The Sometimes-Bumpy Stream of Commerce Clause Doctrine (Symposium: The Commerce Clause: Past, Present, and Future)

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The Sometimes-Bumpy Stream of Commerce Clause Doctrine

Richard D. Friedman*

The title of this essay is a somewhat feeble use of an unoriginal pun. I am not talking about the doctrine of the stream, but about the stream of the doctrine. That is, my principal subject is not the “stream of commerce doctrine,” but rather the historical development of the doctrine governing Congress’s power under the Commerce Clause in the twentieth century, and especially in the years centering on the New Deal. My basic thesis is this: Although the doctrine developed rapidly in the New Deal era, there were no major discontinuities in it. That does not mean that it did not change, or that it only changed in a smooth fashion. Rather, I believe it developed throughout the twentieth century the way much legal doctrine develops, with a series of intellectually undramatic changes that cumulatively caused an enormous transformation in the effect of the doctrine. The development may be regarded as a drift towards an equilibrium that was set in motion by the conceptualization of the Commerce Clause in the nineteenth century, as allowing congressional regulation not only of that which is commerce, but also of that

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2. At the conference at which this paper was presented, Mark Brandon mentioned the very analogy that I had in mind: the development of products liability doctrine in the early twentieth century. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), is often regarded as the decisive case in the rejection of the privity requirement. But, while Benjamin Cardozo’s opinion in MacPherson presented a new rule, it did so “in the most modest terms,” and it drew heavily on New York precedents that “supported his argument” and “made the innovation less striking than it would have been elsewhere.” ANDREW L. KAUFMAN, CARDOZO 273 (1998). Thus, as Professor Brandon pointed out, even though MacPherson led to a substantially different view of the field, in itself it was an incrementalist decision.
which is not commerce but which has a sufficient impact on commerce. Furthermore, though for nearly sixty years the limitations on the doctrine never posed a practical constraint on Congress, the Court continued to articulate a theoretical constraint. That theoretical constraint was available to be invoked at the end of the twentieth century, without doing dramatic violence to pre-existing doctrine, by a Court inclined to impose federalism-related constraints on Congress.

In short, I contend that the development of Congress’s power under the Commerce Clause in the twentieth century was like a stream, mainly continuous, sometimes winding, but heading primarily in one direction, with some bumpy patches of rapid movement and small cascades or discontinuities, but without major breaks. Thus, I believe Justice Thomas erred when he suggested in United States v. Lopez that the critical New Deal cases were the result of a “wrong turn” that departed dramatically from a century and a half of precedent. They were instead a rather natural development that built on the broad structure of Commerce Clause doctrine as it had developed over the previous century, and rejected one doctrinal feature that no longer fit well within that structure.

At the outset, I will lay out a simple conceptual framework. The law develops in a smooth or continuous fashion when it adopts propositions that were predictable on the basis of prior law. Note that to adopt the most predictable position does not mean that the law remains static; it is a development if the Supreme Court makes clear and certain what previously seemed most likely—and in doing so, the Court may make plausible further propositions that previously seemed improbable. A discontinuity occurs when the Court adopts a proposition that previously appeared to be contrary to the law. But the discontinuity is not a major one unless it involves a significant alteration of the underlying framework.

I. THE EFFECTS DOCTRINE

I contend that the basic framework that still governs Congress’s power under the Commerce Clause is the one suggested,
albeit ambiguously, by John Marshall. Marshall could have defined that power in terms of its *object*. That is, he could have declared that when the Constitution provides that Congress has power "[t]o regulate Commerce . . . among the several States," it means what it says. "Commerce" is the object of the verb "[t]o regulate," and so Marshall could have concluded that to fit within the authorization, an invocation of the power must operate on what is deemed to be interstate commerce. To the argument that such a conception would be unduly cramping, that it would not enable Congress to protect interstate commerce or even to fully achieve the objectives that motivated it to regulate that commerce, one might imagine a response that, whatever the merits of such a system, it is not the one the Constitution provides.

But this, of course, is not what Marshall did. In familiar language in *Gibbons v. Ogden*, after emphasizing that "the exclusively internal commerce of a State" lies beyond congressional power, he wrote:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for

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5. U.S. CONST. art. I, § 8, cl. 3.

6. Compare, for example, two passages from opinions by Chief Justice Hughes in critical cases in the 1930s. In *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), responding to an argument suggesting implicitly "that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country," he wrote for the Court: "It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it." *Id.* at 549. And in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), he wrote:

> If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

*Id.* at 318 (Hughes, C.J., separate opinion).

the purpose of executing some of the general powers of the government. \(^8\)

The clear implication is that interstate commerce is the subject of the power: Congress may regulate a matter that is not itself commerce, even though it may be characterized as an "internal" concern of a state, if it affects other states in a sufficient way.

Later cases made the implication more explicit. \(^9\) (Thus, the implicit suggestion by Justice Thomas in *United States v. Lopez* \(^10\) that the only historical basis for an expansive reading of the commerce power is a generous reading of *Gibbons* \(^11\) is mistaken.) For example, in *The Daniel Ball*, \(^12\) the Court said that the commerce power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. “The power to regulate commerce,” this court said in *Gilman v.*

\(^8\) *Id.* at 195. Note also that in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Marshall justified the creation of the United States Bank in part on the basis of its potential for promoting commerce: “It has... a close connection with the power of regulating foreign commerce, and that between the different states. It provides a circulating medium, by which that commerce can be more conveniently carried on, and exchanges may be facilitated.” *Id.* at 389. In addition, he pointed out that “light-houses, beacons, buoys and public piers, have all been established, under the general power to regulate commerce.” *Id.* at 385. Such facilities were “not indispensably necessary to commerce,” but protected it from peril. *Id.*

\(^9\) *United States v. Coombs*, 37 U.S. (12 Pet.) 72 (1838), an opinion for the Court by Justice Story, written shortly after Marshall’s death, is noteworthy in articulating that Congress’s power reaches activities that obstruct commerce or the exercise of the power itself. Story wrote that the power extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the states. Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers.

*Id.* at 78.


