome and time consuming" for the government to prove that it had constitutional jurisdiction for the seizure.<sup>164</sup> As the New Deal faded into the distant past, the political and legal communities gradually forgot the conceptual tools they would have needed to understand the problems that would arise if this tension in theory should ever surface in practice.

#### IV. *LOPEZ* AND *MORRISON*: THE LIVING COMMERCE CLAUSE RESURFACES?

*United States v. Lopez* and *United States v. Morrison* have turned a tension that had always been a theoretical possibility into an urgent practical question. Each case presented a challenge to a federal law that forced the Supreme Court to ask itself how far rational basis deference could extend in principle. As a result, these cases forced into the open questions about constitutional federalism that the rational basis test has postponed since the New Deal. Even more interesting, most of the opinions in these cases express ideas that echo the political ideas at work during the Progressive Era and the New Deal.

Both *Lopez* and *Morrison* presented challenges to laws focusing on the tension between the standard explanations for the rational basis test and the general principle of national government for which that test stands. *Lopez* presented a challenge to the Gun-Free School Zones Act,<sup>165</sup> which made it a federal crime to possess a firearm within 1000 feet of a school,<sup>166</sup> and *Morrison* presented a challenge to one provision of the Violence Against Women Act of 1994,<sup>167</sup> which created a federal

<sup>163</sup> *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968).

<sup>164</sup> *United States v. Depilatron Epilator Model No. DP-206 Universal Technology Inc.*, 473 F. Supp. 913, 914-15 (S.D.N.Y. 1979) (quoting S. REP. NO. 94-33, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1070, 1083, and citing 21 U.S.C. § 334(a)(2)(D) (1976)).

<sup>165</sup> Gun-Free School Zones Act, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (1990) (amending 18 U.S.C. §§ 921(a), 922(q), 924(a) (1988)) (repealed 1996).

<sup>166</sup> See *United States v. Lopez*, 514 U.S. 549, 551 & n.1 (1995) (citing 18 U.S.C. §§ 921(a)(25), 922(q)(1)(A) (1988 & Supp. V 1993) (amended 1996)).

<sup>167</sup> Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941-42 (1994) (codified at 42 U.S.C. § 13981 (1994)).

tort action for the victims of gender-motivated violence.<sup>168</sup> If the rational basis test was an adaptation of the Commerce Clause to an interconnected industrial economy, and if Article I continued to set any meaningful limits on the scope of Congress's powers, these cases presented plausible test cases for establishing those limits. But if the rational basis test stood for the principle that only Congress can determine the limits on its own jurisdiction, these cases presented opportunities to establish that principle beyond any doubt. Rational basis review had postponed these sorts of issues for nearly sixty years, but *Lopez* and *Morrison* made it impossible to avoid them any longer.

A Court majority held *Lopez* and *Morrison* crossed over the line, while four dissenters thought the line still had not been crossed. Writing for the Court in *Lopez*, Chief Justice Rehnquist disclaimed any intention to call the New Deal expansion into question: *Jones & Laughlin* and *Wickard*, he acknowledged, reflected a necessary "recognition of the great changes that had occurred in the way business was carried on in this country" and "a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce."<sup>169</sup> But the Chief Justice also insisted that this expansion did not change the Commerce Clause's position within Article I, which "creates a Federal Government of enumerated powers."<sup>170</sup> If *Jones & Laughlin* and *Wickard*'s effects test were to apply with equal force to every federal regulation, it would "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."<sup>171</sup> To prevent this result, Rehnquist limited the reach of the effects test to "economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."<sup>172</sup> Because neither gun possession near schools<sup>173</sup> nor gender-motivated violence<sup>174</sup> constitutes "economic" activity, neither the Gun-Free School Zones Act nor the tort provisions of the Violence Against Women Act fell within Congress's commerce powers.<sup>175</sup>

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<sup>168</sup> See *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (citing 42 U.S.C. § 13981 (2000)).

<sup>169</sup> *Lopez*, 514 U.S. at 556.

<sup>170</sup> *Id.* at 552.

<sup>171</sup> *Id.* at 567.

<sup>172</sup> *Id.*; see also *id.* at 559–61 (canvassing cases from *Jones & Laughlin* to *Lopez* and concluding that they all spoke to regulations of "economic activity").

<sup>173</sup> *Lopez*, 514 U.S. at 561–62.

<sup>174</sup> *United States v. Morrison*, 529 U.S. 598, 614 (2000).

<sup>175</sup> Even though *Morrison* eliminated the civil remedy provided by section 40302 of the Violence Against Women Act of 1994, the remaining provisions of the Act continue "to promote public safety, health, and activities" relating to crimes of violence motivated by gender. See, e.g., Press Release, Violence Against Women Office, U.S. Department of Justice, Justice Department Awards Over \$162 Million to States, Rural Communities and Colleges and Universities to Address Violence Against Women (Oct. 12, 2000), <http://www.usnewswire.com/OJP/docs/ojp000113.html>.

The results in *Lopez* and *Morrison* surely came as surprises, but it was also interesting to see that most of the majority opinions echo many of the pro-state government themes voiced in the incrementalist and states' rights tendencies in Progressive political thought. The Court opinion in *Lopez* quoted *Jones & Laughlin* to make clear that Article I, section 8 would at some point stop the rational basis test from serving to "effectually obliterate the distinction between what is national and what is local."<sup>176</sup> The Court opinions in *Lopez* and *Morrison* echo reservations voiced by Progressives like Wilson and Croly when they emphasized that education, criminal law, and family law are activities that have "always been the province of the states."<sup>177</sup>

Justice Kennedy's concurring opinion in *Lopez*, joined by Justice O'Connor reflect the same themes even more strongly. Justice Kennedy declared that "[s]tare decisis operates with great force in counseling [the Court] not to call in question the essential principles now in place" over federal commercial regulation since the New Deal.<sup>178</sup> Kennedy declared his intention to consider future Commerce Clause challenges on a case-by-case basis to determine whether the law "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power."<sup>179</sup> But Justice Kennedy appears to see that balance in many of the same terms as the Progressives did in their pro-local government moods. To be sure, he cited *The Federalist Papers*, but he stressed themes like state sovereignty, and the traditional roles of the states.<sup>180</sup> He borrowed a Progressive theme by praising the states as "laboratories of experimentation."<sup>181</sup> When he praised federalism as "the unique contribution of the Framers to political science and political theory,"<sup>182</sup> he echoed Woodrow Wilson, who three generations earlier praised the states as "our great and permanent contribution to constitutional development."<sup>183</sup> And at the end of the day, he found it dispositive that education that education and criminal law were "traditional concern[s] of the States."<sup>184</sup>

The one majority opinion that did not echo these themes came from Justice Thomas, who authored a concurring opinion calling into question all of the Court's

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<sup>176</sup> *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>177</sup> *Morrison*, 529 U.S. at 618; *Lopez*, 514 U.S. at 564; cf. WILSON, *supra* note 55, at 183 ("The States possess all the ordinary legal choices that shape a people's life . . . [including] the regulation of domestic relations . . . the definition of crimes and their punishment.").

<sup>178</sup> *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

<sup>179</sup> *Id.* at 580 (Kennedy, J., concurring).

<sup>180</sup> *See id.* at 575-55 (Kennedy, J., concurring).

<sup>181</sup> *Id.* at 581 (Kennedy, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>182</sup> *Id.* at 575 (Kennedy, J., concurring).

<sup>183</sup> WILSON, *supra* note 55, at 50.

<sup>184</sup> *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Commerce Clause case law from 1937 onward. Applying plain-meaning and structural interpretation principles, he concluded that, if “commerce” encompassed activities like “manufacture” and “agriculture,” the Commerce Clause, the Foreign and Indian Commerce Clauses,<sup>185</sup> and the Port Preference Clause<sup>186</sup> would all be unintelligible, because it is impossible to conduct “manufacture” between states or with foreign and Indian nations.<sup>187</sup> He attacked the reading of *Gibbons v. Ogden* made familiar by *Wickard*, that *Gibbons* “established that Congress may control all local activities that ‘significantly affect interstate commerce.’”<sup>188</sup> And he warned that the Court’s construction of the Commerce Clause and the Sweeping Clause since the New Deal renders “many of Congress’ other enumerated powers . . . wholly superfluous.”<sup>189</sup>

It came as no surprise that *Lopez* and *Morrison* provoked dissents, because they were the first two cases in almost sixty years in which the Supreme Court used the Commerce Clause to strike down federal enactments. But the dissents in *Lopez* and *Morrison* were vitriolic. Justice Stevens wrote a short dissent in *Lopez* warning that the Court’s opinion was “extraordinary” for its “radical character.”<sup>190</sup> In both cases, Justice Souter hurled at the majority the worst judicial insult imaginable after the New Deal, accusing the Court of taking a “backward glance at . . . the old pitfalls” of *Lochner*-style substantive due process judicial activism.<sup>191</sup> And in *Morrison*, Justice Breyer<sup>192</sup> and Justice Souter<sup>193</sup> intimated for four Justices that they shall refuse to accept the *Lopez* holding as good law in future cases.

