New Deal Constitutionalism and the Unshackling of the States

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I. INTRODUCTION

Conventional wisdom has it that during the presidency of Franklin Roosevelt, the Supreme Court brought about a nationalist revolution in constitutional terms. Indeed, this familiar account provides a rare piece of common ground occupied both by those who come to praise what the Supreme Court did during this period and those who come to bury it.¹ What this shared un-

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¹ Among supporters of the Court, the nationalist characterization is prominently expressed in the work of Bruce Ackerman. See Bruce Ackerman, *We the People: Foundations* 105-30 (Belknap 1991) (arguing that the New Deal Court legitimized activist national government); Bruce Ackerman and Neal Katyal, *Our Unconventional Founding*, 62 U Chi L Rev 475, 572 (1995) (“[The New Deal was] the only moment in our history when a nationalist and inclusionary movement gained the overwhelming support of every region, race, and class in America for its revolutionary reforms.”). See also Morton J. Horwitz, *The Transformation of American Law, 1870-1960* 3 (Oxford 1992) (“The New Deal constitutional revolution of 1937 represented a fundamental shift in the constitutional relationship of the states to the federal government.”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv L Rev 421, 425 (1987) (The New Deal “produced a massive shift in the relationship between the federal government and the states” and “rejected traditional notions of federalism.”).

Among opponents of the constitutional revolution, the nationalist characterization is prominent in the work of Robert Bork. See Robert Bork, *The Tempting of America: The Political Seduction of the Law* 57 (Free Press 1989) (arguing that the New Deal Court illegitimately centralized power in Washington). See also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va L Rev 1387, 1443, 1451 (1987) (stating that the New Deal Court worked “a revolution in constitutional theory” by replacing the system of enumerated federal powers with “the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state,” and that the “Justices . . . rejected the idea of limited federal government and decentralized power”); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 Mich L Rev 752, 790-99 (1995) (referring to the “nationalism of the New Deal” and arguing that the Court’s enlargement of the scope of the Commerce Clause effectively—though illegitimately—abolished judicial enforcement of federalism at the expense of the reserved powers of the states). Bork states that in refusing to protect federalism, the Court “worked a revolution in the relationship of the federal government to the state governments and to the people” and that the “New Court decisions made con-

derstanding implies is that the constitutional transformation of the New Deal era should be conceived of as a revolution from the perspective of federalism. In granting extensive new powers to Congress, the New Deal Court engineered a massive project of constitutional centralization involving a fundamental shift in the relationship between the states and the federal government. Specifically, the expanded powers of Congress under the Commerce Clause, which enabled it to reach "local" activities for the first time, were transferred from the states, thereby ending (in effect if not in name) their previously exclusive power over intrastate matters.² The consequence was that the states became constitutionally dependent on the will of Congress through the latter's power of preemption and the operation of the Supremacy Clause.³ Arguably, this not only radically changed the nature and balance of the federal system, but abolished federalism as a matter of constitutional law.⁴ What divides supporters and opponents of the New Deal Court is not the belief that it brought about this nationalist revolution, but their respective evaluations of its constitutional legitimacy, wisdom, or both.⁵

gressional power over commerce virtually limitless as the Court simply stopped protecting federalism." Bork, *The Tempting of America* at 56-57.

² As Ackerman argues:

Although the enumerated [federal] power strategy was finally repudiated by the American people, this happened in the twentieth century, not in the eighteenth or nineteenth, and we are wrong to condemn the Republican Justices for failing to use the right crystal ball. Though we may properly quibble with the precise way the Justices drew their lines around interstate commerce, they were not wrong on the main point; *before the New Deal, the People had never self-consciously reallocated plenary power over the economy from the states to the national government.*

Ackerman, *We the People* at 103 (cited in note 1).

³ On the difference between the power of preemption and the principle of the supremacy of federal law, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767, 770-77 (1994).

⁴ Among those who believe the abolition of judicial enforcement of federalism is basically a good thing, see, for example, Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485 (1994). Among those who believe it is not, see, for example, Calabresi, 94 Mich L Rev at 800-06 (cited in note 1).

For an argument challenging the standard assumption that the existence of areas of exclusive state power is a necessary condition of constitutional federalism, and a proposal for an alternative model of constitutional federalism based on this argument, see Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex L Rev 795 (1996).

⁵ See notes 1 and 2. A second, and extremely current, disagreement among scholars of the Roosevelt era Court—which cuts across the first one discussed in the text—concerns the *timing* of the constitutional revolution. The traditional account dates the revolution to 1937 and focuses on the "switch in time" of that year when the Court overturned its own Commerce Clause and substantive due process decisions of a year earlier. See, for example, Ackerman, *We the People* at 49 (cited in note 1); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 216-36 (Oxford 1995). This received wisdom has recently been challenged by accounts of

This standard view of the impact of the New Deal period on the states, however, is a myopic one that seriously distorts our understanding of the constitutional revolution that the Roosevelt era Court implemented.⁶ This is so for two reasons. First, it mistakenly attributes the character of a zero-sum game to the issue of the powers of the federal and state governments over the economy: what the federal government gains in power the states lose. Although it is most certainly the case that the Court granted the federal government extensive new constitutional powers during the New Deal era, it is very far from clear that these powers were simply transferred from the states as the nationalist account assumes. In many of the most important cases, what the federal

the constitutional revolution that see it as more drawn out and less sudden and discontinuous than the "switch in time" account suggests. See Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine From Swift to Jones & Laughlin*, 61 Fordham L Rev 105, 127-31 (1992) (Commerce Clause revolution did not occur until 1941 and 1942); Barry Cushman, *Rethinking the New Deal Court*, 80 Va L Rev 201, 206 (1994) (challenging the "switch in time" account as a "bedtime story with a happy ending for New Deal liberals"); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U Pa L Rev 1891, 1895 (1994) (transformation starts in 1930 with the appointments of Hughes and Roberts to the Court).

In addition, both Professors Cushman and Friedman challenge the received *explanation* for the Court's transformative shifts in constitutional doctrine, viewing them as internally or legally driven rather than as a response to external political pressures, such as the 1936 election and the Court-packing plan. See Cushman, 80 Va L Rev at 226 ("Because the Court-packing plan lacked sufficient public and congressional support to pose a genuine threat to the Court as an institution, it is unlikely to have been the proximate cause of the Constitutional Revolution of 1937."); Friedman, 142 U Pa L Rev at 1897 (constitutional revolution "less affected by immediate political factors" than commonly thought). On both these issues of timing and explanation, this Article is largely agnostic. More importantly for my purposes, Professors Cushman and Friedman do not deny that there *was* a constitutional revolution (although Professor Friedman prefers to call it a "transformation"), nor do they obviously question the generally nationalist characterization of it. For a recent account, however, that does appear to deny there was a constitutional revolution at all, see Larry Kramer, *What's a Constitution For Anyway? Of History and Theory, Bruce Ackerman, and the New Deal*, 46 Case Western Res L Rev 885 (1996) (arguing that "[t]he New Deal called for a significant expansion of federal authority . . . but from a constitutional perspective, the increase was quantitative rather than qualitative. . . . [The standard account] overlook[s] the significant strides toward activist government that were taken in the late nineteenth and early twentieth centuries."). Id at 921, 929.

⁶ The hegemony of the nationalist characterization is directly reflected in the standard terminology for the period. Thus, the terms "New Deal constitutional revolution" and "New Deal Court" incorporate and express the view that the constitutional revolution was most essentially about the "New Deal": that is, the constitutionality of the federal government's legislative program. In challenging this characterization, I generally avoid these loaded terms and refer to the "constitutional revolution of the New Deal era" and the "Court during the New Deal era" (or even the "Roosevelt era Court"). For stylistic reasons, however, I sometimes use the term "New Deal Court" and when this occurs I am using shorthand for the Court during the entire Roosevelt era (1933-1945) and not only to that period after the so-called "switch in time" of 1937.

government was able to do under the Commerce Clause for the first time as a result of the constitutional revolution, the states had been unable to do under other pre-revolutionary constitutional doctrines, most notably substantive due process. Accordingly, what occurred in many areas was not a shift from exclusive state authority to concurrent federal and state authority, but a shift from a regulatory vacuum to concurrent powers: *both* federal and state governments were constitutionally enabled to regulate a large number of areas of social and economic life that previously they had both been prohibited from regulating. This is a quite different and more complex transformation, and suggests that what occurred was much less a nationalist revolution—with the connotations this label has for its attitude towards state authority—than it was a revolution in the power and permissible ends of government at all levels, *state as well as national*.⁷ In thus concerning the dynamic issue of enlarging the *scope* of governmental power rather than the more traditional and static one of its proper *distribution* among levels of government, the revolution was unique in constitutional history.⁸

Second, by focusing almost exclusively on congressional powers under the Commerce Clause, the nationalist account overlooks the radical changes made by the Court to a whole host of other constitutional doctrines and, as a result, fails to appreciate that *the states were the direct and sole beneficiaries of much else that the Court did in this period*. While it certainly bestowed extensive new powers on the federal government under the Commerce Clause, the Court also granted many new powers to the states under various other clauses of the Constitution, especially as compared with the previous era of constitutional interpretation.⁹ Moreover, the net effect of these enhanced state powers

⁷ As I point out in the conclusion, the understanding of what occurred as an “economic revolution” often exists alongside the nationalist one, although the tension between the two is generally overlooked due to the common focus on national regulation. See text accompanying notes 303-04.

⁸ This is not to suggest that the zero-sum perspective is not a useful heuristic tool for the historical interpretation of previous periods during which national power was enhanced, such as the Federalist and Reconstruction eras, see Ackerman, *We the People* at 58-80 (cited in note 1), but only that it is neither the most useful nor the most accurate perspective from which to analyze or interpret the constitutional revolution of the New Deal era.