\(^11\) *Lopez*, 514 U.S. at 593-96 (Thomas, J., concurring).

\(^12\) 77 U.S. (10 Wall.) 557 (1871).
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Phila., “comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress.”

Thus, if a state authorized the construction of a low bridge over a navigable waterway, Congress might deem it to be an obstruction to interstate commerce and inimical to a policy that the waterway be kept open. The bridge was an obstruction to commerce. The fact that it was not itself part of interstate commerce, any more than rocks in a harbor would be, did not undercut the legitimacy of federal power.

Exercises of Congress’s commerce power throughout most of the nineteenth century tended not to press the limits of this doctrine. But the doctrine was firmly established. Consider, then, the early twentieth century case of Southern Railway Co. v. United States. That case involved a challenge to a federal act requiring safety appliances on rolling stock used on any railway engaged in interstate commerce, regardless of whether the particular vehicle was moving interstate. The Court upheld the law, and in doing so declared that Congress may protect interstate commerce “no matter what may be the source of the dangers which threaten it.” All that was necessary was that there be “a real or substantial relation or connection between” the requirement of the legislation and the safety of interstate commerce and of those who were engaged in it. That language, viewing the matter as one of degree, is especially interesting, given that the Court sometimes insisted that only direct effects would qualify. And the interest is enhanced by the facts that the decision was unanimous, and that the opinion was issued by Justice Willis.

14. Cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) (holding that a low bridge over the Ohio River at Wheeling, authorized by Virginia, was a violation of congressional policy favoring unimpeded traffic on the Ohio).
15. 222 U.S. 20 (1911).
16. Id. at 27.
17. Id. at 26.
Van Devanter, who in the 1930s was one of the four Justices most resistant to expansive uses of the commerce power. 18

Three years later, in the Shreveport Rates Cases, 19 the Court developed the doctrine in a significant way. In Shreveport, the Interstate Commerce Commission had barred carriers from charging lower rates for an intrastate route than for a competing interstate route, and in doing so relieved the carriers from a state order governing the intrastate route. The Court upheld the order, in an opinion by Justice Hughes, with Justices Lurton and Pitney dissenting silently (and probably on non-constitutional grounds). 20 Hughes wrote that congressional power,

extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. 21

The logic was that regulation of the intrastate route was necessary to achieve effective regulation of the interstate route. There are two moves here of great importance. One, the Federal Government was allowed to regulate an intrastate activity not so much because, as matters stood previously, that activity was ad-

18. Note also Mondon v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1 (1912), sometimes referred to as the Second Employers’ Liability Cases, in which Van Devanter, again for a unanimous Court, upheld imposition of liability for injury to an employee engaged in interstate commerce, even though the negligent employee was not so engaged. Echoing Southern Railway, Van Devanter wrote that Congress can protect interstate commerce “no matter what the source of the dangers which threaten it.” Id. at 51. Of particular interest, the future Justice McReynolds—the most conservative of the “Four Horsemen” of the 1930s—appeared for the United States as a Special Assistant to the Attorney General in defense of the statute. See Supplemental Brief for the United States as Amicus Curiae, Second Employers’ Liability Cases, 223 U.S. 1 (1912) (No. 11-120). 19. 234 U.S. 342 (1914).
20. This is a matter of speculation, but the most dubious, vulnerable, defensive, and arguably overreaching portion of Hughes’s opinion appears to be the one in which—after resolving the issue of constitutional power—he holds inapplicable a statutory proviso that the Commission’s authority does not extend to “the transportation of passengers or property . . . wholly within one State.” Id. at 356, 358.
21. Id. at 351 (emphasis added).
versely affecting interstate commerce itself, but because that activity would make less effective, or intolerably unfair, the federal regulation of commerce. This principle was in accordance with earlier articulations of the power, but the Shreveport case provided a striking application of it. Second, the impact that the intrastate activity would have on interstate commerce as regulated was not a physical obstruction, like a rock or low bridge, but rather a predictable and immediate economic effect.

These are developments of great significance. But notice that they are, in the terms I have used, smooth or continuous. There is nothing in them that contradicted prior law. They flow perfectly well with the conception of prior doctrine. If Congress can regulate something that is not commerce because that something adversely affects commerce, it makes perfect sense that it should be able to take into account not only how that something affects commerce as it stood, but also commerce as it would stand after the regulation, and so ensure that the regulation does not fail to achieve its purpose or yield unacceptable results. And if Congress can clear away obstructions to commerce, there is no good reason why an economic obstruction is beyond its power. Neither the language nor the logic of prior decisions suggested that economic obstructions were beyond congressional power; indeed, the language had been general and capacious. Earlier Courts may have had only physical obstructions in mind, because that is what Congress’s focus had been. But they did not limit their holdings to physical obstructions, and as

22. See id. at 351-52. Specifically, Justice Hughes wrote:
Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the Nation, would be supreme within the national field.

Id.

23. See, e.g., supra note 9.

24. This is a point that was recognized by Justice Jackson’s opinion for the Court in Wickard v. Filburn, 317 U.S. 111 (1942): “The Court’s recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified by this statement [the one quoted above from Shreveport], has made the mechanical application of legal formulas no longer feasible.” Id. at 123-24.
Congress began to widen its sights, the doctrine was ready to accommodate the new exercises of power.25

II. PRODUCTION

The Court decided the Shreveport Rate Cases26 even while adhering to a doctrine of long standing: that production was not commerce,27 and so was beyond the reach of Congress. That doctrine had been enunciated repeatedly in the nineteenth century, and as Barry Cushman has emphasized,28 its principal effect then was to ensure that the states had the ability to regulate production. Judges then tended to speak of the Commerce Clause as having created two mutually distinct spheres, so that if production was in the state sphere it could not be within Congress's power.29 (They sometimes worked their way out of this

25. Barry Cushman is correct that the immediate significance of Shreveport was confined by the fact that congressional regulations also had to satisfy the Court's due process standards. Barry Cushman, Formalism and Realism in Commerce Clause Jurisprudence, 67 U. CHI. L. REV. 1089, 1131 (2000). But Hughes did not refer to those standards, which even during the height of the Lochner period were more nebulous than is often recognized. Cushman points out that until the mid-1930s, Shreveport was only cited in cases involving an industry that was classically regarded as being "affected with a public interest," and so subject to rate regulation under then-prevailing due-process standards: railroads. Id. But the applicability of Shreveport was not limited in theory to those industries, and when it did come into force in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38 (1937), its applicability did not depend on the overthrow, in Nebbia v. New York, 291 U.S. 502 (1934), of the "affected with a public interest" doctrine; neither Nebbia nor that doctrine were cited in the majority opinion or in the dissent in Jones & Laughlin, which was not a price-regulating case.