Strangely, as certain as the *Lopez* and *Morrison* dissenters professed to be that the Court’s decisions were wrong, they were not nearly so certain *why* those decisions were wrong. For the most part, Justice Souter’s dissent in *Lopez* hurled “*Lochnerism*” charges at the Court majority. But his dissent in *Morrison* vacillated between *Lochnerism* charges and “political safeguards” arguments, which claimed that Commerce Clause challenges are nonjusticiable.<sup>194</sup> In *Lopez*, Justice Breyer

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<sup>185</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . and with the Indian Tribes.”).

<sup>186</sup> U.S. CONST. art. I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”).

<sup>187</sup> *Lopez*, 514 U.S. at 586–88 (Thomas, J., concurring).

<sup>188</sup> *Id.* at 593 (Thomas, J., concurring) (quoting *id.* at 615 (Breyer, J., dissenting)).

<sup>189</sup> *Id.* at 588 (Thomas, J., concurring).

<sup>190</sup> *Id.* at 602 (Stevens, J., dissenting).

<sup>191</sup> *Id.* at 608 (Souter, J., dissenting); see also *United States v. Morrison*, 529 U.S. 598, 643–44 (2000) (Souter, J., dissenting).

<sup>192</sup> See *Morrison*, 529 U.S. at 662 (Breyer, J., dissenting).

<sup>193</sup> *Id.* at 655 (Souter, J., dissenting).

<sup>194</sup> *Morrison*, 529 U.S. at 647 (Souter, J., dissenting) (“[P]olitics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.”).

made a fairly standard defense of the most expansive reading of the rational basis test. But in *Morrison*, Breyer shifted to political safeguard arguments like Souter's,<sup>195</sup> and, even more creatively, analogized the Commerce Clause to the "hard look" doctrine in federal administrative law<sup>196</sup> and the "subsidiarity" doctrine under the organic law of the European Union.<sup>197</sup>

Most telling of all, the dissents did not confront the tensions the rational basis test has concealed ever since the New Deal. On its face, the rational basis test professes to stay faithful to Article I, but in operation the test does not provide any principle for setting an intelligible limit on the scope of federal power. The dissents suffer from the very same tension. On one hand, Justice Breyer began his dissent in *Morrison* by professing that "[n]o one denies the importance of the Constitution's federalist principles."<sup>198</sup> On the other hand, Justice Souter demonstrated in dissent in both cases that one of his favorite words for the commerce power is the adjective "plenary."<sup>199</sup> And in *Lopez*, Justice Breyer professed to be genuinely puzzled why the Court would "threaten[] legal uncertainty in an area of law that, until this case, seemed reasonably well settled."<sup>200</sup> In other words, everyone always knew the rational basis test was a rubber-stamp, so why upset expectations now? Indeed, when Chief Justice Rehnquist and Justice Thomas challenged Justice Breyer to name a single activity that was committed exclusively to state regulation, Breyer did not respond to the challenge.<sup>201</sup>

As harshly as *Lopez* and *Morrison* were criticized on the Court, they received even worse treatment off the Court. Lower federal judges have criticized these decisions<sup>202</sup> and have by and large declined to apply them to other federal laws.<sup>203</sup>

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<sup>195</sup> See *id.* at 660–61 (Breyer, J., dissenting) (citing Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000)).

<sup>196</sup> *Id.* at 663 (Breyer, J., dissenting).

<sup>197</sup> *Id.* (Breyer, J., dissenting).

<sup>198</sup> *Id.* at 655.

<sup>199</sup> See *id.* at 639 n.12, 640–41, 645, 646 n.14, 648 (Souter, J., dissenting); *Lopez*, 514 U.S. at 609 (Souter, J., dissenting).

<sup>200</sup> *Lopez*, 514 U.S. at 630 (Breyer, J., dissenting).

<sup>201</sup> See *Lopez*, 514 U.S. at 564–65 (Rehnquist, C.J.) ("Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.") (citing *id.* at 624 (Breyer, J., dissenting)); *id.* at 600 (Thomas, J., concurring) ("[T]he principal dissent insists that there are limits [to the Commerce Clause], but it cannot muster even one example.") (citing *id.* at 624 (Breyer, J., dissenting)).

<sup>202</sup> See Louis H. Pollak, *Foreword to Symposium, Reflections on United States v. Lopez*, 94 MICH. L. REV. 533, 551 & n.96 (1995) (noting that lower federal courts already have shown some signs of disagreement and citing several conflicting decisions).

<sup>203</sup> See Glenn H. Reynolds & Brandon P. Denning, *Lower Court Readings of Lopez, or What If The Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WISC. L. REV. 369 (reviewing the treatment of *Lopez* in the lower federal courts and concluding that the overwhelming majority of district and circuit judges are ignoring the

Academics have excoriated *Lopez* and *Morrison*. Cass Sunstein has criticized the cases as “extremely aggressive.”<sup>204</sup> Jack Balkin and Sanford Levinson have cited them as proof of a “paradigm shift” by the Rehnquist Court,<sup>205</sup> the start of a “constitutional revolution” that threatens to “redraw the constitutional map as we have known it.”<sup>206</sup> To be fair, other academics, like Glenn Reynolds and Brandon Denning, profess to be as enthusiastic about this “revolution” as Sunstein, Balkin, and Levinson profess to be dismayed.<sup>207</sup>

While other theorists do not share Sunstein, Balkin, and Levinson’s sense of outrage, they still treat *Lopez* and *Morrison* as monumental decisions. Mark Tushnet has concluded that *Lopez* and *Morrison* mark a “constitutional moment” within Bruce Ackerman’s theory of constitutional regime transformations.<sup>208</sup> While expressed some early reservations, he now interprets *Lopez* and *Morrison* as the death knell for the New Deal. In his view, they portend a sweeping regime change in which “the New Deal/Great Society political system is no longer in place, and . . . ‘[t]he Warren Court is dead.’”<sup>209</sup>

Most telling of all, members of Congress are listening to this revolutionary talk. High-ranking members of the Senate Judiciary Committee are currently considering whether to use federal judicial nominees’ views about federalism as grounds to deny them confirmation.<sup>210</sup>

#### V. *LOPEZ* AND *MORRISON* IN LIGHT OF THE PROGRESSIVE ERA AND THE NEW DEAL

This is an extraordinary level of controversy and criticism, even for two Supreme Court decisions. Constitutional law decisions attract attention from time to time, but it is rare for a structural provision like the Commerce Clause to be the focus of such prolonged controversy. Why have these decisions prompted

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case).

<sup>204</sup> Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 757 & n.2 (2001).

<sup>205</sup> Balkin & Levinson, *supra* note 15, at 1051.

<sup>206</sup> *Id.* at 1053; *see also id.* at 1056–57 (wondering whether *Lopez* and *Morrison* will have only limited impact, or if the “economic” limitation in these cases is “strategic,” and the Court’s Commerce Clause jurisprudence “could become much more radical and far ranging”).

<sup>207</sup> *See* Reynolds & Denning, *supra* note 203, at 399 (characterizing *Lopez* as possibly a “bold and telling blow for limited government and a return to the first principles of the Constitution”).

<sup>208</sup> Tushnet, *Living*, *supra* note 18, at 266 (citing ACKERMAN, *supra* note 18, at 266).

<sup>209</sup> Tushnet, *New Constitutional Order*, *supra* note 18, at 30 (alteration in original) (quoting Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 205 (1991)).

<sup>210</sup> *See* *Judicial Nomination and Confirmation Process*, *supra* note 13, at 1 (statement of Sen. Charles E. Schumer); Edward Walsh, *Panel Debates Senate Role on Court Choices*, WASH. POST, June 27, 2001, at A23; *see also supra* text accompanying note 13.

accusations that *Lopez* and *Morrison* are extraordinarily wrong, even revolutionary? And why all the vitriol, if these cases present questions as abstruse as whether gender-motivated violence can be classified as “non-economic,” or as fact-intensive as whether gun violence in schools drags down American productivity by deterring students from learning in school?

The short answer is that *Lopez* and *Morrison* mark the re-emergence of the Commerce Clause as an issue in constitutional politics. Lawyers are used to thinking of the Constitution as a source of law, but we sometimes forget that the Constitution also can serve as a source of inspiration and principle — a guide to good government and political practice. Abraham Lincoln, to take just one example, could not have created a winning political coalition against the *Dred Scott* decision if he had not been so adept at explaining the Constitution in terms that integrated legal doctrine with political practice. He once likened the Constitution to a “picture of silver,” made “to adorn and preserve” the “apple of gold” he saw in the political principles of the Declaration of Independence.<sup>211</sup>

The Commerce Clause informed legal and political practice alike until the rational basis test came along. Nineteenth-century Commerce Clause legal doctrine relied not only on the Clause’s text but on some background political ideas that the text was thought to promote. It was accepted that the American people would be happier and better governed if their liberty and property were regulated locally except when general interests like interstate trade, transportation, and communication demanded otherwise. Progressive constitutional theory criticized this idea as it manifested itself both in legal doctrine and in political practice. In Progressive thought, the country’s evolving national interests are too fluid and evanescent for any group of dead white males to have captured in black ink on white parchment two hundred years ago.