⁹ One account of the constitutional revolution that does identify some of the areas of enhanced state power is provided by William E. Leuchtenburg. See *The Supreme Court Reborn* at 225-27 (cited in note 5). Even Leuchtenburg, however, does not deal systematically with state power. His treatment of this side of the story is brief, and is largely incidental (or supplemental) to his account of the increase in national powers. Moreover, he does not question the standard account of the impact of the constitutional revolution as a whole on the states and the balance of federalism. For an interesting, critical review of

was to increase substantially the amount of constitutionally permissible regulatory diversity throughout the country at the expense of the uniformity that, as we shall see, was a central goal of the *Lochner* era Court and its philosophy of economic nationalism.¹⁰ In this additional, and more subtle way, then, recognition of these changes undermines the nationalist account.

If one isolates and analyzes the history of state power alone under the Constitution, the net effect of the New Deal era on the states was to reassert the traditional position that their powers are presumed to be significantly unconstrained by the Constitution absent express limitations, a position from which the federal courts in the previous, *Lochner* era had radically departed. In concrete terms, the Roosevelt era Court abolished or significantly limited a number of specific constitutional constraints on the power of the states that had either been imposed for the first time or substantially enhanced during the *Lochner* era. The imposition of these constraints had been, in part, a reflection of the general suspicion of legislative power that characterized much of the judicial response to Populism and Progressivism, and since that power was most often and successfully exercised at the state level, this is where judicial activism was disproportionately felt.¹¹ But this is only part of the story, for the *Lochner* era constraints on the states also reflected a strong judicial commitment to the vision of the United States as a truly national economy, presumptively requiring uniform national, rather than diverse state, regulation. To promote this vision, the *Lochner* era Court had restructured constitutional federalism in a manner that generally supported and encouraged the first sustained exercise of congressional power over interstate commerce.¹² As will be noted throughout this Article, however, the enhancement of state power that the New Deal Court ushered in as the result of rejecting *both* of these foundations of the *Lochner* worldview was itself partially reversed in subsequent years. During the Warren

Leuchtenburg, see G. Edward White, *Courts and Constitution: Cabining the Constitutional History of the New Deal in Time*, 94 Mich L Rev 1392 (1996).

¹⁰ Unless otherwise specified, by the "*Lochner* era," I mean to use a familiar shorthand to refer to the period from roughly the mid-1880s to 1933. This era, of course, takes its name from the case of *Lochner v New York*, 198 US 45 (1905).

¹¹ For an excellent and sophisticated version of this by-now relatively familiar view of the *Lochner* Court, see Cass R. Sunstein, *Lochner's Legacy*, 87 Colum L Rev 873, 874 (1987) (arguing that for the *Lochner* Court, the Constitution required governmental non-intervention with the baseline of economic entitlements provided by common law and market outcomes).

¹² A masterful and detailed account of this somewhat less familiar story is provided in Owen Fiss, *Troubled Beginnings of the Modern State, 1888-1910* 257-92 (Macmillan 1993).

Court period in particular, many of the *Lochner* era constitutional constraints on the states were reimposed, albeit for different purposes¹³ and in most cases with different wine in the old bottles, and others—most notably those held to derive from the Equal Protection Clause—were applied systematically for the first time.¹⁴

The specific preexisting constitutional constraints on state power that the Roosevelt era Court lifted or limited are five in number, and they are discussed at length in the next five sections of this Article. First, and best-known, the Court abolished the doctrine of substantive due process that the *Lochner* era courts read into the Due Process Clauses of both the Fifth and Fourteenth Amendments, but the burden of which in concrete terms overwhelmingly fell on the states rather than Congress (Part II). Substantive due process was the doctrine that the *Lochner* era courts had employed more than any other to disem-

¹³ Rather than seeking to counter Progressive legislation and to promote economic nationalism, the purposes of the Warren Court in reimposing many of the constitutional constraints on the states were (a) to protect privacy, and (b) to combat the “states’ rights” opposition to the Court’s equal protection jurisprudence.

¹⁴ Prior to the Warren Court, the Equal Protection Clause of the Fourteenth Amendment was still largely, as Justice Holmes had stated in 1932, “the usual last resort of constitutional arguments.” *Buck v Bell*, 274 US 200, 208 (1932). Like its predecessors, the Roosevelt era Court employed the clause infrequently and somewhat inconsistently. Thus, on the issue of racial discrimination, it gave the NAACP its first victory in a school desegregation case, *Missouri ex rel Gaines v Canada*, 305 US 337 (1938), but it also decided *Korematsu v United States*, the last occasion on which the Court upheld a race-specific statute disadvantaging a racial minority, 323 US 214 (1944). On equal protection issues more generally, compare *Skinner v Oklahoma*, 316 US 535 (1942) (invalidating state statute authorizing sterilization of “habitual” criminals on equal protection grounds), with *Breedlove v Suttles*, 302 US 277 (1937) (rejecting equal protection challenge to state statute requiring payment of poll tax by males between ages of 21 and 60). For the view that the Hughes Court had a mixed, but overall favorable, record on civil rights generally, see A. Leon Higginbotham, Jr. and William C. Smith, *The Hughes Court and the Beginning of the End of the “Separate But Equal” Doctrine*, 76 Minn L Rev 1099 (1992).

It was of course the Warren Court that breathed life into the clause as a major source of constitutional rights against the states for the first time. It wielded the clause as its leading weapon in struggles against racial discrimination and voting/procedural access rights in particular. See, for example, *Brown v Board of Education*, 347 US 483, 495 (1954) (“separate but equal” doctrine is inapplicable to field of public education because separate educational facilities are “inherently unequal”); *Loving v Virginia*, 388 US 1, 12 (1967) (Virginia statute prohibiting interracial marriages violates “the central meaning of the Equal Protection Clause”); *Reynolds v Sims*, 377 US 533, 566 (1964) (apportionment scheme for Alabama legislature violates the Equal Protection Clause that “guarantees the opportunity for equal participation by all voters in the election of state legislators”); *Griffin v Illinois*, 351 US 12, 19 (1956) (Equal Protection Clause requires state to provide indigent criminal defendant with free trial transcript where necessary for adequate review of conviction).

power the states from regulating much of what it prevented the federal government from regulating under the Commerce Clause.

Second, the dormant Commerce Clause, under which the states are subject to constitutional limitations on their power to regulate interstate commerce (even absent congressional action), had been wielded extremely aggressively against the states during the *Lochner* era but was drastically scaled back by the Court starting in 1938 (Part III). Third, where Congress did exercise its regulatory powers, the Court reduced the impact of such legislation on state authority by replacing the previously automatic preemption of state law by federal law in the same field with a presumption against preemption that is rebutted only when Congress clearly manifests the purpose to preempt (Part IV).¹⁵ Fourth, starting in 1937, the Court brought to a virtual halt the previous trend of applying new parts of the Bill of Rights against the states via the Fourteenth Amendment (Part V).

Finally, the Court substantially enhanced state judicial power. The doctrine of *Swift v Tyson*¹⁶ was overruled in the 1938 case of *Erie Railroad Co v Tompkins*,¹⁷ with the result that in diversity cases, federal courts apply state law (as interpreted by state courts) rather than "general federal common law," which they had previously applied and which *Erie* abolished. Accordingly, a prominent post-New Deal text could reasonably include the assertion that "[i]t is [state] law which is of chief importance in the guidance of primary private activity."¹⁸ In addition to its *Erie* doctrine, the Roosevelt era Court increased state judicial power by three other means: first, by creating the doctrine of federal court abstention; second, by expansively reconceptualizing state court territorial jurisdiction; and third, by substantially reducing the constitutional limitations on state courts' choice of law (Part VI).¹⁹

¹⁵ See Gardbaum, 79 Cornell L Rev at 801-07 (cited in note 3). See also Lawrence Lesig, *Translating Federalism: United States v Lopez*, 1995 S Ct Rev 125, 167-68.

¹⁶ 41 US (16 Pet) 1 (1842).

¹⁷ 304 US 64 (1938).

¹⁸ Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 171 (William N. Eskridge, Jr. and Philip P. Frickey, eds) (Foundation 1994).

¹⁹ *International Shoe Co v Washington*, 326 US 310 (1945). A sixth major change might be thought to involve the Contracts Clause, which prevents states from impairing the obligations of contracts. In its well known 1934 decision in *Home Building & Loan Association v Blaisdell*, 290 US 398 (1934), the Court, over the dissenting votes of Justices Sutherland, Butler, McReynolds, and Van Devanter, the so-called four horsemen, see note 28, upheld against a Contracts Clause challenge a 1933 Minnesota statute declaring a state of emergency and temporarily extending the time allowed for redeeming real property from foreclosure and sale under existing mortgages.