28. See Cushman, supra note 25, at 1121.

29. For instance, in a celebrated passage in Kidd v. Pearson, 128 U.S. 1 (1888), the first Justice Lamar said:

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining—in short, every branch of human industry. For is
constraint by saying that a state regulation that in itself was not
deemed to be a regulation of commerce would not be rendered
invalid by the fact that it had some incidental effect on com-
merce.)\textsuperscript{30} It made sense that the states retained control of pro-
duction, not only because it occurred locally but also because
regulations of production, unlike regulations of sales, ordinarily
would not be protectionist; if they had any competitive impact at
all, it would ordinarily be to weaken, not strengthen, the com-
petitive position of the local producer who was subject to the
regulation.

Near the end of the nineteenth century, the Court applied
the production doctrine with a vengeance in a celebrated case
involving federal powers, \textit{United States v. E.C. Knight Co.}\textsuperscript{31}
That case involved the Federal Government’s attempt to apply
the then-new Sherman Act to the Sugar Trust. The Court pro-
nounced, in line with the prevailing doctrine, “Commerce suc-
cedes to manufacture, and is not a part of it.”\textsuperscript{32} But its applica-
tion of the principle was rather daring. It said that acts charged
“related exclusively” to the acquisition of refineries in Philadel-
phia and to “the business of sugar refining in Pennsylvania,” and
that they “bore no direct relation to commerce between the
States or with foreign nations”; the fact “that trade or commerce
might be indirectly affected” did not avail the Government.\textsuperscript{33}

\textit{Knight} had little persistent effect in hampering Government
actions under the Sherman Act against production monopolies
(that is, combinations of producers, or the resultant dominant
producer); in this context, it was soon rendered a virtual nul-

\textsuperscript{30} See Cushman, supra note 25, at 1116 n.130. Such manipulation of doctrinal cate-
gories is, of course, a common response of courts when those categories do not adequately
perform the “mapping function” of determining cases in accordance with underlying poli-
cies.

\textsuperscript{31} 156 U.S. 1 (1895).
\textsuperscript{32} \textit{Id}. at 12.
\textsuperscript{33} \textit{Id}. at 17.
Moreover, it became clear that Congress could regulate commerce in a way that would have a significant impact on production, and numerous applications of the antitrust laws did just that. And, for that matter, the Court was willing, consistent with the language of *Knight*, to apply the antitrust laws to enjoin collaborative obstructions to commerce—most notably by unions—that operated on production, so long as it was able to perceive an intent to restrain interstate commerce. The Court sometimes

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34. See N. Sec. Co. v. United States, 193 U.S. 197 (1904). Specifically, the Court noted:

In *United States v. E.C. Knight Co.*, it was held that the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination; but if it had directly embraced interstate or international commerce, it would then have been covered by the anti-trust act and would have been illegal.

*Id.* at 329 (plurality opinion). That the *Northern Securities* decision contradicted *Knight*, or very nearly did so, was a theme of Justice Holmes’s dissent. *Id.* at 410 (Holmes, J., dissenting); see also Standard Oil Co. v. United States, 221 U.S. 1, 68-69 (1911) (noting that the company’s arguments under *Knight* “have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice”); cf. Indus. Ass’n v. United States, 268 U.S. 64 (1925). In *Industrial Ass’n*, the Court held the Sherman Act inapplicable to a combination intended to enforce an agreement to require “open shop” policies among building contractors by granting only to contractors implementing such policies permits for certain materials. *Id.* at 77. According to the Court,

Interference with interstate trade was neither desired nor intended. On the contrary, the desire and intention was to avoid any such interference, and, to this end, the selection of materials subject to the permit system was substantially confined to California productions. The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. Interstate commerce, indeed, commerce of any description, was not the object of attack.

*Id.; see also infra* note 35.

35. See, e.g., Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310 (1925) [hereinafter *Coronado II*] (noting that the “mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce”; adding, however, that “when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act”); United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 409 (1922) [hereinafter *Coronado I*] (noting that if the evidence supported a finding that the national body had attempted by unlawful means “to unionize mines whose product was important, actually or potentially, in affecting prices in interstate commerce,” then there would be an actionable conspiracy under the Sherman Act, but ruling that the evidence did not support a
brought such cases within the direct-indirect framework of Knight by speaking of intent to obstruct interstate commerce as creating a direct impact on that commerce.36

But the underlying conception remained that production was not commerce, and so not subject to federal power. Indeed, though in Swift & Co. v. United States37 and subsequent cases the Court articulated the theory that activities within the “stream of commerce” fell within the commerce power, this theory was very limited, and would not overcome the doctrine that production was not commerce.38 And so strong was this conception

holding that such a motive actuated “every lawless strike of a local and sporadic character”). These and other cases are analyzed tellingly in Cushman, supra note 25, at 1094-99.

36. See, e.g., Coronado I, 259 U.S. at 408 (stating that “[a]bstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce”; holding that for a conspiracy to obstruct interstate commerce to be punishable under the commerce power, “the intent to injure, obstruct, or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstance”); United Leather Workers Int’l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924) (stating that it is “only when the intent or necessary effect upon [interstate] commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce”).

37. 196 U.S. 375 (1905).

38. See Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co., 249 U.S. 134 (1919), stating:

It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value.