During the New Deal, by contrast, the law and the political practice built around the Commerce Clause went in separate directions. Political idealists relied on political conceptions about evolving national interests to agitate for a program of economic redistribution and social reform run by a vigorous, activist national government. These ideas were resisted by much of the federal judiciary, perhaps a large segment of the American public, and even many of the idealists’ fellow-travelers (the legal craftsmen Schlesinger describes) because they jarred sharply with the pre-existing legal and constitutional traditions of federalism. Lawyers and courts postponed this tension by developing a value-neutral language built on process-based rational basis arguments. These arguments put off the hard political

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<sup>211</sup> Abraham Lincoln, Fragmentary Writing c. 1858, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 168 (Roy P. Basler ed., 1953) (quoting Proverbs 25:11). Mark Tushnet makes this same complaint about individual rights constitutional law doctrine and uses this same quotation from Lincoln. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11 (1999).

questions by making every Commerce Clause question seem, in *Wickard v. Filburn*'s famous phrase, a question "wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process."<sup>212</sup>

On occasion after the New Deal, this value-neutrality generated strange results. Most students are puzzled to learn that the Supreme Court upheld one of the titles of the Civil Rights Act of 1964 — perhaps the most worthy achievement of the social-reform movement in the last century — on the ground that segregated barbeques and other establishments might depress the national economy.<sup>213</sup> As one commentator caustically observed, if the Court had been sincere, segregationists could have wiped out the basis for federal jurisdiction by ordering more barbeque.<sup>214</sup> But in most other cases, the rational basis test effectively kept the federal courts out of the way and generated little dissonance in the process.

But *Lopez* and *Morrison* exposed that dissonance, and the clearest proof that they did so comes in the outrage they have provoked. These decisions would not be controversial if they only focused on questions about whether Congress has jurisdiction to determine whether guns in schools or violence against women impairs national productivity. Rather, these decisions struck a political nerve — a strong political attachment to the idea of an activist federal government. A large segment of American political and legal elites, it seems, has always conflated the rational basis test with some political idea like the principle that Congress should have national powers to attack national problems. This notion resembles the living Commerce Clause for which Progressives and New Deal social reformers agitated much more than it resembles the ideas behind the rational basis test.

This idea of a vigorous national government, not checked by the federal judiciary, has roots in the New Deal, but it is not the only intellectual tradition that emerged from the New Deal. *Lopez* and *Morrison* do not really repudiate the New Deal; they test the limits of a settlement struck during it. In the critical New Deal Commerce Clause cases, the federal courts and more cautious lawyers balked at the idea that Congress has a power to regulate for the general welfare. The Supreme Court sanctioned an expansion of the Commerce Clause on the narrower ground that, in a modern industrial economy, "the relevance of the economic effects in the application of the Commerce Clause" could no longer be denied.<sup>215</sup> This rationale postponed some fundamental questions about how the New Deal expansion relates to Article I of the Constitution, which creates a constitutional system of limited and enumerated federal powers. Sixty years later, *Lopez* and *Morrison* are forcing those postponed questions back onto the table.

A few conclusions follow. The most obvious and simplest is that, contrary to

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<sup>212</sup> 317 U.S. 111, 129 (1942).

<sup>213</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964).

<sup>214</sup> HADLEY ARKES, *FIRST THINGS* 95 (1990). Arkes attributes this remark to a colleague.

<sup>215</sup> *Wickard v. Filburn*, 317 U.S. 111, 123 (1942).



many accounts, we are not witnessing the advent of a "revolution" or a "constitutional moment" built around American federalism. To be sure, *Lopez* and *Morrison* represent a new chapter in a long-running political struggle over constitutional federalism going back the Progressive Era. But they are only one chapter, not a new storyline. Far from repudiating the New Deal, *Lopez* and *Morrison* suggest that, over the last generation, Congress has started to legislate on topics about which the New Deal's "regime principles" do not speak with any single or clear intention. The majority and dissenting positions in these cases can each draw on different resources within Progressive political theory and New Deal legal theory to support their arguments. Thus, *Lopez* and *Morrison* do not signal a judicial revolution. They merely note that the time has come for a candid reexamination about how far the New Deal went in transforming the Constitution's commitment to limited and enumerated federal powers into a grant of general and unlimited powers.

Second, and pessimistically, this candid reexamination may never take place, for reasons both political and legal. Politically, the rational basis test has been quite effective at taking the Commerce Clause off the table of constitutional clauses the federal courts are willing to enforce in a serious way. If *Lopez* and *Morrison* are controversial, one can only imagine the controversy the Court would engender if it reexamined the origins of the rational basis test in a candid way.

There are similar legal problems. At a fundamental level, law, especially constitutional law, needs to preserve the appearance that legal doctrine follows in an understandable way from the fundamental authority for the doctrine. In an important sense, living Commerce Clause ideas are incompatible with Article I of the Constitution. If judges like Hughes and Cardozo developed the rational basis test to avoid the fault line between these ideas and Article I, it is a little late in the day for their successors to reopen that fault now that sixty years of reliance interests are sitting on it. As will be seen below, I disagree with Justice Kennedy when he says that *stare decisis* arguments prevent him from reconsidering *Jones & Laughlin* and *Wickard*, but he is right to recognize a serious legitimacy problem here.

Finally, even if Kennedy and his colleagues *were* inclined to conduct this reexamination, the rational basis test has been so effective at covering over important substantive issues that the legal system has in large part lost the conceptual tools it needs to conduct such a reexamination. This gap presents less of a problem for jurists like Justice Thomas, who relies heavily on plain and original-meaning principles of interpretation — though his approach would raise doctrinal problems like those raised under the pre-1937 "effects" test if his position ever became Court doctrine.<sup>216</sup> Still, it does present a serious problem for the *Lopez* majority and the *Lopez* dissenters.

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<sup>216</sup> See *supra* notes 35–42 and accompanying text.

## VI. THE LIVING COMMERCE CLAUSE CONSIDERED

*A. The Economic-Effects Rule and Article I*

Yet even if everyone pretends to ignore the 800-pound gorilla in the room, that is not the same thing as saying the gorilla is not there. Even though no one on the Court has expressed an interest in reintegrating Commerce Clause case law to substantive political commitments, intellectual clarity still requires that this connection be explored. Most important, the living Commerce Clause arguments Progressives and New Dealers made 75 years ago may capture the hostility toward *Lopez* and *Morrison* better than any legal arguments being made now.

*Lopez* and *Morrison*'s critics, and particularly the dissenting Justices in these cases, need to confront the tensions that the rational basis test has concealed since the New Deal. During the Progressive Era, leading thinkers were of two minds about whether the living Commerce Clause could engulf local regulation. During the New Deal, most reformers agreed that Commerce Clause doctrine had to change to make way for New Deal economic regulation, but many took issue with the idea that the Commerce Clause should be converted explicitly into a national general-welfare power in defiance of Article I. The rational basis test, and particularly its "effects" rule, finessed this dispute, but it did not settle it.

If this question is still open, *Lopez* and *Morrison*'s critics need to decide now whether they agree that Article I sets any workable limits on the scope of Congress's powers. An act like the Gun-Free School Zones Act gives rise to at least a serious question whether Article I has any force in limiting the scope of federal powers. The Constitution presupposes in very simple ways that Article I does have such force. The Constitution does so simply by virtue of being a constitution — a compact in which federal officials agree to follow written grants of constitutional power when they regulate the people they serve. Article I, section 1 limits federal powers by vesting in Congress only those "legislative Powers herein granted."<sup>217</sup> And Article I, section 8 reinforces that conclusion by specifically enumerating seventeen specific sets of congressional powers.<sup>218</sup>

The economic-effects rule from *Wickard v. Filburn* and other cases has always threatened to reverse this basic orientation of Article I. In theory, *any* activity can have an economic effect on any other activity. Consider one illustration cited by the district court in the *Morrison* case: If there is no principled limit on the cumulative-effects test, and if domestic violence cumulatively affects interstate commerce, Congress must also have jurisdiction over insomnia, which may have anywhere from one to eight times as much of an economic effect on the national economy as

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<sup>217</sup> U.S. CONST. art. I, § 1.

<sup>218</sup> See U.S. CONST. art. I, § 8.

domestic violence.<sup>219</sup> In 1937, when Chief Justice Hughes reoriented the effects test to make way for federal labor and manufacture regulation, that test did not pose as much of a threat to the federal-state structure as the idea of a living Commerce Clause because family law, morals legislation, education, and a wide variety of other fields were virtually free of federal control. In 2002, circumstances are different. The effects doctrine from *Jones & Laughlin* and *Wickard* is now being applied to local activities, including gun possession near schools or sexual attacks, that create a plausible concern that the rational basis doctrine has created a general federal power. Chief Justice Hughes and Justice Cardozo, the founders of the modern "effects" doctrine, were not willing to press the doctrine this far.<sup>220</sup> If *Lopez* and *Morrison*'s critics intend to do so, they must explain why.