Contrary to the nationalist account, most of these changes derived less from considerations of the proper roles of state versus national legislatures (that is, considerations of federalism) than from a fundamental change in thinking about the proper roles of legislatures (whether state or federal) and courts with respect to matters of public policy. In other words, the constitutional revolution as a whole had more to do with separation of powers than with federalism, ushering in a new understanding of the respective legislative and judicial functions. In this regard, its liberating impact on the states in so many different, but generally overlooked, doctrinal areas was the result of the fact—which the nationalist focus on the history of Congress’s commerce power tends to ignore—that the states had been the primary victims of the shackles imposed by the *Lochner* era Court’s judicial activism on behalf of market outcomes and economic nationalism. It would be wrong to conclude from this, however, that the states were entirely unintended and indirect beneficiaries of the Court’s new philosophy of judicial restraint and separation of powers. To the contrary, Roosevelt supporters and appointees such as Justices Stone, Black, Douglas, and Frankfurter repeatedly expressed an affirmative and principled commitment to maintaining and vindicating the role of the states as independent centers of regulatory power in the new context of expanded, though largely concurrent, governmental authority. Moreover, they did not generally see this commitment as inconsistent with their better known commitments to textualism and judicial restraint.²⁰

Although *Blaisdell* is sometimes viewed as the starting point of the modern approach that has largely read the Contracts Clause out of the Constitution, see, for example, Sunstein, 87 Colum L Rev at 890-91 (cited in note 11), it really only affirmed (perhaps at most extended) a trend that had started in the last quarter of the nineteenth century. Since the 1905 decision in *Manigault v Springs*, which held that the Contracts Clause does not prevent states from impairing the obligations of contracts if the impairment resulted from an otherwise valid exercise of the police power, 199 US 473, 480-81 (1905), the Court had rarely invalidated state statutes on this ground. Accordingly, the real issue in *Blaisdell* was whether or not the state’s police power extends this far, which was a question concerning substantive due process limitations rather than the Contracts Clause per se. Indeed, in his dissenting opinion for the four horsemen, Justice Sutherland’s list of precedents supporting his position conspicuously ended in 1896, *Blaisdell*, 290 US at 470-71 (Sutherland dissenting), and in relying on their authority, he defended at length the proposition that the meanings of clauses of the Constitution do not change over time. *Id.* at 448-71. Accordingly, in my view, unlike the other areas considered in this Article, the Contracts Clause is not really an area of constitutional law in which the New Deal Court significantly altered the status quo ante. But see Friedman, 142 U Pa L Rev at 1914-18 (cited in note 5) (arguing that *Blaisdell* had a significant impact on the Contracts Clause and was an important harbinger of the new constitutionalism).

²⁰ The views of Justice Douglas, unlike those of Justice Black or Justice Frankfurter, appear to have changed over the course of his long tenure on the Court, perhaps as the

Taken together and looked at in their own terms, these changes in doctrine substantially enhanced the constitutional position of the states as compared with the pre-New Deal era. Although some of them are well known to specialists in the relevant areas, their individual and collective importance in understanding the overall constitutional change of the period has tended to be overlooked in the conventional account's focus on the Commerce Clause and the battle over the New Deal legislative program. The claim of this Article is not that state authority can be precisely quantified and that after all the factors have been placed on the scale, the states were definitively "better off" in some global sense after the constitutional revolution than before. Rather, my claim is that their powers were enhanced in many important but generally overlooked areas of constitutional law in a manner and to a degree that complicates the standard and straightforward nationalist story that is usually told. Even with respect to the Commerce Clause itself, the impact of (a) substantive due process and the dormant Commerce Clause on the states' ability to regulate "local" commerce during the *Lochner* era, and (b) the qualification of Congress's preemption power challenges the simple application of the zero-sum framework and its assumption that federal power was increased at the expense of the states.²¹ Once these correctives have been properly taken into account, it becomes rather more difficult—if not misleading—to think of what occurred in this era as primarily a nationalist revolution in constitutional terms. Moreover, this characterization tends only to obscure what is really at stake in the continuing battle over the New Deal's legacy.²²

demon of *Lochner* faded further from view, so that he became a leading proponent of the Warren Court's jurisprudence. The one area in which a conflict between these two commitments emerged for Justice Black involved his support for the total incorporation of the Bill of Rights, but even his support for this doctrine was not entirely inconsistent with his general concern for state authority. See Part V.

²¹ In crude terms, the states were clearly not worse off in those areas they were previously prohibited from regulating at all. After the constitutional revolution, they could exercise their concurrent regulatory power until preempted by Congress.

²² Indeed, the distracting influence of the nationalist account that is shared by both supporters and opponents of the Court's new Commerce Clause jurisprudence suggests an explanation for Cass Sunstein's observation that, despite the New Deal, what he terms "*Lochner's Legacy*"—the fundamental premise that common law and market outcomes serve as the baseline with respect to which there is a constitutional requirement of government neutrality—has not by any means been extirpated from constitutional interpretation. See Sunstein, 87 Colum L Rev at 902-03 (cited in note 11). Arguing over whether the nationalist revolution was constitutionally legitimate, wise or both is in a sense a sideshow that diverts attention from the fact that the constitutional revolution was more fundamentally about the proper scope of governmental power as a whole than about that of the national government.

II. SUBSTANTIVE DUE PROCESS

The federalism framework of the nationalist account presupposes that the extensive new regulatory powers granted to Congress under the Commerce Clause were transferred from the states. This is why the constitutional revolution of the New Deal era is characterized as involving a radical transformation in the relationship between the federal government and the states. In this Part, I seek to challenge this orthodoxy by showing that during the reign of substantive due process, the states were also unable to regulate many of the most important areas that prior to 1937 were off-limits to Congress under the Commerce Clause. Accordingly, in these areas the constitutional revolution did not involve a transfer of (previously exclusive) state powers to the federal government. Rather, where previously the Court had purposefully created a regulatory vacuum, there was now concurrent regulatory power.

The story of the rise and fall of substantive due process between the late 1880s and 1937 is too well known to require detailed retelling here.²³ Prior to what has become known as the *Lochner* era, the Due Process Clauses of the Fifth and Fourteenth Amendments were understood as essentially procedural, guaranteeing that the federal government (under the Fifth Amendment) and the states (under the Fourteenth Amendment) must follow certain “due” procedures before they may constitutionally deprive any person of life, liberty, or property.

In 1886 and 1887, the Supreme Court for the first time announced the doctrine of substantive due process, meaning that the liberty sections of the two Due Process Clauses were deemed to grant certain substantive rights to individuals that limited the authority of Congress and the states to regulate private—especially economic—activity.²⁴ The Court relied on this new doctrine to invalidate a state statute for the first time in the 1890 case of *Chicago, Milwaukee and St. Paul Railway Co v Minnesota*,²⁵ and seven years later in *Allgeyer v Louisiana* it provided a particularly clear statement of this new constitutional doctrine:

The liberty mentioned [in the Due Process Clause] means not only the right of the citizen to be free from the mere

²³ In setting out the very brief overview of the general history of substantive due process contained in this and the following paragraph, I have relied heavily on the excellent account in Geoffrey R. Stone, et al, *Constitutional Law* 813-42 (Little, Brown 3d ed 1996).

²⁴ The two cases involved were the *Railroad Commission Cases*, 116 US 307, 331 (1886), and *Mugler v Kansas*, 123 US 623, 661-64 (1887).

²⁵ 134 US 418, 452-59 (1890).

physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.²⁶

In *Lochner v New York*, the case that gave its name not only to an era but subsequently to a term connoting illegitimate judicial activism, the Supreme Court in a five-four decision declared unconstitutional a New York statute that set maximum hours for bakers on the ground that it impermissibly interfered with the freedom to contract of both employers and employees that was an essential part of the liberty of individuals protected by the Due Process Clause.²⁷ The era of substantive due process lasted until 1937 when the Court, in the landmark case of *West Coast Hotel Co v Parrish* and over the dissents of the "four horsemen," distinguished its own decision of the previous year and overruled the leading case of *Adkins v Children's Hospital*, both of which had held state minimum wage laws for women unconstitutional.²⁸ Since *West Coast Hotel*, no claim challenging economic regulation on substantive due process grounds has been entertained by the Court. In 1949, the Court made clear that, in rejecting substantive due process, it had returned "to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal

²⁶ 165 US 578, 589 (1897).

²⁷ 198 US 45, 64 (1905).

²⁸ *West Coast Hotel Co v Parrish*, 300 US 379, 388-89, 398-400 (1937), distinguishing *Morehead v Tipaldo*, 298 US 587, 618 (1936), and overruling *Adkins v Children's Hospital*, 261 US 525, 558, 561-62 (1923). "The Four Horsemen of the Apocalypse" or "of Reaction" was the pejorative nickname given to the four sternest opponents of the constitutional revolution: Justices Butler, McReynolds, Sutherland, and Van Devanter.

As both Professors Cushman and Friedman correctly point out, see Cushman, 61 *Fordham L Rev* at 127-31 (cited in note 5); Friedman, 142 *U Pa L Rev* at 1919-22 (cited in note 5), the landmark five-four 1934 decision in *Nebbia v New York*, 291 US 502 (1934), which upheld state minimum retail price legislation for milk, marked the beginning of the end for substantive due process. In *Nebbia*, the majority overturned the narrow understanding of the category of businesses ("businesses affected with a public interest") that could be subject to reasonable regulation in the public welfare. *Id* at 536-37. Nonetheless, if *Nebbia* was the beginning of the end, the end itself came with *West Coast Hotel* in 1937.

commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition."²⁹

The two most important points for the general thesis about the nature of the constitutional revolution of the New Deal era that I am presenting in this Article are perhaps a little less familiar than this general story that I have briefly outlined. First, even though during its reign the courts consistently stated that substantive due process applied to Congress through the Fifth Amendment just as much as it did to the states through the Fourteenth, the actual impact of the doctrine in terms of invalidated statutes was borne overwhelmingly by the states, and correspondingly its demise was of greater direct practical importance to them than to Congress in terms of enhanced constitutional powers.³⁰ During the *Lochner* era, over two hundred state statutes regulating "local" economic activity were declared unconstitutional under the Due Process Clause by the Supreme Court alone, mainly in the areas of labor legislation, regulation of prices, and restrictions on entry into businesses.³¹ This figure, of course, omits those state statutes struck down by state and other federal courts following Supreme Court precedent, as well as statutes never enacted because of their presumed unconstitutionality. By contrast, only a handful of federal statutes were invalidated directly on due process grounds.³² Accordingly, the demise of substantive due process primarily had the effect of enhancing the constitutional powers of the states. Moreover, in the limited and indirect way that its demise can be thought of as adding to the powers of Congress,³³ it cannot be seen as a

²⁹ *Lincoln Federal Labor Union v Northwestern Iron & Metal Co*, 335 US 525, 536 (1949). On the revival of substantive due process relating to personal rights, see note 71.