Id. at 151. Cushman has pointed out that the lumber in Arkadelphia had not moved across state lines before reaching the mill, unlike many of the raw materials in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See Cushman, supra note 25, at 1119-20. The distinction does not seem to be important. The key is that, in Arkadelphia, as in Jones & Laughlin, the producer transformed the character of the materials in a significant way. In Industrial Ass’n, holding that the Sherman Act did not apply to a California-based conspiracy though the conspiracy concerned, in part, plaster that had been produced in other states and shipped into California, the Court noted that the conspiracy reached only “such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended.” 268 U.S. at 78-79. The situation was therefore “utterly unlike” that presented in Swift and the similar case of Stafford v. Wallace, 258 U.S. 495 (1922), where “the only interruption of the interstate transit of live stock being that necessary to find a purchaser at the stockyards, and this the usual and constantly recurring course.” Indus. Ass’n, 268 U.S. at 79.

Note further that in Jones & Laughlin, the company relied heavily on Arkadelphia in its brief. Brief for Jones & Laughlin Steel Corp. at 27, 66, 81, 95, NLRB v. Jones &
that, in *Hammer v. Dagenhart*,\(^{39}\) it led a majority of the Court to invalidate a federal statute prohibiting the shipment in interstate commerce of goods that had been produced in violation of child labor standards set out by the statute—notwithstanding the well-established principle, articulated by Justice Holmes for four Justices, that Congress could, in effect, stand astride state lines and decide what goods could not pass, even though doing so effectively overcame state policy.\(^{40}\) The majority was unwilling to countenance the possibility that all production of goods intended for interstate commerce could be subject to federal control.

III. CONFRONTATION

Thus, in the pre-New Deal years, there was substantial tension in the doctrine. On the one hand, Congress could regulate matters that were not interstate commerce so long as they had a sufficient impact on that commerce. On the other hand, though Congress could regulate obstructions to commerce that operated by impairing production, it could not regulate production itself. One or the other of these principles would have to give way.

*Schechter Poultry Corp. v. United States*,\(^{41}\) in which the Court invalidated the President’s code-making authority under the National Industrial Recovery Act,\(^{42}\) did not provide a good opportunity to resolve the tension. The extraordinary breadth of the authority was upsetting to all the justices, and they held

\(^{39}\) 247 U.S. 251 (1918).

\(^{40}\) *Id.* at 277-79 (Holmes, J., dissenting).

\(^{41}\) 295 U.S. 495 (1935).

unanimously against the Government on two grounds—that the authority was an improper delegation of legislative power and that it overreached the commerce power.\textsuperscript{43}

The case involved transactions in the Brooklyn chicken market. This was the polar counterpart of production, for interstate commerce was deemed to have come to an end before the defendants engaged in the slaughtering and local sales that were the subjects of the regulations at issue. That in itself did not end the matter, for there remained the question of whether the effects of the regulated activities sufficiently affected interstate commerce to justify the regulation. The entire Court, however, believed that the connection of the code to interstate commerce was too slight to warrant federal regulation.

The narrow argument made by the Board was that the wages and hours of workers in the local chicken market affected interstate commerce because an employer paying low wages or demanding long hours was able to charge low prices, and that this would lead to demand for a cheaper quality of goods.\textsuperscript{44} The argument was not persuasive—lower distribution costs would mean that there was less of a cost wedge between producer and consumer, and so could make room for better quality product—and in any event was very attenuated.

The Board also made broader-based arguments, that state legislation establishing high labor standards would be deterred by the belief that commerce would be diverted elsewhere unless such standards were established generally, and that wage maintenance was necessary to stimulate national economic recovery.\textsuperscript{45} But no member of the Court was then disposed to accept such far-reaching theories, especially in the context of a case testing the constitutionality of the National Recovery Administration, the Blue Eagle, an agency of such broad power that even liberal members of the Court found it frightening.\textsuperscript{46}

Cardozo's concurrence, joined by Stone, indicated no significant disagreement with Hughes's majority opinion, though Hughes (presumably to accommodate the Court's conservative four-

\textsuperscript{43} Schechter, 295 U.S. at 551.
\textsuperscript{44} Id. at 549-50.
\textsuperscript{45} Id.
\textsuperscript{46} See, e.g., ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 619 (1946).
some) used the old-fashioned direct-indirect language and Cardozo emphasized that the matter was one of degree.

The next year, in *Carter v. Carter Coal Co.*, the Court had a better opportunity to address the issue. The case involved a challenge to the Bituminous Coal Conservation Act of 1935. The Act imposed a heavy sales tax on bituminous coal, but rebated most of it to operators who complied with a code formulated according to statutory directives. A majority of the Court—the conservative four plus Justice Roberts—held that labor provisions of the Code were unconstitutional and that the rest of the Act was inseverable from them. The opinion, by Justice Sutherland, had a hard edge: The labor provisions regulated production, production was a local activity, it could not be considered in the stream of commerce, nor was there, as in the union cases, an intent to restrain commerce, and the effects of the regulated activities on commerce could not be deemed direct. However extensive the effects on commerce might be was immaterial, for “the matter of degree has no bearing upon the question here.” Hughes wrote a cryptic concurrence that conclusorily agreed that one of the labor provisions was unconstitutional, in part because it “goes beyond any proper measure of protection of interstate commerce and attempts a broad regulation of industry within the State.” But ultimately Hughes dissented, because he believed that marketing provisions of the Code, establishing the price at which the coal could be sold in interstate commerce, were constitutional and severable from the labor provisions and provided sufficient basis to uphold the tax. Justice Cardozo, joined by Justices Brandeis and Stone, agreed with these latter conclusions, and thus voted to uphold the tax without reaching the question of the validity of the labor provisions.