On that basis, it is not enough for *Lopez* and *Morrison*'s critics to criticize the Court majority for trying to establish a limiting principle on the "effects" rule; they have to provide a better limiting principle if they think one exists. To date, the critics have issued a great deal of criticism, but they have been much more reticent when it comes to proposing constructive alternatives. Justice Breyer, for instance, criticized the *Lopez* decision for injecting uncertainty into Commerce Clause doctrine,<sup>221</sup> but he declined to name any examples of local activities beyond Congress's powers even when pressed to do so. Justices Souter and Breyer have suggested the Court's distinction between "economic" and "non-economic" activities is arbitrary,<sup>222</sup> and academics like Lawrence Lessig and Michael Dorf have suggested the same in recent scholarship,<sup>223</sup> but again, none of them have suggested a less arbitrary standard that might reconcile the rational basis test to Article I's structure.

These arguments are incomplete if one accepts that Article I still has a role to play in defining the relationship between the states and the federal government. If

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<sup>219</sup> See *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 779, 792–93 (W.D. Va. 1996) ("If such a claim . . . sufficed, Congress's power would extend to an unbounded extreme.").

<sup>220</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (warning that the effects test "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectively obliterate the distinction between what is national and what is local"); *United States v. A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) ("There is a view of causation that would obliterate the distinction between what is national and what is local.").

<sup>221</sup> See *Lopez*, 514 U.S. at 630 ("The . . . legal problem created by the Court's [*Lopez*] holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled.").

<sup>222</sup> See *id.* at 608 (Souter, J., dissenting); *id.* at 627–29 (Breyer, J., dissenting).

<sup>223</sup> See Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 *FORDHAM L. REV.* 2161, 2172–76 (2001); Lawrence Lessig, *Translating Federalism*: *United States v. Lopez*, 1995 *SUP. CT. REV.* 125, 203–06.

it does, then critics must propose a meaningful distinction between the federal and local that is less arbitrary and engenders less uncertainty than the rule *Lopez* and *Morrison* established. If Article I has residual constitutional value — out of respect for the basic principles of constitutionalism and the rule of law, some watered-down theory of textualism or originalism, or any other reason — it is not enough to say that a rule enforcing it engenders uncertainty. Rather, one must show that the uncertainty is so severe that it is effectively impossible to continue to enforce Article I. Thus far, the Court's rule does not seem too arbitrary. This rule has a respectable pedigree in foundational cases like *Jones & Laughlin* and *Wickard*, and it has been applied in fairly straightforward fashion to federal laws purporting to regulate guns in schools and sexual attacks. If critics disagree, they owe a responsibility to propose a better rule or to explain why Article I should go by the board. To date, they have not taken this opportunity.

This issue is particularly critical because the other main components of the rational basis test probably cannot extend to the kinds of regulations considered in *Lopez* and *Morrison* unless this issue is first resolved. The rational basis test depends not only on this claim of economic interdependence but also on the claims that “commerce” has a sweeping meaning, covering all economic activities, and that Commerce Clause issues are better left to the legislative process than to judicial review. Whether or not the Commerce Clause was originally meant to cover general economic activity,<sup>224</sup> “commerce” cannot be used to reach activities like gun possession unless economic interdependence makes it truly impossible to distinguish between the interstate economy and local affairs. Similarly, the only plausible way to apply the political-process arguments cited in *Wickard* and the political-safeguards arguments in the *Morrison* dissent<sup>225</sup> is to establish that, in an interconnected economy, it is simply impossible for courts to use judge-made rules to distinguish between interstate transactions, school gun violence, and the like.

In short, the acts under review in *Lopez* and *Morrison* push the distinction between national and local so far that *Lopez* and *Morrison*'s critics have a choice to

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<sup>224</sup> Compare Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702–06 (1996), Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 111–32 (2001), and Epstein, *supra* note 22, at 1393–99 (all interpreting “commerce” to mean “trade”), with 3 CROSSKEY & JEFFERY, *supra* note 160, at 131–48, WALTON H. HAMILTON & DOUGLASS ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION — THEN AND NOW* 145–58 (1937), Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 129–30, and Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 35–50 (1999) (all interpreting “commerce” to mean “economic activity”).

<sup>225</sup> See Saikrishna Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Theories of Federalism*, 79 TEX. L. REV. 1459 (2001) (discussing the implausibility of political process arguments).

make. If they think that Article I still sets some limits on the scope of federal power, the time has come for them to acknowledge as much. If so, they must acknowledge that Article I has *some* value, that there need to be *some* meaningful limits on the scope of Congress's Commerce powers, and they have to propose limits that might do a more credible job than the "economic" limits the *Lopez* majority created to enforce the boundaries between national and local regulation. And if they make such acknowledgments, it is probably time to abandon the talk of "judicial activism."

### *B. The Living Commerce Clause Considered*

On the other hand, if the critics wish to claim that there are no principled limits on the scope of Congress's commerce powers, then they are probably going to need a constitutional theory for erasing Article I. Supreme Court cases from *Jones & Laughlin* to *Lopez* interpreted the Commerce Clause expansively, but none of them ever claimed that the fact of economic interdependence eliminated Article I federalism. This claim would require a new constitutional argument. Such an argument would probably have to establish why the understanding of the Commerce Clause that prevailed from 1937 to 1995 sets the constitutional benchmark for determining the scope of Congress's regulatory powers, and why other ideas about original meaning, text, and constitutional structure must go by the board. It would have to show why federal courts should not use judicial review to set any outer limits on the scope of Congress's commerce powers. Most important of all, it would have to go on to explain why the understanding of rational basis review widely accepted after the New Deal is so authoritative, even in the face of legitimate countervailing interpretive arguments that to set any limits on rational basis review would be tantamount to a constitutional revolution.

And here, the Progressives' vision of a living Commerce Clause may provide the conceptual tools necessary for making these arguments. If the rational basis test was supposed to be an Ackermanian "professional narrative"<sup>226</sup> justifying some idea like the Progressives' living Commerce Clause, and if that narrative has now exhausted its possibilities, perhaps it is time to go back to the Progressives' original plan for an expanding national government.<sup>227</sup> According to this plan, as Woodrow Wilson explained it, whenever "[c]hanges of fact and alterations of opinion" cause

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<sup>226</sup> ACKERMAN, *supra* note 18, at 38 (naming the "ongoing constitutional narrative constructed by lawyers and judges" as the "professional narrative").

<sup>227</sup> Liberal constitutional law theorists are borrowing from Progressive ideas in other areas of constitutional law. For example, Mark Tushnet's recent work *Taking the Constitution Away from the Courts* borrows heavily from Progressive ideas to explain why and how to recover a tradition of populist constitutional politics. See TUSHNET, *supra* note 211 *passim*.

the American "community of interest" to grow, the Commerce Clause automatically gives the people national powers to match those new interests.<sup>228</sup>

To be sure, cases like *Carter Coal*, in which the Supreme Court warned that Congress does not have the power to legislate on subjects that affect the national interest, would stand in the way of such a recovery.<sup>229</sup> But, as Progressive theory holds, times have changed. One of the country's two major political parties now holds as a fundamental tenet the Progressive truth that "the Constitution ought to be interpreted as a document that grows with our country and our history."<sup>230</sup> Progressive living Constitution theory accords in large part with mainline contemporary academic views about constitutional interpretation — like Professor Ackerman's theory of "constitutional moments," in which the American people are engaged in a process of "ongoing construction of national identity" and "collective self-definition."<sup>231</sup> Such theory has also gathered considerable respect and acceptance in many areas of constitutional law. For instance, in his now-influential dissent from *Poe v. Ullman*, the second Justice Harlan described the Due Process Clause as relying on a historical tradition that is "a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound."<sup>232</sup>

Updating the Progressives' vision of a living Commerce Clause from 1910 to 2001, it would run something like the following. "We" the American people are a very different people than the people that drafted and ratified the Constitution. We have matured: We fought a Civil War to defeat some of the states' rights prejudices that existed at the Founding, we overcame the economic problems created by the laissez-faire assumptions of the original Constitution, and we have waged a civil-rights movement to finish off the project we started during the Civil War.

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<sup>228</sup> WILSON, *supra* note 55, at 192.

<sup>229</sup> See *supra* text accompanying notes 136–40.

<sup>230</sup> Transcript: Debate Between Vice President Al Gore and George W. Bush, held by the Presidential Debate Commission (Oct. 3, 2000) (statement by Vice President Gore), 2000 WL 1466168.

<sup>231</sup> ACKERMAN, *supra* note 18, at 36.

<sup>232</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); see, e.g., *Casey v. Planned Parenthood*, 505 U.S. 833, 850 (1992) (quoting *Poe*, 367 U.S. at 542 (Harlan, J. dissenting)); *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J. concurring) (citing *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Address at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), in 19 U.C. DAVIS L. REV. 2 (1985):

But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

As a result of these events and others, we now have a comprehensive national regulatory state. We might as well recognize that text- or structure-based readings of the Commerce Clause may not help us achieve the aspirations about national identity that we want for our times. As the Due Process Clause encapsulates the people's current and deeply held concerns about liberty and privacy, and as the Equal Protection Clause does the same for their evolving conceptions of fairness, so the Commerce Clause stands as a symbol of those activities that the American people deem to be in their joint and collective interests. It may have made sense in the nineteenth century to distinguish between "interstate trade" and local economic regulation, and it may have made sense from the New Deal until the end of the twentieth century to distinguish between federal "economic regulation" and state-based "social regulation." But sixty years after the New Deal, the American people have come to appreciate that their mutual interests reach much more widely than this. The civil-rights movement, the women's-rights movement, and the social and environmental causes of the 1960s and 1970s all presented the American people with new challenges to overcome, and the people responded by demanding an ever-more vigorous national government.