³⁰ This is not to say that had substantive due process survived, it would not have been a limitation on the federal government even with its expanded Commerce Clause power. It is to say that the substantive due process issue was rarely reached given the limitations on Congress's commerce power. Accordingly, Congress was an indirect beneficiary of its demise.

³¹ See Stone, et al, *Constitutional Law* at 829 (cited in note 23).

³² Probably the best known case in which the *Lochner* era Court struck down a federal statute on due process grounds is *Adair v United States*, 208 US 161, 179-80 (1908) (invalidating federal statute forbidding employers to require employees not to join a union). But even in *Adair*, the majority concluded that the federal statute violated the Due Process Clause only after finding that Congress had exceeded its authority under the Commerce Clause. *Adkins*, it is true, also involved a law passed by Congress. The minimum wage law for women and children struck down in this case, however, was passed by Congress in its capacity as "state" legislature for the District of Columbia. 261 US at 539. In the 1935 case of *Railroad Retirement Board v Alton RR Co*, 295 US 330, 355-62 (1935), a bare majority of the Court held that the Railroad Retirement Act of 1934 violated the Due Process Clause of the Fifth Amendment. However, as in *Adair*, the majority also held that it independently exceeded Congress's commerce power. *Id.* at 362-74.

³³ See note 30.

“nationalist” step because it clearly added to—rather than detracted from—the powers of the states. In this regard, the rejection of substantive due process can be thought of as an instance of the positive-sum aspect of the constitutional revolution: it enhanced the powers of government per se, state as well as federal.

The second major point connects directly to this latter observation, and I have already mentioned it above. The impact on the states of the doctrine of substantive due process was similar in many important respects to the impact on Congress of the *Lochner* era’s Commerce Clause jurisprudence: to a significant degree, what Congress was not permitted to regulate under the Commerce Clause, the states were very often not permitted to regulate either under substantive due process. In this manner, the majority on the Court employed a one-two tactic to support market outcomes and private property rights throughout the era: on the one hand, Congress could not regulate a great deal of private economic activity because much of this activity was deemed “local” and thus outside the reach of its interstate commerce power; on the other hand, the states could not regulate a good proportion of this “local” activity either, because of the due process limitations on their police power. That the two constitutional rubrics were employed as counterparts to each other in this way undermines the nationalist interpretation of the revolution, since it suggests that the new powers of Congress were not transferred from the states. Prior to the revolution neither federal nor state government was constitutionally permitted to regulate a broad array of what were deemed “local” economic activities; as a result of the revolution, both levels of government were empowered to do so.

In fact, it is a remarkable feature of the jurisprudence of the Court throughout the entire *Lochner* era that in Commerce Clause cases, its justification for enforcing limits on congressional power was typically made in terms of federalism—utilizing the zero-sum rationale and defending the reserved police powers of the states to regulate the economic activity in question—with not the slightest suggestion in these opinions that under its substantive due process analysis, those very same state police powers were subject to rigorous judicial review in the name of freedom of contract and private property rights. Indeed, the particular justices who most extolled the importance of maintaining and defending the police powers of the states in the Commerce Clause

context were typically the same justices who took the least expansive view of these powers under due process review.³⁴

The proposition that much of what the New Deal Court permitted the federal government to do under the Commerce Clause, the states had been prohibited from doing under the Due Process Clause during the *Lochner* era—so that (contrary to the zero-sum framework) the increase in federal power cannot simply and straightforwardly be seen as involving a transfer of power from the states—is most clearly illustrated in the context of labor regulation. Indeed, a very large proportion of the best known and most important cases of both the *Lochner* and New Deal periods concerned attempts by either Congress or the state legislatures to regulate the terms and conditions of employment.³⁵ In this area (as in others), both federal *and* state governments were subject to extensive constitutional limitations prior to the revolution; after it, both federal *and* state governments were freed from these limitations. Once again, in light of this feature of the New Deal period's overall impact on constitutionalism, it does not appear to be particularly accurate or useful to think of what occurred as a nationalist revolution.

Lest it be thought that I am overstating my case with respect to the states in this section, the following is an important point of clarification. It is certainly true that the Court's decisions interpreting the legislative constraints imposed by substantive due process were uneven throughout the *Lochner* period and often hard to reconcile with each other; indeed, overall more

³⁴ As we shall see, all four horsemen dissented in both *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 76-103 (1937) (objecting to permissive reading of Commerce Clause), and *West Coast Hotel*, 300 US at 400-14 (objecting to permissive view of state police powers).

³⁵ In the case of congressional statutes, leading pre-revolutionary cases finding labor regulations unconstitutional under the Commerce Clause included *Hammer v Dagenhart*, 247 US 251, 276-77 (1918) (invalidating the Federal Child Labor Act of 1916), *Schechter Poultry Corp v United States*, 295 US 495, 550-51 (1935) (invalidating the labor provisions of the Live Poultry Code promulgated under the National Industrial Recovery Act of 1933), and *Carter v Carter Coal Co*, 298 US 238, 309 (1936) (invalidating the labor provisions of the Bituminous Coal Conservation Act of 1935). Leading revolutionary Commerce Clause cases included *Jones & Laughlin*, 301 US at 49 (upholding the National Labor Relations Act of 1935) and *United States v Darby*, 312 US 100, 125-26 (1941) (upholding the universal minimum wage and maximum hours provisions of the Fair Labor Standards Act of 1938). As for decisions finding state regulations of labor conditions unconstitutional under the Due Process Clause, in addition to *Lochner* itself, leading pre-revolutionary cases included *Coppage v Kansas*, 236 US 1, 26 (1915) (invalidating state statute banning "yellow dog" contracts) and the progeny of *Adkins v Children's Hospital*, 261 US at 554: invalidating minimum wage standards for women in Arkansas, *Donham v West-Nelson Manufacturing Co*, 273 US 657 (1927); Arizona, *Murphy v Sardell*, 269 US 530 (1925); and New York, *Tipaldo*, 298 US 587. The leading revolutionary case involving state regulation of labor conditions was *West Coast Hotel*, already mentioned.

state regulations were upheld than invalidated.³⁶ Moreover, as far as labor regulation specifically is concerned, during the *Lochner* era as a whole the Court on balance probably exhibited decreasing vigor in its review as time went by, in certain areas carving out an increasing number of exceptions to the more absolute positions it had taken earlier. Thus, by the time Roosevelt assumed the Presidency in 1933, the Court had, despite *Lochner* itself and the uncompromising language in *Adair v United States*³⁷ and *Coppage v Kansas*,³⁸ upheld various state maximum hours legislation for specific categories of both male and female employees.³⁹ Nonetheless, a bare majority of the Court claimed that in doing so it was still applying the original *Lochner* principle that distinguished between regulation of specific industries detrimental to health on the one hand and pure labor laws on the other, with the consequence that no general maximum hours law applying to all occupations could be upheld.⁴⁰ In addition, the majority continued until the bitter end to hold the original line against minimum wage laws for both men and women, and also against legislation granting the right of collective bargaining.⁴¹

Moreover, in other important areas of substantive due process, no clear and obvious trend towards decreasing the level of review of state regulation can be detected over time.⁴² Thus, for example, the Court took what was, if anything, a more rigorous stance towards state price-fixing and business-entry restrictions in the late 1920s than it had before.⁴³ Finally, and perhaps most

³⁶ See Kramer, 46 Case Western Res L Rev at 925 (cited in note 5).

³⁷ 208 US 161, 174-75 (1908) ("In all such particulars [sale or purchase of labor, quitting, or firing for any reason] the employer and the employ have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."). See note 32.

³⁸ 236 US 1 (1915).

³⁹ See, for example, *Muller v Oregon*, 208 US 412, 416, 421-23 (1908) (women "in any mechanical establishment, or factory, or laundry"); *Bunting v Oregon*, 243 US 426, 438-39 (1917) (factory workers of both sexes).

⁴⁰ Indeed, this distinction had been applied to uphold a state maximum hours statute for male coal miners prior to *Lochner* itself in *Holden v Hardy*, 169 US 366, 393-96 (1898), and was the principle invoked in *Lochner*. 198 US at 59-60. The closest the Court came to upholding a general maximum hours statute was *Bunting*, 243 US at 438-39 (upholding maximum hour law for factory workers), although in *Adkins*, the majority argued that what justified the outcome in *Bunting* was that factories were particularly detrimental to workers' health. *Adkins*, 261 US at 550-51.

⁴¹ See text accompanying notes 50-51.

⁴² See Kramer, 46 Case Western Res L Rev at 917 n 81 (cited in note 5) ("After 1918, the Court became considerably more aggressive and less progressive, striking down many more statutes on due process grounds than before.").

⁴³ See, for example, *Williams v Standard Oil Co*, 278 US 235, 240 (1929) (invalidating state law regulating price of gasoline); *Ribnik v McBride*, 277 US 350, 356-57 (1928) (striking down state law fixing prices charged by employment agencies); *Tyson and*

importantly, the Court's record concerning the constraints on federal legislative power over economic activity under the Commerce Clause was at least equally uneven and hard to reconcile throughout the *Lochner* era, with more federal statutes being upheld than invalidated.⁴⁴ As with substantive due process, the Commerce Clause cases often produced a bitterly divided Court, with each side producing long lists of precedents in its favor and engaging those that were not to show that they constituted departures from the application of true principles long established by the Court.⁴⁵ Accordingly, if it cannot be said that with the death of substantive due process, the Court granted to the states powers that were entirely unprecedented and unthinkable during the previous era, the same is true with respect to the new powers that it granted to Congress. The major difference in both cases was not so much the individual outcomes upholding particular exercises of power, but rather the absolute rejection of the old challenges to those exercises and the constitutional tests that had been developed around them.