One year later, in 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, the result was dramatically different. The National La-
SOMETIMES-BUMPY STREAM

bor Relations Act, like the Coal Act, regulated labor relations in productive industries. This time, however, five members of the Court voted to uphold the statute, in an opinion by Hughes, with Cardozo and the liberals joining. I regard attempts to reconcile the decision with *Carter Coal* as quite unconvincing. Indeed, the first part of McReynolds’s dissent, joined by the other conservatives, is little more than a reproduction of the decisions of three circuit courts of appeals, in *Jones & Laughlin* and two companion cases, and each of those amounts to an extended citation of *Carter Coal*. It appears to me that for Roberts, the decision represents a sharp break in his thinking about national powers—whether because of the pendency of President Roosevelt’s Court-packing proposal is another matter. But for the liberals, the decision represented no change at all—they had not opined on the validity of the labor provisions in *Carter Coal*, and one would expect them to be receptive to the expansionary holding of *Jones & Laughlin*.

As to Hughes, I have argued elsewhere that his separate and mysterious opinion in *Carter Coal*, rather than his majestic opinion for the Court in *Jones & Laughlin*, is the aberration, one perhaps best explained by his attempt to deflect criticism from the Court. Indeed, he made no serious attempt to reconcile the two cases, and instead essentially shrugged *Carter Coal* aside.

There can be little doubt that for Hughes, the decision was in accordance with his long-held views. It was he, of course, who had established in the *Shreveport Rate Cases* nearly a quarter century before that a “close and substantial” effect of an economic nature on interstate commerce was sufficient to justify congressional power. And in 1933 he had made clear that production could have that kind of impact on commerce; in *Appalachian Coals, Inc. v. United States*, he had written: “When industry is grievously hurt, when producing concerns fail, when

55. *See id.* at 1967-74 (concluding that Roberts’s votes were probably not substantially affected either by the Court-packing battle or by the election of 1936).
56. *See id.* at 1962-63.
57. *See id.* at 1965-66.
58. 234 U.S. 342 (1914).
59. 288 U.S. 344 (1933).
unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."\textsuperscript{60} Putting those two propositions together, the result appears clear: Even though production is not deemed to be part of commerce, Congress can regulate production when, as will often be true, the effect of production on commerce is a substantial one. Though in \textit{Schechter}, Hughes had used categorical language, probably to keep the conservatives in line, now he said—contrary to Sutherland's opinion in \textit{Carter Coal}—that the matter is "necessarily one of degree," and instead of speaking in direct-indirect terms he said that Congress may regulate matters intrastate in character "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."\textsuperscript{61}

Thus, Hughes wrote, "the fact that the employees here concerned were engaged in production is not determinative."\textsuperscript{62} The question was as to effects, and the answer seemed clear:

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?\textsuperscript{63}

\textit{Jones & Laughlin} thus was a major development, one with enormous consequences for the effective scope of federal power. But it was what one would have expected had \textit{Carter Coal} not been decided the year before, or at least if \textit{Schechter} and \textit{Carter Coal} had not been decided in the two preceding years. Its theoretical contribution lay in excising a categorical rule—that production lies beyond federal power—that no longer fit well with the general principles governing congressional power over interstate commerce. \textit{Jones & Laughlin} was thus comparable to the Court's decision three years before in \textit{Nebbia v. New York}.\textsuperscript{64} \textit{Nebbia} had also excised a categorical rule that no longer fit with

\begin{itemize}
  \item \textsuperscript{60} \textit{Id.} at 372.
  \item \textsuperscript{61} \textit{Jones & Laughlin}, 301 U.S. at 37.
  \item \textsuperscript{62} \textit{Id.} at 40.
  \item \textsuperscript{63} \textit{Id.} at 41.
  \item \textsuperscript{64} 291 U.S. 502 (1934).
\end{itemize}
the general theory: It showed that there was a general principle presumptively favoring the validity of state regulations of economic matters, that there was nothing "sacrosanct" about prices, and therefore no reason to attempt to preserve a rule barring price regulation except for a limited list of industries "affected with a public interest." Jones & Laughlin, like Nebbia, was a crucial decision, but in both cases the achievement was not in adopting a new broad theory, but in discarding a narrow and restrictive rule of great practical importance that fit poorly with broad and more receptive principles.

In the few years after Jones & Laughlin, the Court decided several cases that built on it. None created much difficulty until United States v. Darby. There, the Court, in an opinion by Justice Stone, rejected a challenge to the Fair Labor Standards Act of 1938. The Court was unanimous, Justice McReynolds, the last of the four conservatives, having retired just two days before. The first part of the opinion consisted largely of an adoption of the position that four justices had taken nearly a quarter century before in Hammer v. Dagenhart, that Congress could bar the shipment across state lines of goods made under labor conditions it deemed substandard. Certainly there was

65. Id. at 523-28.
66. Id. at 529.
67. Id. at 532-37. I am using Nebbia only by way of analogy here; I do not believe there is any causal connection between the two cases, at least not a strong one. There was a due process issue in Jones & Laughlin, but the case did not involve price regulation and the decision did not depend on Nebbia. Jones & Laughlin did not cite either Nebbia or any other case decided after it. See also supra note 25.
68. The Jones & Laughlin opinion explicitly disclaimed reliance on the "stream of commerce" theory. 301 U.S. at 36. This was a point emphasized by Hughes the next year. Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 464 (1938) ("[A]s we said in the Jones & Laughlin Case, the instances in which the metaphor of a 'stream of commerce' has been used are but particular, and not exclusive, illustrations of the protective power which Congress may exercise.").
70. 312 U.S. 100 (1941).
71. 247 U.S. 251 (1918).
nothing revolutionary here, even though the result was to over-rule *Dagenhart*.

The opinion went beyond, however, for the statute not only prohibited the shipment in interstate commerce of goods made under substandard conditions, but imposed wage and hour requirements with respect to all employees engaged in production of goods for interstate commerce. Justice Stone first upheld these requirements by enunciating a remarkable two-step: Congress, having prohibited the interstate transportation of goods produced under substandard conditions, could choose "means reasonably adapted to the attainment of the permitted end," in this case by "stop[ping] the initial step toward transportation, production with the purpose of so transporting it." The logic has some force, and yet it has an inverted quality; clearly, Congress's primary goal was to prescribe labor conditions, and the shipment ban was a means that took advantage of constitutional doctrine to achieve that end, but Stone's opinion treats the production ban as if it were a means of effectuating the shipment ban. In any event, Stone declared that the production ban could also be upheld independently of the shipment ban, and here the argument was more straightforward. Congress aimed at preventing

the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions[,] and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce.