Along the same lines, the federal judiciary has no business interposing limits when the political branches legislate on new topics of common national interest. The judiciary is the least sensitive of the three branches to the changes in the nation's deepest political inclinations. The courts have a useful role to play in making sure that changes in the federal structure happen slowly and fairly. But they can serve this function by enforcing the Constitution's individual rights provisions. And they cannot use this function as an excuse for refusing to acknowledge all the new national interests the American people have created since the New Deal. If they do use their power this way, they will lose legitimacy by failing to recognize that Congress has a better sense for the American people's will than the courts do.

Such an interpretation goes a long way toward making sense of the charges that *Lopez* and *Morrison* are "revolutionary" decisions. If the American people's shared sense of national identity fleshes out the Commerce Clause's meaning in any generation, it becomes at least plausible that the New Deal might set a constitutional baseline which has more authority to determine the scope of Congress's power than pre-New Deal case law or Article I of the Constitution. Along the same lines, it would be immaterial that many of the Progressives who proposed a living Commerce Clause did not want it to extend to cover manufacture or labor<sup>233</sup> or that New Dealers did not want it to extend to cover family law and local government.<sup>234</sup> As Progressives used a living Constitution to confront the national threats of their day (the trusts and the railroads), and as the New Dealers did so for the problems of their day (labor strife and overproduction), future generations should be left free to

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<sup>233</sup> See *supra* text accompanying notes 93–100.

<sup>234</sup> See *supra* text accompanying notes 126–48.

apply the same historicist principles to overcome the pressing problems of their day.

### *C. The Living Commerce Clause Reconsidered*

Nevertheless, there would be obvious, and to my mind insurmountable, problems with this living Commerce Clause argument. To begin with, it is difficult if not impossible to reconcile this argument with other traditional tools of interpretation. A “living Commerce Clause” simply cannot be squared with any conception of “commerce” — whether “commerce” is understood as trade or as any gainful economic activity — in the same manner that a “living Due Process Clause” can be reconciled with “liberty,” or a “living Equal Protection Clause” with “equality.” Likewise, the living Commerce Clause is incompatible with any reading of the Constitution that tries to preserve a structural commitment to limited federal powers.

But even taken on its own terms, living Constitution theory suffers from deep interpretive problems as applied to the Commerce Clause. Progressives like Woodrow Wilson were confident that they could “read[] our Constitution in its true spirit, neither sticking in its letter nor yet forcing it arbitrarily to mean what we wish it to mean.”<sup>235</sup> On close examination, however, it is not clear that there is a middle ground between these two extremes.

Living Constitution theory claims to build a theory of interpretation on group experience and ordinary political opinion. In the view of thinkers like Wilson, Croly, and Goodnow, it is impossible to apply the Constitution in what we now call a “formalist” way: To insist that constitutional terms keep fixed meanings and that the Constitution cannot be changed without following Article V’s amendment process.<sup>236</sup> This is because political opinions, the raw material of political life, change too frequently to build a stable system on any fixed and rigid constitutional understandings. Like an animal, a constitutional order must adapt or die.<sup>237</sup>

Living Constitution theory solves this problem by grounding constitutional meaning in an evolving historical American will. Government, “with life,” Wilson claims, “must change, alike in its objects and in its practices.”<sup>238</sup> But if, like the Progressives, one intends to found a system of higher law on the American people’s group will or group consciousness, one needs a way to tease out their “constitutional” opinions from their petty, base, and passion-driven opinions. For instance, one must discern how it is that a judge or legislator could know that the American people had “willed,” in a constitutionally compelling way, that racial discrimination be abolished in 1954 when a substantial minority of states enforced

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<sup>235</sup> WILSON, *supra* note 55, at 178.

<sup>236</sup> See Gillman, *supra* note 50, at 230–31; see also *supra* text accompanying notes 63–72.

<sup>237</sup> See WILSON, *supra* note 55, at 54–57.

<sup>238</sup> *Id.* at 4–5.



Jim Crow laws and a slight majority of the American people opposed racial integration.<sup>239</sup>

The Progressives claimed to solve this problem by resorting to the concept of Progress. As individuals, Americans may be slaves to the passions and interests that drive their actions in their daily lives. As one people, however, their common consciousness gives their politics fundamental meaning and direction. Historical forces inspire that consciousness with intelligence, rationality, and intent that the people could not grasp or acquire individually. Progress imparts constitutional priorities to the people's will.<sup>240</sup>

But because this idea of Progress radically subordinates the role of individual reason and moral perception, it makes it virtually impossible for any single person to apply a constitution to her times. Individuals do not determine the people's will; the will comes to them, as a people, through historical forces and development.<sup>241</sup> If the people need Progress to impart rationality and moral authority to their will, and if Progress is beyond any individual person's powers of perception, there is no way any single individual can grasp the rationality or the authority Progress imparts. The interpreter cannot know whether she is, in Charles Kesler's words, "distinguish[ing] the faint but swelling notes of progress"<sup>242</sup> from all the noise and chaos in the people's changing opinions, or succumbing to a very theoretical form of self-deception.

While this problem is particularly obvious in Progressive interpretive theory, it deserves careful attention now because it inheres in any constitutional theory that builds on the authority of common popular opinion. Many now-prevailing theories of interpretation abandon the Progressives' commitment to Progress, but they agree that constitutionalism rests on some sort of historically changing popular consciousness. For instance, Bruce Ackerman's "constitutional moment" theory is based on the principle that constitutionalism is a process of "ongoing construction of national identity" and "collective self-definition,"<sup>243</sup> in which political actors and lawyers learn to follow a "higher law[]" that comes from the "mandate from the People."<sup>244</sup> The formal structure for Ackerman's regime changes — government by strong presidents, whose visions are legislated by Congress and then ratified by the judiciary after an overwhelming electoral victory<sup>245</sup> — is operationally identical to

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<sup>239</sup> See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 42 (1991).

<sup>240</sup> See WILSON, *supra* note 55, at 25–27. Wilson gave these historicist principles concrete context when he canvassed 1500 years of European history to explain how constitutional government evolved, *see id.* at 27–42, and when he interpreted 800 years of Anglo-American history to explain the emergence of American constitutional government. *See id.* at 2–3, 6–8.

<sup>241</sup> *See id.* at 26.

<sup>242</sup> Kesler, *supra* note 56, at 33.

<sup>243</sup> ACKERMAN, *supra* note 18, at 36.

<sup>244</sup> *Id.* at 48.

<sup>245</sup> *See id.* at 268.

Woodrow Wilson's vision for reorganizing the federal government.<sup>246</sup>

Whatever merits Ackerman's theory has as a historical and descriptive theory of American constitutional development, it has no normative power except on the Progressive premise that the people's will is constructive and binding. Further, Progressive theory has one obvious advantage over Ackerman's: At least in Progressive theory, the legislator or judge can rely on 800 years' worth of shared Anglo-American or European experiences while trying to discern the People's commands.<sup>247</sup> If, as in Ackerman's theory, the people are always reconstructing their political identity in no particular direction, it is virtually impossible to know what the people decree to be their "higher law," separate from the "ordinary law."

I have focused on Ackerman's theory here because it is widely respected and influential, but the same could be said of many other prevailing theories of constitutional interpretation. Some might prefer David Strauss' theory of common law constitutional interpretation because it offers the prospect of gradual Burkean evolution, not the violent revolutionary spasms of Ackerman's constitutional moments.<sup>248</sup> But because Strauss starts from the premise that judges should interpret constitutional doctrines to keep up with changing societal moral intuitions, he places a great deal of faith in judges' ability to discern which intuitions prescribe the moral and constitutional standards in their day.<sup>249</sup> Others, like Mark Tushnet, might scoff at judicial interpretation and argue that the Constitution should be interpreted populist-style by representatives whose job it is to help us "start telling a different story about ourselves precisely because we constitute *ourselves* . . . can, in short, change who we are."<sup>250</sup> But Tushnet's project places a great deal of faith in those representatives' capacity to know how we want to reconstitute ourselves.<sup>251</sup> If one prefers popular constitutionalism to Tushnet's populist constitutionalism, one can follow Larry Kramer and argue that constitutionalism must accommodate "processes, formal and informal, by which our constitutional understandings and

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<sup>246</sup> See *supra* text accompanying notes 91–100.

<sup>247</sup> See CROLY, *supra* note 61, at 215–64 (interpreting the course of European history to show the development of the concept of the centralized nation-state); WILSON, *supra* note 55, at 6–13 (interpreting the course of Anglo-American history from the time of Magna Carta to 1910).