To illustrate the pre- and post-revolutionary constitutional powers of both Congress and state legislatures with respect to the regulation of the terms and conditions of employment, I shall focus on the four well known cases that exhibit the comparison in the starkest possible terms: the 1936 cases of *Carter v Carter Coal*⁴⁶ and *Morehead v New York ex rel Tipaldo*,⁴⁷ which show the limitations on Congress and the states respectively, and the two "switch in time" cases of the following year, *NLRB v Jones & Laughlin Steel*⁴⁸ and *West Coast Hotel*, which effectively abolished the limitations on both.⁴⁹

Brother v Banton, 273 US 418, 442 (1927) (invalidating state law setting prices of theater tickets); *New State Ice Co v Liebmann*, 285 US 262, 278-79 (1932) (invalidating state law prohibiting any person from manufacturing ice without obtaining required license); *Louis K. Liggett Co v Baldridge*, 278 US 105, 113-14 (1928) (invalidating state law restricting entry into pharmacy business).

⁴⁴ See Kramer, 46 Case Western Res L Rev at 921-30 (cited in note 5). Indeed, this fact leads Kramer to suggest that the 1935-36 decisions overturning New Deal legislation were more exceptional and inconsistent with prior precedent than those subsequently upholding it so that they represented a new (if short-lived) departure for the Court.

⁴⁵ See, for example, *Champion v Ames*, 188 US 321, 363-64 (1903) (five-four vote upholding the Federal Lottery Act of 1895); *Hammer v Dagenhart*, 247 US at 276-77 (five-four vote invalidating the Federal Child Labor Act of 1916). See also Justice Harlan's impassioned dissent in *United States v E.C. Knight Co*, 156 US 1, 18-46 (1895) (dissenting from majority holding that the Constitution does not permit Congress to regulate "manufacturing").

⁴⁶ 298 US 238 (1936).

⁴⁷ 298 US 537 (1936).

⁴⁸ 301 US 1 (1937).

⁴⁹ To the extent I suggest here (and elsewhere throughout this Article) that the year

In *Carter Coal*, decided on May 18, 1936, the Court invalidated the Bituminous Coal Conservation Act of 1935, finding that its labor provisions were unconstitutional because they exceeded Congress's power under the Commerce Clause. These provisions, contained in Section 4 of the Act, included establishment of a system of local coal boards that would administer a code recognizing the right of employees to organize and bargain collectively and also mandated that once a sufficient number of collective bargaining agreements had been negotiated, their wage and hours terms would bind all mine operators in the area.⁵⁰ The majority opinion did not reach the constitutionality of the separately challenged provision of the Act by which the boards set minimum prices for coal as it held the two sets of provisions not to be severable.⁵¹

Writing for the Court, Justice Sutherland first set out the fundamental principles of federalism requiring the Court to ensure that Congress stayed within its specifically enumerated powers. In doing so, he gave classic expression to the zero-sum view of federal and state powers that lies behind the understanding of what occurred during the New Deal period—by its supporters and opponents alike—as a nationalist revolution:

And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom.⁵²

Sutherland then applied these general principles to the particular federal statute in question as follows:

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bar-

1937 was a watershed for state and federal regulatory power under both the Commerce and Due Process Clauses, I do not intend to take a position in the debate between those who argue that the entire constitutional revolution of the era occurred in this year and those who argue that it was more continuous, extending over the entire New Deal period. See note 5. For one thing, those participating in this debate generally focus on these two clauses alone, overlooking the other important changes in constitutional doctrine enhancing state power that I identify in this Article, many of which took place in other years.

⁵⁰ 298 US at 281-84.

⁵¹ Id at 312-17.

⁵² Id at 294-95.

gaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. *The relation of employer and employee is a local relation.*⁵³

Two weeks later, in *Tipaldo*, the Court provoked great furor throughout the country when it followed its 1923 *Adkins* precedent and invalidated a 1933 New York statute prescribing minimum wages for women employees on the basis that it violated the Due Process Clause of the Fourteenth Amendment.⁵⁴ In a rare public comment on a Court decision, President Roosevelt said of *Tipaldo*, "it seems to be fairly clear, as a result of this decision and former decisions . . . that the 'no-man's-land' where no Government—State or Federal—can function is being more clearly defined. A state cannot do it [set a minimum wage], and the Federal Government cannot do it."⁵⁵ Although Justice Butler stressed in his five-four opinion for the Court that the petition had not requested that *Adkins* be reconsidered on the merits but merely that the New York statute be distinguished from the one held unconstitutional in that case, he appeared to leave little doubt that this procedural point would not have affected the outcome, at least as far as he was concerned.⁵⁶ Referring to two other post-*Adkins* cases in which the Court had been asked to overrule its precedent, Butler stated that in each of these cases, the Court was "clearly of opinion that no discussion was required to show that, having regard to the principles applied in the *Adkins* case, the state legislation fixing wages for women was repugnant to the due process clause of the Fourteenth Amendment."⁵⁷ He summarized these principles as follows:

In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best

⁵³ Id at 308 (second emphasis added).

⁵⁴ 298 US at 609. For some of the details of the furor, see Leuchtenburg, *The Supreme Court Reborn* at 215 (cited in note 5). The 1936 Republican presidential platform pledged to introduce a constitutional amendment to overrule *Tipaldo*.

⁵⁵ Leuchtenburg, *The Supreme Court Reborn* at 106 (cited in note 5), citing Samuel I. Roseman, ed, 5 *The Public Papers and Addresses of Franklin D. Roosevelt* 191-92 (Russell & Russell 1969).

⁵⁶ *Tipaldo*, 298 US at 604, 618. For the argument that this procedural point determined the vote of Justice Roberts, see Friedman, 142 U Pa L Rev at 1940-46 (cited in note 5).

⁵⁷ *Tipaldo*, 298 US at 618. The two earlier cases were *Donham*, 273 US 657, and *Murphy*, 269 US 530. See note 35.

terms they can by private bargaining. Legislative abridgement of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception.

Butler concluded that "[t]he decision [in *Adkins*] and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."⁵⁸ Nowhere in his opinion did Justice Butler mention that "the relation of employer and employee is a local relation" in the federalism sense insisted upon in *Carter Coal*. Moreover, if a state was without power to regulate the wages of ordinary women employees, it was certainly without power to regulate those of ordinary men.

Let us now turn the clock forward just nine months to March 29, 1937, a presidential campaign and Court-packing plan later, but with no changes of personnel on the Court.⁵⁹ In *West Coast Hotel*, by a five-four decision and with Justice Roberts's vote alone differing from those cast in *Tipaldo*,⁶⁰ the Court expressly overruled *Adkins* and upheld the State of Washington's minimum wage law for women as a reasonable exercise of the state's "broad protective power."⁶¹ Chief Justice Hughes in his opinion for the Court wrote that:

the liberty safeguarded [by the Due Process Clause of the Fourteenth Amendment governing the states] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

⁵⁸ *Tipaldo*, 298 US at 610-11.

⁵⁹ The first change occurred when Justice Van Devanter retired on June 2, 1937, nearly two months after the decision in *Jones & Laughlin*. He was replaced by Justice Hugo Black.

⁶⁰ Contrary to the "switch in time" thesis, I do not intend to suggest any causal connection between Justice Roberts's vote and the Court-packing plan. As Professor Friedman has convincingly shown, Roberts voted to uphold the Washington minimum wage law at the first conference on the case following oral argument on December 19, 1936, over six weeks before the Court-packing plan was announced. See Friedman, 142 U Pa L Rev at 1949-50 (cited in note 5).

⁶¹ *West Coast Hotel*, 300 US at 396.

This essential limitation of liberty in general governs freedom of contract in particular.⁶²

The majority concluded that upholding the statute was a "true application of the principles governing the regulation by the State of the relation of employer and employed," and that *Adkins* had been a "departure."⁶³ Hughes described these principles as follows:

In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.⁶⁴

The majority applied these principles to the effect that the public interest in the health of women and their protection from unscrupulous and overreaching employers was both clear and well-established and that, contrary to the opinion of the dissenters, no constitutional difference exists between the regulation of maximum hours and the fixing of a minimum wage as an acceptable means to that permissible end. Both are within the legislative discretion of the states.⁶⁵

Writing for all four horsemen in dissent, Justice Sutherland insisted that *Adkins* was properly decided and should stand. He stated that its principle of freedom of contract as the general rule and restraint the exception, justified only by the existence of exceptional circumstances, was unquestioned, and that the distinction between fixing hours (which is merely an incident of employment) and fixing wages remained essential.⁶⁶ To the extent that the minimum wage exceeds the fair value of the services rendered, this amounts to a compulsory exaction from the employer and is a "naked, arbitrary exercise of power" contrary to due process.⁶⁷ It is similarly so because in singling out women alone, the statute denies them the right to compete freely with men for work paying lower wages than the minimum.⁶⁸

The gap between the majority's "wide" legislative discretion to interfere with freedom of contract in the public interest and

⁶² Id at 391-92.

⁶³ Id at 397.

⁶⁴ Id at 393 (emphasis added and citation omitted).

⁶⁵ Id at 398-99.

⁶⁶ Id at 406-08 (Sutherland dissenting).

⁶⁷ Id at 411, quoting from *Adkins*, 261 US at 559.

⁶⁸ *West Coast Hotel*, 300 US at 411-13 (Sutherland dissenting).

the dissent's strong presumption against such interference was clearly enormous. Although the majority did not take this particular occasion to spell out the general implications of the gap, it did so for all intents and purposes in *United States v Carolene Products Co* a year later by announcing its general deference to, and the presumptive constitutionality under the Due Process Clause of, legislative judgments in matters of economic regulation.⁶⁹ The official and explicit rejection of substantive due process came in the 1941 case of *Olsen v Nebraska*, in which Justice Douglas referred to the doctrine as:

those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. . . . Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.⁷⁰

This complete and definitive rejection of substantive due process lasted until 1965 when, in *Griswold v Connecticut*, the Court revived and reaffirmed that part of the doctrine concerning personal rights and the right of privacy in particular.⁷¹

⁶⁹ 304 US 144, 152 (1938).