Given recognition of an aggregation effect—that "competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great," a prohibition on the production of goods made under substandard conditions was "so related to the commerce and so affects it as to be within the reach of the commerce power."
This holding culminated in a declaration that *Carter Coal* had been limited in principle by subsequent cases. But it was *Schechter* that this portion of the opinion seemed most directly to contradict. In *Schechter*, none of the justices had been willing to accept an argument of this sort; in *Darby* all nine of them, including the three holdovers, Hughes, Stone, and Roberts, did. What accounts for the difference? *Darby* was presented in a far less threatening context than *Schechter* had been, because it involved a much narrower statute and one that did not create a wholesale assumption or delegation of power. Moreover, the doctrinal landscape had shifted dramatically. Once *Jones & Laughlin* established that Congress could regulate labor relations in production if they had a sufficient impact on interstate commerce, and subsequent cases had consolidated this development, a broad-based argument of the type adopted by Stone in *Darby* seemed to follow much more naturally than it had before.

*Darby*, then, was an advancement, but it was hardly revolutionary. It did not suggest—and no subsequent case has suggested—that production is commerce, or that a substantial relationship to commerce is not essential to justify congressional regulation under the Commerce Clause. The lower court that decided a companion case to *Darby* had upheld the statute, and Justice Douglas's clerk noted briefly before the Court took the case that the statute was probably constitutional. Roberts, the most conservative member of the Court after the departure of McReynolds, seemed to have no difficulty with the case. Hughes did. At argument, he discussed the case at length, calling it "the most important case we have had by far in connection with the commerce power," but when it came time to vote he passed. Hughes’s hesitance was motivated in large part by the

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76. Opp Cotton Mills, Inc. v. Adm'r, 111 F.2d 23 (5th Cir. 1940), aff'd, 312 U.S. 126 (1941).
78. See Conference Notes, No. 82, United States v. F. W. Darby Lumber Co. (Dec. 21, 1940) (William O. Douglas MSS, Box 52, on file with Manuscript Division, Library of Congress); Conference Notes, No. 82, United States v. F. W. Darby Lumber Co. (Dec. 21, 1940) (Frank Murphy Papers, Red 123, on file with Bentley Historical Library, Ann Arbor, Michigan) [hereinafter Murphy conference notes].
79. Murphy conference notes, supra note 78.
fact that the scope of the statute seemed too vague, especially for application in a criminal case. After Stone circulated his draft opinion, Hughes wrote to him expressing his misgivings. But as to fundamental theory he seemed to have no doubt; he began his letter saying, "You have written a strong opinion, again setting forth with suitable elaboration the general principles which we have held should govern the exercise of the commerce power."\textsuperscript{80}

And on the proofs of Stone's opinion in the companion case, a civil one, Hughes wrote, "Very careful and satisfactory."\textsuperscript{81}

There was no revolution here, either.

Finally, we come to the celebrated case of \textit{Wickard v. Filburn},\textsuperscript{82} in which a farmer challenged the Government's attempt to count wheat consumed on the farm in his marketing allotment under the second Agricultural Adjustment Act. \textit{Wickard} presented a significant problem of proof—that is, to justify the restraint, the Government had to show that wheat consumed on the farm genuinely, or at least plausibly, had a significant impact on market prices. But the Government was able to make a more than credible case on this point.

The amount of farm-consumed wheat was substantial, and so it was reasonable to conclude that farmers growing wheat on the farm and consuming it, rather than their presumed next-best alternative of buying wheat on the market, had a non-trivial impact on wheat prices. Indeed, it is almost certain that the regulators believed that the impact of farm-consumed wheat was substantial, because they had no other plausible reason to regulate the activity. In this sense, the case stood on a stronger footing than either \textit{Darby} or the later civil rights cases. In those cases, it is reasonable to infer that Congress's principal interest was in the local impact of the activities being regulated and not their effect on commerce, and so a plausible argument could be made that Congress was invoking the commerce power as a pretext; not so in \textit{Wickard}.

\textsuperscript{80} Letter from Charles Evans Hughes to Harkan Fiske Stone (Jan. 27, 1941) (Harlan Fiske Stone MSS, Box 66, on file with Manuscript Division, Library of Congress).

\textsuperscript{81} Id.

\textsuperscript{82} 317 U.S. 111 (1942).
Given the apparent effect of farm-consumed wheat, the case was actually a rather easy one conceptually. Regulation of consumption on the farm was not beyond federal power because the production and consumption were themselves local activities, or because their impact on interstate commerce was economic and could be characterized as indirect. To a large extent, the result in Wickard had already been foreshadowed by the Court’s decision in Mulford v. Smith, a case, like Wickard, that concerned the constitutionality of an application of the quota system under the second Agricultural Adjustment Act. In Mulford, the Court held that tobacco allotments could validly count all sales, whether destined for interstate or intrastate commerce. It is noteworthy also that the two lower court judges in the Wickard case who held against the statute did not opine on the Commerce Clause ground—they held that a statutory change that increased the penalties on farmers who produced in excess of their allotments operated retroactively and in doing so violated due process—and the one dissenter thought the allotment posed no problem under the Commerce Clause. Cushman shows that the Supreme Court contemplated remanding the case for further findings, but in the end, after holding reargument, the Court decided it unanimously in favor of the Government, without need for remand. Justice Roberts again raised no objection.