<sup>248</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 893 (1996) [hereinafter Strauss, *Common Law*] (advancing "familiar ideas perhaps most commonly associated with Burke"); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1457 (2001) ("American constitutional law is best seen as the result of a complex, evolutionary process . . .").

<sup>249</sup> See Strauss, *Common Law*, *supra* note 248, at 900–02, 905–06, 918–19, 924.

<sup>250</sup> TUSHNET, *supra* note 211, at 191.

<sup>251</sup> On this point, see Hadley Arkes, *Lincoln, Nietzsche, and the Constitution*, FIRST THINGS, Apr. 2000, at 16 (criticizing Tushnet for his post-modernism and for interpreting the Declaration contrary to its obvious meaning as an expression of political truths following from "the Laws of Nature and Nature's God").

commitments can be challenged, reinterpreted, and renewed.”<sup>252</sup> But to say so is to beg huge substantive questions about why and how “popular constitutionalism” and institutional processes have any meaning that can impose normatively binding constitutional commitments.

In any event, these sorts of interpretive problems beset Progressive constitutional interpretation generally, and they would beset any attempt to invoke living Commerce Clause arguments now. Herbert Croly and Woodrow Wilson’s interpretations of American history were one-sided and shallow. The United States became more united over the course of the nineteenth century, yet at the end of this period, court opinions and political speeches made clear that state regulation should be the rule and federal regulation the exception, reserved for truly national objects like stopping state protection wars or eradicating organized racial discrimination by states.<sup>253</sup> On the same basis, there are good reasons to wonder how much the American people really “wanted” the New Deal expansion of national government — at least in any way that could establish a normative basis for replacing the constitutional presumption of limited and enumerated national powers<sup>254</sup> with a presumption of unlimited and general national powers. To be sure, the American electorate supported the New Deal,<sup>255</sup> and even now, the American people support many new federal regulatory initiatives. At the same time, for at least a generation, voters have seemed skeptical about federal regulation generally. Ever since the Great Society and Watergate, presidential candidates including Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush have had much more success “running against Washington” than they have running with Washington.<sup>256</sup> When President Clinton proposed an ambitious new national system

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<sup>252</sup> Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 15 (2001).

<sup>253</sup> See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 20–26 (1888) (“There must be a point of time when [the goods] cease to be governed exclusively by the domestic [state] law and begin to be governed and protected by the national law of commercial regulation . . . .”); *The Civil Rights Cases*, 109 U.S. 3, 11–18 (1887) (Stating that the Fourteenth Amendment “nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States . . . .”).

<sup>254</sup> See U.S. CONST. art. I, § 8 (setting forth the powers of Congress); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“the Constitution creates a Federal Government of enumerated powers.”).

<sup>255</sup> See THE WORLD ALMANAC AND BOOK OF FACTS 494 (1999) (listing Franklin Delano Roosevelt’s overwhelming popular and electoral-vote totals in his campaigns for the Presidency); *id.* at 90 (listing party makeup of the U.S. House and Senate during the 1930s). Barry Cushman has canvassed public opinion polls during the New Deal in *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7 (2002).

<sup>256</sup> See, e.g., MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 1 (1977) (“In the 1976 campaign, Carter and Reagan “asked us to believe that the seat of national government is (choose): (a) immobile, (b) corrupt, (c) dangerously

of health-care regulation, he handed control of Congress to the Republican Party for the first time in forty years.<sup>257</sup> Reasonable minds can disagree about which of these two views captures the American "state of mind." In either case, there is probably no principled way to build a constitutional mandate on the answer.

Finally, these interpretive problems are especially severe as they relate to the Commerce Clause, because they convert that Clause into a one-way ticket for uniform national government. By way of contrast, in living Constitution terms, a people's ideas about privacy can evolve and grow in any direction. The people may fundamentally desire property in one century but sexual autonomy in another. Not so when it comes to federalism. If the Constitution's meaning on federalism emanates from the changing will of one, unified *American* people, the inquiry is over before it even begins. This fact is obvious in the political thought of thinkers like Wilson and Croly. They posited that American people acted parochially when they chose to keep regulation in their backyards but maturely and historically when they chose to expand the scope of their common national interests. These sorts of distinctions create huge prejudices for preferring federal regulation over state regulation without any obvious basis in principle or fact.

I do not know which of these two alternatives critics of *Lopez* and *Morrison* will choose, but a choice must be made fairly soon. Laws like the Gun-Free School Zones Act and the civil-liability provisions of the Violence Against Women Act have pushed the case law to a point where either Article I or the cumulative-effects rule has to go by the board. The Progressives' ideas about a living Commerce Clause probably offer the best-developed argument in the American constitutional tradition to wipe out Article I.

## VII. THE LIVING COMMERCE CLAUSE IN AMERICAN POLITICS TODAY

### A. Can *Stare Decisis* Support the Rational Basis Test?

On the other side, the Justices who want to protect the core of the New Deal but use Article I to set some outer limits on the Commerce Clause also have some explaining to do. In *Lopez*, the Court opinion<sup>258</sup> and Justice Kennedy's concurrence both resolved not to disturb any of the Court's Commerce Clause precedent from 1937 up through *Lopez*, out of respect for *stare decisis*. Justice Kennedy was particularly emphatic on this point: "*Stare decisis* operates with great force in

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out of touch, (d) all of the above.").

<sup>257</sup> See THE WORLD ALMANAC AND BOOK OF FACTS 90 (1999) (listing party makeup of the U.S. House and Senate during the 1990s); E.J. Dionne Jr., Op-Ed, *Tied Score on Health Care*, WASH. POST, Nov. 19, 1996, at A21, (attributing the Republican victory in the house to President Clinton's attempt at health-care reform).

<sup>258</sup> See *supra* note 169–77 and accompanying text.

counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature."<sup>259</sup>

These *stare decisis* claims are much more controversial than the Chief Justice and Justice Kennedy made them seem. *Stare decisis* arguments smuggle in through the backdoor political considerations about how well an established constitutional rule is working and how much a new rule might improve things. That assessment has not really taken place yet as to the rational basis test, even though other authors have noted important problems in the arguments for that test. One of the main justifications for the rational basis test was always a doctrinal criticism that pre-New Deal Commerce Clause case law was "formal," brittle, arbitrary, and perhaps even opportunistic.<sup>260</sup> But Barry Cushman has shown convincingly why this body of Commerce Clause law made much more sense on its own terms than we tend to assume now.<sup>261</sup> Richard Epstein has explained why in principle it is no more or less difficult to enforce the pre-New Deal understanding of the Commerce Clause than it is to enforce several kinds of laws federal courts apply routinely, especially the dormant Commerce Clause and international-trade agreements.<sup>262</sup> Separately, Epstein and Michael Greve have also pointed out serious public-choice criticisms with the rational basis test, which undermined a system of interstate regulatory competition and replaced it with a system of organized rent-seeking by national interest groups.<sup>263</sup>

But the Commerce Clause and the rational basis test also raise a third series of *stare decisis* considerations. These considerations arise only when the Court is reconsidering a constitutional doctrine so fundamental that it belongs not only in a class on constitutional law but also in any class on constitutional government. One can probably count such doctrines on the fingers of two hands: They surely include *Lochner*, the debate over equality reflected in *Dred Scott*,<sup>264</sup> *Plessy v. Ferguson*'s separate-but-equal doctrine<sup>265</sup> and *Brown v. Board of Education*'s color-blind doctrine,<sup>266</sup> and the debate over abortion reflected in *Planned Parenthood v.*

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<sup>259</sup> *Id.* at 574 (Kennedy, J., concurring).

<sup>260</sup> See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (Aspen 3d ed. 1996); TRIBE, *supra* note 160, § 5-1, at 297.

<sup>261</sup> See Cushman, *supra* note 36; Epstein, *supra* note 22 (discussing the significance of pre-New Deal Commerce Clause interpretation).

<sup>262</sup> See, e.g., Epstein, *supra* note 22, at 1454; Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 190 (1996) [hereinafter Epstein, *Constitutional Faith*].

<sup>263</sup> See MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 2-3, 79-82 (1999); Epstein, *Constitutional Faith*, *supra* note 262, at 190-91 (favoring pre-new Deal state regulatory competition); Epstein, *supra* note 22, at 1451-54.

<sup>264</sup> See *Scott v. Sandford*, 60 U.S. (14 How.) 393 (1856).

<sup>265</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>266</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954).