⁷⁰ 313 US 236, 247 (1941) (internal citation omitted).

⁷¹ 381 US 479 (1965). In *Griswold*, the Court invalidated a Connecticut statute prohibiting the use of contraceptives on the ground that it violated the Due Process Clause of the Fourteenth Amendment, the liberty section of which includes a "zone of privacy created by several fundamental constitutional guarantees [contained in the Bill of Rights together with the penumbras formed by emanations from those guarantees]." *Id.* at 485. Writing for the Court, Justice Douglas stated that it continued to reject *Lochner* as applied to "economic problems, business affairs, or social conditions," but that as regards the "intimate relation of husband and wife and their physician's role in one aspect of that relation," it "reaffirm[s] the principle of *Pierce* [*v Society of Sisters*, 268 US 510 (1925)] and the *Meyer* [*v Nebraska*, 260 US 390 (1923)] cases." *Griswold*, 381 US at 482-83. The principle of these two *Lochner* era cases was that the Due Process Clause requires the state to respect "certain fundamental rights," *Meyer*, 260 US at 401, possessed by each individual, including the right to contract, to choose an occupation, to establish a home and bring up children, and to freely worship God, that have been "long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. See text accompanying notes 215-16.

In dissent, Justice Black argued that to find a right of privacy in the "penumbras" of the first eight amendments was simply to engage in the "same natural law due process philosophy found in [*Lochner*] . . . [and] which many later opinions repudiated." *Griswold*, 381 US at 515-16 (Black dissenting). Moreover, according to Justice Black, this "formula . . . is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights." *Id.* at 522.

Griswold's right of privacy was, of course, extended in subsequent landmark cases to protect all "individual decisions in matters of childbearing from unjustified intrusion by the State," *Carey v Population Services Intl.*, 431 US 678, 687 (1977), including the right of

Jones & Laughlin, decided two weeks after *West Coast Hotel* and with the same alignment of votes, upheld the National Labor Relations Act of 1935 as within the power of Congress on the basis that the "unfair labor practices" it prohibited (namely, restraint or coercion of employees' ability to organize and bargain collectively) directly and immediately burdened interstate commerce.⁷² Thus, contrary to the very recent decisions in *Schechter Poultry* and *Carter Coal*, a bare majority of the same Court now upheld the power of Congress to regulate the terms and conditions of employment in manufacturing.⁷³

Justice McReynolds's dissenting opinion for the four horsemen is particularly interesting from the perspective of whether the congressional power now affirmed by the majority was a power that was exercisable by the states prior to *West Coast Hotel*. It is interesting because the inherent and underlying tension between the strategy of opposing congressional power in the name of the reserved powers of the states and the dissenters' deeper and more fundamental convictions in favor of liberty of contract and the rights of property comes to the surface. Predictably, McReynolds began his dissenting opinion by relying on *Schechter Poultry* and *Carter Coal* for the principle that had been applied in those cases to invalidate the respective federal statutes: "the power of Congress . . . does not extend to relations between employers and their employees engaged in manufacture."⁷⁴ As we saw in *Carter Coal*, such relations are local matters beyond the power of Congress.⁷⁵ But unlike his colleague in *Carter Coal* who had left the (presumably unwelcome) conclusion that such relations are therefore within the police power of the states somewhat implicit, McReynolds bit the bullet and followed the lower court, whose entire opinion he incorporated as Part II of his own, by making this implication explicit. According to McReynolds:

Any effect on interstate commerce by the discharge of employees shown here [for union activities, which was a prohibited "unfair practice" under the Act], would be indirect and remote in the highest degree. . . . A more remote and indirect interference with interstate commerce or a more defi-

all persons (and not just married couples) to use and have access to contraceptives, *Eisenstadt v Baird*, 405 US 438, 454-55 (1972), and most famously of all, a woman's right to an abortion, *Roe v Wade*, 410 US 113, 164-65 (1973).

⁷² *Jones & Laughlin*, 301 US at 41-43.

⁷³ *Id* at 34-41. See also note 35.

⁷⁴ *Jones & Laughlin*, 301 US at 76 (McReynolds dissenting).

⁷⁵ See text accompanying note 53.

nite invasion of the powers reserved to the states is difficult, if not impossible to imagine. . . . The Constitution still recognizes the existence of states with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy.⁷⁶

This impassioned defense of state regulatory authority from the four justices, who so vigorously argued against state power to regulate wages just two weeks earlier by invoking the near-absolute freedom of contract language of *Adkins*, may strike one as surprising and disingenuous. The inherent tension between concern for state regulatory authority and freedom of contract is, however, resolved by Justice McReynolds himself in favor of the latter, for at the very end of his opinion in *Jones & Laughlin*, he relies directly on *Adair* and *Coppage*, two of the major substantive due process decisions which deny the power of interfering with the choice of contractual partners in the labor context to any government, federal or state. Quoting *Adair*, McReynolds writes that, "[I]t is not within the functions of government . . . to compel any person in the course of his business and against his will to accept or retain the personal services of another." And he continues, "*Coppage v Kansas*, following the *Adair* case, held that a state statute, declaring it a misdemeanor to require an employee to agree not to become a member of a labor organization . . . was repugnant to the due process clause of the Fourteenth Amendment."⁷⁷

Thus, as far as the four dissenters were concerned, it seems clear that their deepest conviction was that neither Congress nor the states could constitutionally do what the majority in *Jones & Laughlin* permitted Congress to do. And, moreover, neither Congress nor the states could do what the majority permitted the states to do in *West Coast Hotel*. Or, to take two other landmark examples: is it likely that prior to 1937 the states would have been permitted under substantive due process to do what a unanimous, newly constituted Court permitted Congress to do in either *United States v Darby*⁷⁸ in 1941 (to set universal minimum wage and maximum hour laws) or *Wickard v Filburn*⁷⁹ in 1942 (to regulate the production of wheat for purely domestic con-

⁷⁶ *Jones & Laughlin*, 301 US at 96-97 (McReynolds dissenting) (emphasis added).

⁷⁷ Id at 102-03, quoting, in part, from *Adair*, 208 US at 161.

⁷⁸ 312 US 100, 125-26 (1941). Justice Stone's famous statement in *Darby* that "[t]he [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered," id at 124, is not a nationalist manifesto. It simply affirms that the Tenth Amendment expressly sets out the principle of enumerated federal powers.

⁷⁹ 317 US 111, 128-29 (1942).

sumption)? In their heart of hearts, the four horsemen were against government regulation of "private" economic relations by any level of government, rather than pro-states' rights, just as their colleagues in the majority were for permitting reasonable economic regulation *per se* rather than specifically being for regulation at the national level.

In sum, considering the impact of substantive due process alongside the conventional focus on the Commerce Clause permits us to see that, contrary to the straightforward nationalist account, the net result of the Court's leading decisions in both areas was far less a massive transfer of powers from the states to the federal government than a shift from a regulatory vacuum to concurrent powers. This section has, accordingly, addressed the first reason stated in the introduction for thinking that the nationalist account distorts our understanding of the constitutional revolution as a whole. In the remainder of this Article, I focus on the second reason and describe what in this context are the largely overlooked changes in many other constitutional doctrines that directly and solely benefited the states.

III. THE DORMANT COMMERCE CLAUSE

A second radical change in doctrine undertaken by the New Deal Court that reduced the previously established constitutional limitations on state regulatory power concerned the "dormant" Commerce Clause. This area of constitutional law deals with a fundamental economic issue that confronts all federal systems: namely, whether (constitutionally speaking) the entire territory within that federal system is to constitute a single—or common—market, or whether it is effectively to be divided into a series of separate markets that result from the economic impact of diverse regulatory regimes in the individual states. In other words, should the inevitable conflict between the general economic benefits of a single market on the one hand, and the capacity of the constituent states to exercise their traditional regulatory powers on the other, be resolved in favor of a constitutional norm of free, unrestricted movement of goods across state boundaries?⁸⁰

⁸⁰ For example, in the European Union, the establishment of a common market among the member states is a fundamental principle. See Treaty of Rome, Article 2. The specific provisions constitutionalizing free movement of goods throughout the Union are contained in three different sections of the Treaty of Rome: Articles 9-17 (prohibiting customs duties and measures having equivalent effect), Articles 30-37 (prohibiting quantitative restrictions and measures having equivalent effect), and Article 95 (prohibiting discriminatory internal taxation).

As things have developed in the United States, this fundamental constitutional issue is framed in terms of the negative implications (if any) of the constitutional grant to Congress of the power to regulate interstate commerce.⁸¹ Does this grant have any constitutional implications for the regulatory or "police" powers of the states when an otherwise valid exercise of those powers has an impact on commerce crossing state lines? Put yet another way, is congressional power to regulate interstate commerce exclusive of the states or is it concurrent, with state power subject only to the impact of enacted federal law through the Supremacy Clause and Congress's power of preemption? To the extent that the former is the case, what types of state regulation constitute a regulation of interstate commerce?

For the first sixty years of its history, the Supreme Court gave no clear and authoritative answer to this question. To be sure, certain dicta of Chief Justice Marshall expressed clear support for exclusivity and the vision of a single market,⁸² but his successor, Chief Justice Roger Taney, vigorously asserted the contrary position: namely, that the Commerce Clause in itself has no negative implications for state sovereignty.⁸³ In its landmark 1851 decision in *Cooley v Board of Wardens*, the Court finally gave an authoritative determination, although it opted for the compromise position of what became known as "selective exclusivity." It held that no single answer could be given that would cover all the myriad subjects contained within the grant of power over commerce and divided these subjects into two categories:

⁸¹ The text of the Constitution could arguably have permitted this issue to be framed in different terms, for example, through the Imports Clause, but this clause was held not to apply to domestic imports. See text accompanying note 110.

⁸² Most notably in *Gibbons v Ogden*, 22 US (9 Wheat) 1, 209 (1824) ("There is great force in this argument."), and *Brown v Maryland*, 25 US (12 Wheat) 419, 449 (1827).