Cushman also shows that Justice Jackson contemplated writing a blunt opinion in which the Court would essentially an-

83. United States v. Morrison, 529 U.S. 598, 617 (2000) (holding that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce") puts a bound on application of the style of reasoning applied in Wickard. But it did not purport to affect Wickard itself, because, following United States v. Lopez, 514 U.S. 549 (1995), it characterized the activity involved in Wickard as economic. Id. at 610 (quoting Lopez, 514 U.S. at 560).
84. 307 U.S. 38.
85. Id. at 47-48.
87. Id. at 1021-23 (Allen, J., dissenting). Note particularly this statement: Since regulation of the supply of wheat available for sale in interstate commerce but actually used within the state of its origin is drawn into a general plan for the protection of interstate commerce in the commodity from the interferences, burdens and obstructions arising from excessive surplus and the social evils of low values, the power of Congress extends to it as well. Id. at 1023 (Allen, J., dissenting).
88. Cushman, supra note 25, at 1138.
nounce complete deference to Congress. But Jackson was an
inveterate second-guesser, who seemed to revel in changing his
mind. It would be a mistake to assume that his musings repre-

sented his settled views, much less the settled views of the
Court. The opinion he actually wrote for the Court essentially
follows the framework laid out by the cases decided in the pre-
ceeding few years, and explicitly requires a “substantial” impact
on commerce. Thus, Wickard did not detach the jurisprudence
of the Commerce Clause from its language in the way that the
Court had done with the Eleventh Amendment, with the Con-
tracts Clause, and even with respect to the Commerce Clause it-
self, in establishing that Congress can regulate a matter that is
not commerce so long as it has a sufficient effect on commerce.
Consider, for example, the following passage that is reminiscent
of Hughes’s majority opinion in Home Building & Loan Ass’n v.
Blaisdell, Cardozo’s unpublished concurrence in the same
case, and Roberts’s majority opinion in Nebbia:

In earlier times, it was thought that the Commerce Clause
could not support an exercise of Congressional power
unless the Court was satisfied that the particular activity
regulated bore a “direct” or “close and substantial” relation
to commerce among the states. Moreover, the conception
of commerce was a narrow one, excluding productive indus-
tries. But time and experience have taught that such a

89. Id.
90. In a 1999 book review of JEFFREY D. HOCKETT, NEW DEAL JUSTICE: THE
CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND
ROBERT H. JACKSON (1996), I wrote about Jackson that he
seems to have had a strong sense of whimsy that affected his jurisprudence. “If
there are other ways of gracefully and good-naturedly surrendering former views
to a better considered position,” he wrote in one case, after listing several such
ways from old cases, “I invoke them all.” McGrath v. Kristensen, 340 US 162,
177-78 (1950) (concurring). And in a memorandum quoted by Hockett (p. 287),
he wrote, “If it should become necessary to revise my views I shall prove that I
am then right by declaring that I have theretofore been wrong. I would not be
without precedent.”

Richard D. Friedman, Three New Deal Justices, at
91. 290 U.S. 398, 442-44 (1934).
92. Excerpts from this draft are reproduced in PAUL BRESTER, ET AL., PROCESSES OF
93. 291 U.S. at 536 (“The phrase ‘affected with a public interest’ can, in the nature of
things, mean no more than that an industry, for adequate reason, is subject to control for the
public good.”).
cramped view of commerce, and of Congress’s power under the Commerce Clause, however well they fit the world of the Framers, do not satisfy the needs of the modern day. To say that a matter is within Congress’s power to regulate “commerce among the states” means nothing more than that the matter is one that Congress reasonably believed was a matter of national concern calling for exercise of the national legislative power.

The *Wickard* opinion actually included nothing of the sort, of course; this language is my own draft, suggesting how a more aggressive opinion might have obviated the need for inquiry into effects on commerce. But *Wickard* did not do this. By continuing to operate within the rubric of the effects doctrine, it assured that, though the outcome would usually be a foregone conclusion, subsequent cases would continue to look for the connection between the matter regulated and commerce.

*Wickard* did express the position that it is enough if there is sufficient support for Congress to regard the impact on commerce as substantial; it is not necessary that the Court reach that conclusion independently. But this position was hardly revolutionary. Note the following language from *United Mine Workers v. Coronado Coal Co.*, articulating a principle deemed to be clear from earlier cases and quoted by Hughes in *Jones & Laughlin*:

> "If Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint."  

And, for that matter, *Wickard* did not establish this position with complete clarity; more than two decades later, in *Heart of Atlanta Motel, Inc. v. United States*, Justice Black referred to the question of substantial effects as "ultimately a judicial decision."

One further point suggests the lack of revolutionary quality of *Wickard*: The case is a high-water mark of sorts. It remains the paradigm of an aggressive use of federal power controlling...
local activity. The law did not move beyond Wickard, or at least not very far beyond, because Wickard took it nearly as far as it could go. The decision was a culmination, not a progenitor. Had it never arisen, neither the outcome nor the rhetoric of later decisions would likely have been substantially different.

IV. THE LATEST TURN

The New Deal cases, we have seen, continued to articulate a demand that there be a real nexus between the matter regulated and interstate commerce. Later actors took seriously the need to show this nexus. Congress assiduously built legislative histories showing the relationship of the regulated matters to commerce, and set the bounds of statutes to require or indicate the connection. Litigators defending statutes did not treat the matter perfunctorily; they poured considerable energy into demonstrating the nexus. And Supreme Court justices also treated the matter seriously. Decisions upholding statutes as regulations of commerce carefully worked through their justifications.

98. See Lopez, 514 U.S. at 560 (calling Wickard "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").


100. For example, 18 U.S.C. § 922(g)(9) (2000), codifying a portion of P.L. 99-308, 100 Stat 449 (1986), provides that it is unlawful for certain persons, including convicted felons, "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000), prohibiting discrimination in places of public accommodation, is limited to those operations that "affect commerce" or in which discrimination is supported by state action. Subsection (c) contains a detailed definition of the circumstances in which the operations of an establishment are deemed to affect commerce. Thus, with respect to a restaurant or gasoline station, the operations of the facility are deemed to affect commerce if "it serves or offers to serve interstate travelers of a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce." 42 U.S.C. § 2000a(c).


sionally a justice dissented from a decision in favor of the Gov-
ernment.103

Thus, there was always a possibility that, sooner or later, a
majority of the Court would rule that Congress had transcended
the broad limits on its power. When that happened, in United
States v. Lopez104 and United States v. Morrison,105 the majority
was able to achieve the result without overruling any prece-
dents—because, however much the Court had deferred to Con-
gress in the six decades following NLRB v. Jones & Laughlin
Steel Corp.,106 it had continued to articulate limits on congres-
sional power, limits to which the four dissenting justices in
Lop-
pez and Morrison, as well as the majority, continued to sub-
scribe.107