*Casey*.<sup>267</sup> As Justice Kennedy himself recognized in *Casey*, when the Court considers the viability of doctrines so fundamental, the Court cannot decide whether to continue to apply *stare decisis* without taking stock of how society has accepted the doctrine and how it understands the facts and norms on which the doctrine is based.<sup>268</sup>

The Commerce Clause surely counts as one of those fundamental doctrines. We may forget it now because Commerce Clause doctrine has been technical and economic ever since *Wickard*. But the doctrine seems dry and boring only because the Progressives and President Franklin Roosevelt succeeded in working a thorough transformation of the federal government's regulatory powers. That constitutional transformation could not have come about without a series of strong political commitments. Anyone who is inclined to doubt this claim need only consider the extraordinary hostility *Lopez* and *Morrison* have generated. Those political commitments are bound to have a huge impact on our current political and regulatory practice. Before the members of the *Lopez* majority can use *stare decisis* as a ground for declining to reconsider the rational basis test, they must make a considered and honest assessment about how well the political commitments this test symbolizes have contributed to our system of government. The dissenters must take the same lessons under advisement when they follow Larry Kramer's "political safeguards" theory, which claims that state governments protect their interests by negotiating with federal bureaucracies.<sup>269</sup> The political safeguards theory breaks down if state governments and federal bureaucracies are following conceptions of state and national interests mapped out by progressives like Wilson, Croly, and Goodnow.<sup>270</sup>

### *B. The Living Commerce Clause in Contemporary Political Practice*

Here, living Commerce Clause principles describe the character of modern regulatory and political practice far better than the standard process and economics-based explanations for the rational basis test. If Epstein and Greve have described how post-New Deal federalism encourages regulatory "bootlegging" by national special interests, Progressive political ideas capture the tendencies of the idealistic "Baptists" who have done much of the regulating since the New Deal.<sup>271</sup> Every

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<sup>267</sup> 505 U.S. 833 (1992).

<sup>268</sup> See *id.* at 861–69 (O'Connor, Kennedy, and Souter, JJ.).

<sup>269</sup> See Larry D. Kramer, *Putting the Politics Back in to the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 283 (2000); Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123, 136 (1999); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1543 (1994).

<sup>270</sup> See *supra* text accompanying notes 49–120.

<sup>271</sup> See, e.g., BRUCE YANDLE, *THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION*:

constitutional order has what Bruce Ackerman calls "regime principles,"<sup>272</sup> the common opinions held throughout a society that set that society's aspirations and goals. The rational basis test does not articulate any such principles. It is not a blueprint for political action, but rather a judge-made excuse for judicial *inaction*. The Progressives' arguments about federalism, by contrast, articulate the New Deal's regime principles for federalism. To illustrate, the Justices of the Supreme Court in *Morrison* spent all of their energies arguing whether the tort provisions of the Violence Against Women Act increase the productivity of women in the American workforce and whether the answer to this empirical question makes any constitutional difference.<sup>273</sup> Surely congressmen did not trouble themselves with such questions when they voted on the Act; they made a political judgment about whether "[a]ll persons within the United States" should have "the right to be free from crimes of violence motivated by gender," and whether the federal government should guarantee that right.<sup>274</sup>

These nationalism and federalism regime principles capture many of these ideas in our political practice today. First, these themes anticipate the tendency of many federal laws to make grand symbolic promises, like the claim that the Violence Against Women Act would eradicate gender-motivated violence. In living Constitution theory, enterprising national elites and forceful presidents catalyze the political process when they present the American people with competing political visions.<sup>275</sup> When the people subscribe to one vision over another, they automatically create a new set of common national interests. Because these visions are broad, Congress codifies them in broad, thematic strokes. Federal bureaucrats do the detail work, deciding how best how to write the people's declared will into regulation.

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TRACKING THE UNICORN 23–25 (1989); R. Shep Melnick, *Strange Bedfellows Make Normal Politics: An Essay*, 9 DUKE ENVTL. L. & POL'Y F. 75, 79 (1998).

<sup>272</sup> ACKERMAN, *supra* note 18; Tushnet, *New Constitutional Order*, *supra* note 18, at 29, 31.

<sup>273</sup> Compare *United States v. Morrison*, 529 U.S. 598, 614–15 (2000) ("But the existence of congressional findings [of the impact of gender-motivated violence] is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."), *with id.* at 629–35 & nn. 3–7 (Souter, J., dissenting) ("[T]he legislative record [supporting the VAWA] . . . is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges."), and *id.* at 662 (Breyer, J., dissenting) ("[A]s Justice Souter has pointed out, Congress compiled a 'mountain of data' explicitly documenting the interstate commercial effects of gender-motivated crimes of violence.").

<sup>274</sup> 42 U.S.C. § 13981(b) (2000).

<sup>275</sup> See WILSON, *supra* note 55, at 65 (describing a good president as "a man who understands his own day and the needs of the country, and who has the personality and the initiative to enforce his views both upon the people and upon Congress"); Woodrow Wilson, *Leaders of Men*, Commencement Address at the University of Tennessee, Knoxville (June 17, 1890), in 6 THE PAPERS OF WOODROW WILSON 646 (Arthur S. Link ed., 1969).

These symbol-heavy laws tend to be implemented in ways that manifest a strong hostility toward state and local government. State or local government is often preferable when local agencies are better informed about local conditions and the opinions of the local populace who have to live under the law.<sup>276</sup> In Progressive political thought, these kinds of concerns do not count. If federal officials are convinced they are helping promote the next new national solution, state and local governments are most likely part of the problem. Writers like Woodrow Wilson and Herbert Croly claimed to conserve state institutions, but they also went to considerable lengths to make such institutions seem parochial<sup>277</sup> and corrupt.<sup>278</sup> These critical tendencies in their writings accord with the basic presuppositions of their thought much more than their conservative tendencies. Because the American people act progressively when they act as one people, state government's first tendency is to atomize the people and impede their historical evolution. Thus, Woodrow Wilson can warn that any "conflict of laws in matters which vitally interest the whole country" constitutes a great "political danger."<sup>279</sup>

The last and perhaps most extreme tendency is toward immoderation in national political goals. Because the people are always setting new federal goals for themselves, they cannot have any long-term federal priorities. There is no sense that the federal government is institutionally better-equipped to handle a few enormous problems, like the common defense and interstate trade, or that the federal government becomes less effective as it assumes more responsibility. Instead, in Woodrow Wilson's words, there is only a confidence that the federal government must "take cognizance and attempt to control" an ever-expanding list of objects that jointly concern the American people.<sup>280</sup> For Wilson, the national statesman's virtues do not include moderation or prudence. All of the Progressive political virtues are oriented toward action: "initiative," "look[ing] forward, not backward," and "a slowly progressive modification and transfer of functions as between the States and the federal government."<sup>281</sup> As Wilson says elsewhere, "the transgression of the law of political progress" is "[p]olitical [s]in."<sup>282</sup>

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<sup>276</sup> Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

<sup>277</sup> See WILSON, *supra* note 55, at 44–45 (criticizing the states at the Founding for being havens for "the jealous politicians of the self-conscious little commonwealths").

<sup>278</sup> See *id.* at 189–90 ("The truth is that our state governments are, many of them, no longer truly representative governments.").

<sup>279</sup> *Id.* at 186.

<sup>280</sup> *Id.* at 195.

<sup>281</sup> *Id.* at 193–94.

<sup>282</sup> Woodrow Wilson, An Outline of and Memoranda for "The Philosophy of Politics" (c. Jan. 26, 1895), in 9 THE PAPERS OF WOODROW WILSON, *supra* note 275, at 129; see also Kesler, *supra* note 50, at 120 (discussing Wilson's belief that the statesman's role is "to point out the way of progress").



*C. Illustrations: Guns in Schools, Violence Against Women, and Arsenic in Water*

These themes cannot capture every facet of post-New Deal federal commercial regulation in all its varieties, but they are familiar, and they have an effect on modern-day federal regulation. The Gun-Free School Zones Act certainly seems to loom larger for its political symbolism content than its substantive content. Even if the U.S. Department of Justice tried to prosecute offenses against the Gun-Free School Zones Act on a consistent basis, it simply would not have the resources to prosecute them as consistently as state and local authorities can. The same can be said of the civil remedy provisions of the Violence Against Women Act (VAWA), which declared a federal "right to be free from crimes of violence motivated by gender" anywhere in the United States.<sup>283</sup> Federal courts cannot vindicate a federal right against gender-related battery effectively: There are almost twice as many trial judges in California alone as there are Article III federal judges throughout the entire United States.<sup>284</sup> Nor was there any obvious evidence that Congress created this remedy because it was dissatisfied with the way state and local courts were applying state law to gender-motivated torts. To guarantee women their newfound rights, VAWA's cause of action created an undefined "action for the recovery of compensatory and punitive damages."<sup>285</sup> Congress did not single out any specific defects in state battery law; it simply declared an open-ended right and left the federal courts to declare what the right means.

The Gun-Free School Zones Act and VAWA's civil action probably had fairly minor effects on the federal-state balance, but this penchant for national political symbolism can have a huge substantive impact when it influences federal administrative regulation. In environmental law and policy, for instance, the prevailing conventional wisdom holds that states are either too incompetent or too corrupt to make sound environmental policy. Richard Revesz has criticized this view extensively in his scholarship,<sup>286</sup> but he has had little success because he is going against powerful political assumptions that shape environmental policy. To take just one recent example, in 2001 the Bush Administration and leading members of Congress debated whether the Environmental Protection Agency should lower the federal arsenic standard for drinking water from fifty to ten parts per billion (ppb). President Bush was criticized roundly for suggesting that this topic might be better left to state regulation, and eventually his Administration backed down. But Bush's

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<sup>283</sup> 42 U.S.C. § 13981(b) (2001).