⁸³ See *The License Cases*, 46 US (5 How) 504, 578 (1847) (Taney opinion) ("[T]he mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. . . . [State] regulations [of commerce] are valid unless they come in conflict with a law of Congress.").

Among current members of the Supreme Court, Justice Scalia essentially affirms the Taney position as a textual and historical matter. See, for example, *Tyler Pipe Industries, Inc v Washington State Department of Revenue*, 483 US 232, 263 (1987) ("The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce."). Among contemporary constitutional scholars, Taney's position is held by Martin H. Redish, also on textual grounds. See Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L J 569, 573 ("State power to regulate interstate commerce was designed to be determined solely by the political judgment of Congress."). Professor Richard Friedman has also advocated abandoning the doctrine. See Richard D. Friedman, *Putting the Dormancy Doctrine Out of its Misery*, 12 Cardozo L Rev 1745, 1745 (1991).

first, those that are “inherently national” because they require uniform regulation throughout the country, with respect to which congressional power is exclusive; second, those that are “local” in that they are likely to benefit from more diverse and contextualized treatment, with respect to which state and federal power is concurrent.⁸⁴ In effect, the *Cooley* Court compromised between the two competing values of a single national market and continuing state regulatory authority: it affirmed a limited constitutional norm of free movement of goods, applying to some but not all of the subjects of interstate commerce. As to which of the two categories a particular subject fell into, the Court was in effect required to balance the claims of uniformity, diversity, and state sovereignty in each case. Although for the first thirty years of its existence the decision in *Cooley* was largely ignored, from the mid-1880s continuing right into the present, it is cited as the classic precedent on the issue, although it has been used in support of solutions to the basic conflict that span the entire spectrum of possibilities.⁸⁵

The original *Cooley* solution was decisively shifted in favor of a broader and more general constitutional norm of free interstate movement of goods when, starting in the mid-1880s with its decision in *Wabash, St. Louis and Pacific Railway v Illinois*,⁸⁶ the Court firmly and consistently embraced the vision of the United States as a single or common market for the first time. By reading this vision into the Commerce Clause and accordingly expanding the “inherently national” prong of the *Cooley* test to embrace all movement of goods across state lines, the Court sharply limited the regulatory powers of the states in the name of economic nationalism. In the words of (then Professor) Felix Frankfurter:

⁸⁴ 53 US (12 How) 299, 319 (1851). Applying this test to the case before it, the *Cooley* Court found that the Pennsylvania statute in question, which required ships to utilize a local pilot when navigating the waters around Philadelphia, was valid as an exercise of concurrent state power over one of these “local” subjects, even though it undoubtedly regulated and burdened interstate commerce. *Id.* at 319-21. This result, upholding the challenged state law, no doubt explains Chief Justice Taney’s vote with the majority.

⁸⁵ For classic treatments of the history and development of dormant Commerce Clause doctrine, see Edward S. Corwin, *The Commerce Power Versus States Rights* (Princeton 1936); Felix Frankfurter, *The Commerce Clause under Marshall, Taney, and Waite* (Quadrangle 1937); Bernard C. Gavit, *The Commerce Clause of the United States Constitution* (Principia 1932); Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* 150, 181-82 (Columbia 1956); F. D. G. Ribble, *State and National Power Over Commerce* (Columbia 1937).

⁸⁶ 118 US 557, 577 (1886) (holding that states lack power to regulate rates of railway trips extending beyond their borders).

not until after the Reconstruction period had largely spent its political energies did those powerful economic forces emerge which bring into play the affirmative possibilities of the authority over commerce granted to Congress, and the beginning of the long series of restrictions upon [state] legislative interference with economic enterprise which the Supreme Court has found in the commerce clause as well as in the due process clause.⁸⁷

As Frankfurter indicates, these new limitations on the *interstate* power of the states were in addition to the limitations that the same Court imposed on their purely *intrastate* police power under the rubric of substantive due process considered above. And once again, as in the area of due process, these limitations under the Commerce Clause remained largely in effect until the New Deal era, when the Court rejected the vigorous and activist judicial review on which they were premised. In 1938, the Court announced that it was drastically scaling back dormant Commerce Clause review, thereby substantially enhancing the constitutional powers of the states.

This new resolution of the fundamental issue, however, did not survive fully intact for very long. By 1949 at the latest, and probably by 1945, a majority of the Court was persuaded to retreat from the full radicalism of 1938. Nonetheless, overall the "modern approach" to the dormant Commerce Clause that was forged in these years reflects a significantly less nationalist vision than the predominant one during the *Lochner* era. Although there is a good deal of controversy as to how precisely the modern approach to the clause should be characterized,⁸⁸ it is at least common ground that this approach originated during the New Deal era and that it differs markedly from what went before.⁸⁹ Moreover, by focusing on the larger picture and abstracting from the details and complexities of the modern case law that fuels the

⁸⁷ Frankfurter, *The Commerce Clause* at 8 (cited in note 85).

⁸⁸ The main positions in this controversy are (a) to take the Court's balancing test at face value, see Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum L Rev 1022, 1037-41 (1978); (b) that the Court is in fact applying a nondiscriminatory effect standard that is justified by representation-reinforcement considerations, see Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L J 425, 474-84 (1982); or (c) that the Court is applying a nonprotectionist standard requiring proof of intent to discriminate, see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich L Rev 1091, 1206-07 (1986).

⁸⁹ Contemporary scholarly treatments of the dormant Commerce Clause typically do not consider cases from before the New Deal period. See, for example, Regan, 84 Mich L Rev at 1093-94 (cited in note 88) (noting that he will "discuss no case from before 1935" in setting out scope of his thesis); Eule, 91 Yale L J 425 (cited in note 88) (tracing origin of modern approach to the cases of the 1930s and 1940s).

controversy, it becomes clear that however the post-1945 approach is best characterized, it leaves both *more* constitutional space for state regulatory activity than did the dominant conception held between the mid-1880s and 1938, and *less* constitutional space than the Court carved out for the states between 1938 and 1945.⁹⁰

A. The *Lochner* Era

During the period in which the vision of a single national market rose to dominance on the Court, from roughly the mid-1880s to the turn of the century, the conflict between it and the competing claims of state regulatory authority was most intense in cases involving state laws regulating the sale of intoxicating liquors.⁹¹ These laws were enacted as part of the hugely successful and growing prohibitionist movement in the late nineteenth century, and the Court's opposition to them as clogging the nation's commercial arteries ultimately brought it into confrontation not only with the states but also with the express intent of a Congress that, under prohibitionist pressure, twice acted to overturn the Court's decisions and to bolster state power.⁹²

For reasons that will be explained below, the *Lochner* of dormant Commerce Clause cases was *Leisy v Hardin*,⁹³ decided in 1890—that is, contemporaneously with the first cases invalidating state laws on substantive due process grounds. In *Leisy*, the Court overruled the leading precedent of *The License Cases*, a (pre-*Cooley*) Taney Court decision of 1847 that had upheld state liquor licensing laws that applied not only to liquor produced in the state but also to imports.⁹⁴ The Iowa statute in question in *Leisy*, which had been enacted after the Court's 1888 decision in *Bowman v Chicago and Northwestern Railway Co* holding that states cannot ban imports of liquor,⁹⁵ prohibited sale within the state of *all* intoxicating liquors—domestically produced as well as imports from other states. By a six-three majority, the Court in

⁹⁰ One possible dissenting voice with respect to this point is that of Lisa Heinzerling, *The Commercial Constitution*, 1995 S Ct Rev 217, 271-75 (arguing that the modern non-discrimination principle itself is a *Lochner*-style incursion on the legitimate autonomy of the states). However, even accepting her argument, one can still distinguish here between kind and degree.

⁹¹ The detailed story of this conflict is masterfully told in Fiss, *Troubled Beginnings* at 257-92 (cited in note 12).

⁹² See the Wilson Act, 26 Stat 313 (1890), and the Webb-Kenyon Act, 37 Stat 699 (1913).

⁹³ 135 US 100 (1890).

⁹⁴ See *id* at 115-18, overruling *The License Cases*, 46 US (5 How) 504, 585 (1847).

⁹⁵ 125 US 465, 560 (1888).

Leisy invalidated this statute on the ground that it was repugnant to the Commerce Clause as applied to the sale by an importer of beer produced in another state and still in its original packages.⁹⁶ Writing for the Court, Chief Justice Fuller relied on an expansive interpretation of the *Cooley* category of “inherently national” subjects of interstate commerce (over which Congress has exclusive power) so that it was held to encompass all interstate movement of goods, including liquor.⁹⁷

Apart from the significance of the actual decision overturning *The Licensing Cases* itself, *Leisy* is generally noted for two particular features of the majority opinion. First, Fuller adopted the “original package doctrine” first suggested by Chief Justice Marshall in 1827—under which goods are still in interstate commerce even after importation as long as they remain in their original form or package—to hold that the right to import liquor (established in *Bowman*) included the right to sell it in its original package, since the process of selling was integral to importing.⁹⁸ Second, he expounded on the novel “silence of Congress doctrine,” first mentioned briefly in *Bowman*, which would permit Congress to authorize otherwise unconstitutional state regulation even though such intervention would seemingly undermine the uniformity rationale on which exclusive power was premised in the first place and, to this extent, compromise the common market vision so clearly reflected in the decision itself. According to the Chief Justice, given the exclusivity of congressional power over this subject, “so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.”⁹⁹ And, even more invitingly, where a state considers that sale of particular articles of commerce will be injurious to its citizens, “the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the

⁹⁶ *Leisy*, 135 US at 124-25.

⁹⁷ According to Justice Fuller, the “transportation, purchase, sale and exchange of commodities” was an inherently national subject. *Id.* at 109.