Just as the great developments of the New Deal era oc-
curred without any major discontinuities, then, it appears to me
that the retrenchment begun by Lopez is largely continuous with
prior law. That is not to deny that Lopez and Morrison mark a
significant turning and shift of mood; clearly they do. I only
mean that the New Deal cases left enough substance in the ar-
ticulated limits on congressional power that later justices in-
clined to cut back on that power could do so while still purpor-
ting to subscribe to the framework provided by those cases.108

105. 529 U.S. 598.
106. 301 U.S. 1 (1937).
107. See Lopez, 514 U.S. at 616-18 (Breyer, J., dissenting) (indicating that the Com-
merce Clause should not permit Congress to regulate something merely by finding it to be
related to commerce); Ronald D. Rotunda, The Implications of the New Commerce Clause
Jurisprudence: An Evolutionary or Revolutionary Court?, 55 ARK. L. REv. 795, 836
(2003) (noting that Justice Breyer, in his dissent in Lopez, rejected a broader argument that
everything is commerce).
108. See Jesse H. Choper & John C. Yoo, the Scope of the Commerce Clause after
Morrison, 25 OKLA. CITY U.L. REv. 843, 854 (2000) (“Despite... ringing rhetoric, Mor-
rison, like Lopez before it, represents an evolution rather than a revolution.”) By character-
izing Congress’s power under the Commerce Clause as reaching three broad categories of
activity, Lopez, 514 U.S. at 558-59, the Court elaborated on the pre-existing framework
and may have made it significantly less supple and capacious. Interestingly, this categori-
zation was drawn closely from Perez, a notably expansionist opinion, though Lopez sug-
gests that it is exclusive, see 514 U.S. at 558 (“we have identified three broad categories of
activity that Congress may regulate under its commerce power”), and Perez clearly leaves
open the possibility that it is not. Id. at 150 (“The Commerce Clause reaches, in the main,
three categories of problems.”) (emphasis added).
What will the long-term significance of *United States v. Lopez*\(^{109}\) and *United States v. Morrison*\(^{110}\) be? Speculation on that question may be aided by considering the durability of the doctrine of Congress’s power under the Commerce Clause that was reached by the decisions of the late 1930s. I contend that this doctrine constituted, and perhaps still constitutes, an equilibrium. By this, I mean not only that the doctrine was stable, but that it resulted from various forces that tended—and still tend—to push the doctrine towards this result. Principal among those forces are the following:

First is a growing sense over many years of how substantial the need for national power is, and diminishing suspicion of the dangers of such power. Of course, the question of the ideal scope of the Federal Government continues to be a significant matter of debate, and probably will continue to be so for the foreseeable future, and beyond. But there has been an enormous change over the last century and a half. Before the Civil War many Americans had greater allegiance to their state than to the nation, but that is true no longer. Now the lines have expanded; most Americans are still unwilling to cede substantial authority to international authorities. At the same time, most Americans expect their national government to be a muscular one, capable of addressing problems of broad impact. The history of railroad regulation explored in this conference by Professor James Ely illustrates the change.\(^{111}\) There has never been a strong constitutional restraint against the Federal Government regulating the railroads, which are the classic instrument of interstate commerce. And yet, as Professor Ely shows, in the early years political restraints made railroad regulation mainly a matter of state law; over time, however, the benefits of national regulation became more apparent and the dangers appeared less salient, so by the early twentieth century the national government was the dominant regulator of the railroads.

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111. James W. Ely, Jr., "the railroad system has burst through State limits": Railroads and Interstate Commerce, 1830-1920, 55 ARK. L. REV. 933 (2003).
Second is hesitancy on the part of the judiciary to exercise power against the political branches. Of course, the judiciary sometimes does exercise such power, but aggressive exercises entail significant potential costs in political friction and in the courts’ claim to legitimacy. Those costs will often appear more worthwhile if the case involves what may be called a “rights constituency” that can make a strong claim that failure to exercise the power will deprive it of a significant right. Even absent such a constituency, the courts will sometimes exercise their power against the political branches—the current Supreme Court certainly has done so repeatedly—but over the long term, deference offers the path of least resistance.

Third is what might be called doctrinal entropy. The attempt to erect doctrinal structures with sharp dividing lines—like the ones that purported to bar federal regulation of production or, more generally, activities with only an indirect effect on commerce—is unlikely to succeed under the pressure of cases that reveal such distinctions to have little bearing on whether the Federal Government should be permitted to regulate a given area. The breakdown of those doctrinal walls means that the law inevitably becomes a matter of degree.

Fourth is the demand of intellectual consistency. Once the doctrine is defined in terms of effects on commerce, rather than being limited to regulation of commerce itself, it is difficult to find any stopping point that is defensible, articulable, and enforceable, short of extremely broad deference to Congress.

Lopez and Morrison may reflect a shift towards another equilibrium that will also prove durable, but I am dubious. Prediction over the long run can only be speculative, especially given how much it depends on the question of who the Supreme Court justices will be. It seems very probable, however, that the forces that I have just described will still persist. If they do, they will tend to counteract any departures from the equilibrium reached, after a century and a half of uneven but ultimately irre-

112. I mean here to be echoing Jesse Choper. See generally JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (arguing that the Supreme Court must exercise judicial review to protect individual rights, which are not adequately represented in the political process, but that the Court should decline to do so when it is unnecessary for the effective preservation of our constitutional scheme).
sustainable development, by the Supreme Court of the New Deal era. 113

The contention by Professors Denning and Reynolds that *Lopez* and *Morrison* have had less impact in the lower courts than might be expected may support this view. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003). In commenting on the draft of this paper presented by Professor Denning at the conference, Adrian Vermeule cautioned against drawing conclusions of hostility to *Lopez* and *Morrison* from the simple fact that the subsequent ratio of decisions rejecting Commerce Clause challenges to decisions sustaining them is small.