<sup>284</sup> There are 1499 judges in California's Superior Courts. See CAL. ADMIN. OFFICES OF THE COURTS, FACT SHEET: CALIFORNIA JUDICIAL SYSTEM (2002), available at <http://www.courtinfo.ca.gov/reference/documents/cajudsys.pdf>. There are 821 Article III judges in the federal court system. See The 'Lectric Law Library, Understanding the Federal Courts, at <http://www.lectlaw.com/files/jud21.htm> (last visited Oct. 4, 2002).

<sup>285</sup> 42 U.S.C. § 13981(c) (2000).

<sup>286</sup> See, e.g., Revesz, *supra* note 276.

first instincts were probably right. Well water is not a migratory resource. Local residents will reap both the costs and the benefits of whatever arsenic standard they apply. The EPA rule claims to protect Americans from bladder and lung cancer caused by trace amounts of arsenic, but no cases of arsenic-related cancer have ever been reported in the United States.<sup>287</sup> In addition, because the EPA relied heavily on extrapolations from cancer studies in Taiwan, reasonable minds could disagree about how much credence to give the EPA's extrapolations.<sup>288</sup> In addition the ten ppb standard is going to be expensive to comply with in many areas, especially in mountain states,<sup>289</sup> where bladder and lung cancer rates are significantly lower than national averages anyway.<sup>290</sup> Strictly at the level of policy, unless local water districts are corrupt or incompetent, why entangle the EPA in thousands of local water safety cost-benefit analyses, and why not leave it to local officials to determine how much safety local residents are willing to pay for?

The regulatory process and the political process, however, exhibited powerful preferences for exactly the opposite substantive result. The Safe Drinking Water Act,<sup>291</sup> which the EPA administered, claims that Congress has a national interest in water safety: Congress enacted it "to assure that water supply systems serving the public meet minimum national standards for protection of public health."<sup>292</sup> To further this intent, the Act makes an ambitious commitment to eradicate drinking water contamination. The Act instructs the EPA to set maximum contaminant goals, the levels of contamination at which "no known or anticipated adverse effects on the health of persons occur."<sup>293</sup> In practice, the EPA usually sets these goals at zero.<sup>294</sup>

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<sup>287</sup> See U.S. ENVTL. PROT. AGENCY, NO. EPA/625/3-87/013, SPECIAL REPORT ON INGESTED INORGANIC ARSENIC SKIN CANCER: NUTRITIONAL ESSENTIALITY 21 (1988).

<sup>288</sup> See Denise Riedel Lewis et al., *Drinking Water Arsenic in Utah: A Cohort Mortality Study*, 107 ENVTL. HEALTH PERSP. 359, 363-64 & nn. 9, 32, 33, 35 (1999); Sue E. Umshler, Comment, *When Arsenic is Safer in Your Cup of Tea Than in Your Local Water Treatment Plant*, 39 NAT. RESOURCES J., 565, 589-92 (1999).

<sup>289</sup> To comply with the new rule, public water users in states like New Mexico and Utah stand to face water bill increases of \$300 or more to comply with the new rule, increases ten times as high as those urban users stand to face. National Primary Drinking Water Regulations, 66 Fed. Reg. 6976, at 7010-11 (Jan. 22, 2001).

<sup>290</sup> Utah and New Mexico, two of the states most likely to be hardest hit by the new rule, have lung cancer rates of 35.9 and 51.7 incidents per 100,000 males, respectively, as compared to a national average of 73.7 per 100,000 males. They have bladder cancer rates of 22.6 and 20.7 incidents per 100,000 males, respectively, as compared to a national average of 28.7. AM. CANCER SOC., CANCER FACTS & FIGURES 2001, at 8 (2001), available at <http://www.cancer.org/downloads/STT/F&F2001.pdf>.

<sup>291</sup> 42 U.S.C. §§ 300f to 300j-26 (2000).

<sup>292</sup> See H.R. REP. NO. 93-1185, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6454.

<sup>293</sup> See 42 U.S.C. § 300g-1(b)(4)(A).

<sup>294</sup> See CASS R. SUNSTEIN, THE ARITHMETIC OF ARSENIC 16 (John M. Olin Program in Law and Econ., Univ. of Chicago Law Sch., Working Paper No. 135, 2001) (explaining that the maximum contaminant goals in this scheme are usually supposed to be zero).

The Act then charges the EPA to issue regulations setting a water-contaminant standard for each contaminant that comes "as close to the maximum contaminant level goal as is feasible."<sup>295</sup> This is an organic statute that reflects an ambitious symbolic commitment to stamp out a national problem.

If the basic drift of the Safe Water Drinking Act left any doubt about the likely result of the arsenic debate, public debate eliminated it. It was simply not respectable in political debate to suggest that drinking water standards could be left to local regulation. As one journalist put it to Christine Whitman, former New Jersey governor and current EPA Secretary, every state had to have as safe a water standard as every other: "Why should people in New Jersey have safer drinking water than the rest of the country?"<sup>296</sup> Supporters of a national standard also attacked the motives of anyone who touted a local solution. When Governor Whitman resisted the thrust of the question above, the interviewer suggested that she was giving "the impression . . . that you were gotten to by the mining industry," which is influential throughout western states.<sup>297</sup>

#### *D. The Living Commerce Clause as a Proxy for the Character of Federal Regulation*

These sentiments are not the only forces influencing post-New Deal federal commercial regulation, but they are quite familiar and consistent. As they influence a wide range of national political and regulatory practice, there are good reasons for wondering whether they have corroded the quality of those practices. Political scientists like John Marini have noted that as the federal regulatory bureaucracy has grown since the New Deal, it "has become more autonomous and less responsive to the political order as a whole."<sup>298</sup> The sheer size of this system has overwhelmed the executive branch's powers to supervise the administration of the law.<sup>299</sup> Members of Congress have relinquished their responsibility for making general laws, assumed responsibility for overseeing administrative agencies through the committee process, and learned to reap the political benefits that come from playing "good cops" for constituents threatened by "bad cop" agencies.<sup>300</sup> Within this expanded system, Marini concludes, "Congress prefers to attend to the details of administration in support of the local, often parochial, interests" of constituencies far narrower than

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<sup>295</sup> 42 U.S.C. § 300g-1(b)(4)(B).

<sup>296</sup> *Meet the Press: EPA Administrator Christine Todd Whitman Discusses Bush Administration Environmental Policies* (NBC television broadcast, Apr. 22, 2001), LEXIS, News Library, Script File.

<sup>297</sup> *Id.*

<sup>298</sup> MARINI, *supra* note 50, at 194.

<sup>299</sup> *Id.* at 194-98.

<sup>300</sup> Morris P. Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in CONGRESS RECONSIDERED 332 (Laurence C. Dodd & Bruce I. Oppenheimer eds., 1981).

the interests of a national majority.<sup>301</sup>

It is worth wondering at this point whether the early view of the Commerce Clause generated a more decent program for politics and regulation than the vision we live under today. The authors of decisions like *Gibbons* and *Kidd* sought to limit the national government both to keep it vigorous in the fields in which it is most competent and to preserve individuals' control over the laws that affected them the most. From their perspective, the rational basis test seems perverse. The nationalist political vision that the rational basis test sanctions contributes to a style of politics and regulation in which federal legislators cannot distinguish between national priorities and local retail politics.

### CONCLUSION

Constitutional law and constitutional politics have a complicated relationship. Massive political changes surely bring about legal changes. New ruling political principles influence and guide the ways in which public lawyers recast old precedents to bring about new political results. Still, the law never completely follows politics. The law has its own institutional needs in the long and slow periods between periods of political ferment. Because the legal system depends on stability, it needs at least the appearance that there is a seamless continuity between the legal commands of the Constitution and the political principles that prevail today.

This tension has influenced Commerce Clause legal doctrine ever since the New Deal. Progressive and New Deal political reformers hoped to establish a new system of government built around a vigorous administrative state run by a national government of general and unlimited powers. Most of all, they wanted to establish a point of principle, that the national government could tackle anything the American people thought a national problem. They accomplished most of what they wanted during the New Deal, but not the point of principle. Instead of a living Commerce Clause, New Deal lawyers won for them the rational basis test. For almost sixty years after the New Deal, this test produced the same substantive results as a living Commerce Clause, but there was always a tension in principle between the two.

I doubt that there will be a serious reexamination of the political merits of the Commerce Clause at any time in the foreseeable future. Politics and constitutional law both strongly need authority, and the rational basis test supplies legal authority for a political practice that is otherwise hard to square with Article I of the Constitution. Nevertheless, if that reexamination should ever occur, the political ideas examined in this Article point the way. On one side, critics must choose either to tone down their criticism of *Lopez* and *Morrison*, or to repudiate their

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<sup>301</sup> MARINI, *supra* note 50, at 199.

commitment to Article I and shift to a living Commerce Clause critique. On the other side, *Lopez* and *Morrison* supporters must ask themselves how long they can advocate incremental limits on the scope of the Commerce Clause without seriously examining the political assumptions that drove the expansion of that Clause through the New Deal and beyond.