⁹⁸ *Id.* at 110-12. Marshall first suggested this doctrine in *Brown v Maryland*, 25 US (12 Wheat) 419, 441-42 (1827).

⁹⁹ *Leisy*, 135 US at 109-10 (citation omitted). The “silence of Congress” doctrine was introduced in *Bowman*, 125 US at 482. It is possible that Chief Justice Fuller thought that by issuing an invitation that in all probability would not be accepted, the doctrine might effectively bolster the legitimacy of the Court’s activism at little cost to itself given that (as was still the case until around the turn of the century) congressional silence with respect to the regulation of interstate commerce was overwhelmingly the rule. If so, his gamble did not pay off.

[constitutional] restriction upon the State in dealing with imported articles of trade within its limits."¹⁰⁰

Although extending this invitation was arguably inconsistent with full-blooded economic nationalism, there is a third feature of the opinion which more than any other makes *Leisy* truly the *Lochner* of dormant Commerce Clause cases. In itself, affirming that Congress has exclusive power to regulate the interstate movement of goods including liquor was certainly important enough, but this alone did not answer the additional question of when state regulation amounts to a (forbidden) regulation of the interstate movement of goods. It is specifically in its definition of the boundary between a valid exercise of the state's police power over purely intrastate affairs and a prohibited regulation of interstate commerce that the Court in *Leisy* comes about as close to constitutionalizing free movement of goods against the states as is possible in a federal system. In defining this boundary, Fuller stated that "the law of [a] State amounts essentially to a regulation of commerce . . . among the States . . . when it *inhibits, directly or indirectly, the receipt of an imported commodity* or its disposition before it has ceased to become an article of trade between one State and another."¹⁰¹ And, in summing up the constitutional infirmities of the state law, he said that the defendants had

the right to import this [Illinois-made] beer into [Iowa] . . . and . . . the right to sell it [there], by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. . . . To concede to a State the power to exclude, *directly or indirectly*, articles [which Congress recognizes as subjects of interstate commerce] . . . is to concede to a majority of people of a State . . . the power to regulate commercial intercourse between the States.¹⁰²

The three dissenting justices argued that the majority had mistakenly imputed to the Framers an intention "to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce."¹⁰³ Rather, they argued, af-

¹⁰⁰ *Leisy*, 135 US at 123-24.

¹⁰¹ *Id* at 123 (emphasis added).

¹⁰² *Id* at 124-25 (emphasis added).

¹⁰³ *Id* at 158 (Gray dissenting).

ter extensively reviewing the previous case law, the Constitution did not strike such a one-sided balance in favor of free movement and thereby deprive the states of the power to protect their citizens against the evils of alcohol by *even-handedly* regulating the sale of all intoxicating liquors inside the State, both domestically produced and imported. Moreover, such laws affect interstate commerce much more remotely and indirectly than many other state laws of unquestioned validity, such as quarantine laws and laws authorizing the construction of bridges and dams across navigable rivers.¹⁰⁴

In order to fully appreciate (a) just how broad was the *Leisy* majority's definition of the constitutional constraints on state regulatory power under the Commerce Clause; and (b) precisely why this definition effectively constitutionalized free movement of goods and a single national market, it will perhaps be useful briefly to introduce and consider some very basic principles of international trade theory.¹⁰⁵ There are a number of different levels or stages of economic integration that states within either a federal system or an international organization may seek to attain among themselves. What is known as "a free trade area" involves the abolition of tariffs and quotas between member states, thus achieving so-called "national treatment," meaning that there is equal treatment by member state governments of domestic goods and goods made in the other member states. A free trade area does not, however, involve common customs tariffs: as to non-member states, each member maintains its own independent tariff policy. A "customs union," by contrast represents one stage beyond a free trade area toward economic integration among member states, in that it creates a common tariff policy on goods imported from non-member states.¹⁰⁶

One stage of economic integration beyond a customs union is a common or single market, the most important distinguishing feature of which for our purposes is the existence of a common or uniform regulatory regime affecting the free flow of goods among member states. Under either a free trade area or a customs union, governments are forbidden from directly excluding or re-

¹⁰⁴ Id at 157-60.

¹⁰⁵ See Bela Balassa, *The Theory of Economic Integration 2* (Compton 1973).

¹⁰⁶ An important implication of this difference is that once inside the customs union, all goods (and not only goods made in member states) will be in "free circulation." There is no longer a need to distinguish between goods from member and non-member states as there is with a free trade area (typically through complex "rules of origin") in order to prevent non-member state goods from entering the lowest-tariff state and moving into higher-tariff states, thereby undermining the capacity of the states to maintain their independent tariff policies.

stricting imports from other member states through the imposition of monetary or numerical barriers (tariffs or quotas, respectively) on them, but neither system addresses the substantial barriers to the free flow of goods across state or national borders that governments create indirectly as the inevitable result of exercising their general regulatory powers. For example, different (albeit nondiscriminatory) health and safety regulatory regimes may be in place in the different member states. If State A requires beer to be made from a specified list of ingredients for health and consumer protection reasons, and State B specifies a different list, then beer producers in State B wishing to sell in both markets will be forced to incur the increased costs of separate production lines for each market. The effect of the differential regulatory regimes is to distort the free competition in State A between its own beer producers (who do not face this increased cost) and those of State B and thus to distort or restrict the flow of imports into State A.¹⁰⁷ Only a common regulatory regime, which prevents such indirect restriction of imports from taking place, can ensure the existence of a single or common marketplace.

Putting this very basic excursus into international trade theory back into our context, the fundamental issue is whether the Constitution itself (that is, in the absence of congressional action) establishes (a) a common market among the states; (b) a customs union; (c) a free trade area; or (d) none of the above. It might understandably be thought that the Constitution expressly creates at least a customs union since the Imports Clause appears to prohibit the states from imposing customs duties on goods from other states or from abroad without congressional consent,¹⁰⁸ and the Commerce Clause grants to Congress the power to regulate commerce with foreign nations, including presumably the power to impose tariffs.¹⁰⁹ In 1869, however, the Court decided that the Imports Clause applies only to foreign, and not domestic imports, with the result that if any such constraint on the states exists it

¹⁰⁷ These were the essential facts of the well known decision of the European Court of Justice in the "German beer" case, *Commission v Germany*. The ECJ held that a 450-year-old German law requiring that only beer manufactured solely from malted barley, hops, yeast, and water could be marketed as "Bier" was equivalent to a quantitative restriction on imported beer since it at least potentially restricted the free flow of foreign beer without adequate justification. Case 178/84, [1987] ECR 1227, 1268-72.

¹⁰⁸ US Const, Art I, § 10, cl 2 (prohibiting states from "lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [their] inspection Laws" without congressional consent).

¹⁰⁹ US Const, Art I, § 8, cl 3 (granting Congress power to "regulate Commerce with foreign Nations, and among the several States").

must be found in the interstate Commerce Clause itself.¹¹⁰ Moreover, nothing in the Constitution expressly prohibits states from imposing *quantitative* restrictions (quotas) on either domestic or foreign imports.¹¹¹

It follows from what was said above that a necessary feature for creating and maintaining a common market in a federal system is that state governments are limited in their power to take measures that have the effect of restricting the flow of imports per se, since such measures are not uniform and so undermine the commercial unity of the federation as a whole. By contrast, a customs union (or a free trade area) is not so restrictive. It prohibits tariffs and quotas between members, and in addition typically prevents member governments from using their general regulatory powers for protectionist purposes—that is, to distort free competition between domestic and competing imported goods *within that state*. Given the modern regulatory context, however, a customs union cannot prevent the separateness of markets in two different member states; it requires only that within the market of any particular state, imported goods compete on equal terms with domestic goods. In short, a customs union mandates equal treatment within each potentially separate market, but not a single national market. In pursuance of their legitimate (i.e., non-protectionist) governmental ends and functions, states may take regulatory measures that have the effect of restricting imports as compared with the ex ante situation. What they cannot do is to take measures that restrict imports disproportionately, as compared to their effect on domestic goods. By contrast, from the perspective of the more integrationist goal of achieving or maintaining a single market, state measures that in effect restrict imports are objectionable whether they are direct or indirect, discriminatory or nondiscriminatory. All such measures artificially distort the free movement and circulation of goods across the nation as a whole and make state boundaries relevant for commercial purposes.

¹¹⁰ See *Woodruff v Parham*, 75 US (8 Wall) 123, 136 (1869). Arguably, Chief Justice Marshall's dictum in *Brown* suggests that he found such an implication in the Commerce Clause: "we suppose the principles laid down in this case [state licensing fee imposed on importers of foreign goods violates the Imports Clause and conflicts with federal statute imposing import taxes], to apply equally to importations from a sister State." 25 US at 449. On the other hand, he may have assumed that the Imports Clause applied to domestic imports.

¹¹¹ Although the Constitution does not explicitly deal with quotas, which are essential to both a free trade area and a customs union, Article I, section 10 does explicitly refer to the power of the states to pass inspection laws. This may explain why even the *Lochner* era Court upheld state quarantine laws against dormant Commerce Clause challenges. See text accompanying notes 102-04.

It is from this perspective that the definition of state measures prohibited by the Commerce Clause established in *Leisy* may be seen in its full significance. A state law "amounts essentially to a [prohibited] regulation of commerce . . . when it inhibits, *directly or indirectly*, the receipt of an imported commodity."¹¹² As the dissenters pointed out, there was no doubt that the invalidated state statute represented an otherwise valid exercise of a traditional state governmental function aimed at the health and moral welfare of the citizens.¹¹³ It was protectionist in neither purpose nor effect, since it prohibited the sale of all intoxicating liquors (except under certain specified circumstances) regardless of whether such liquor was imported or domestically produced. Accordingly, on a customs union understanding of the dormant Commerce Clause, the statute was unobjectionable. The statute did, however, unquestionably restrict the flow of imported liquor into Iowa compared to the position *ex ante*, and to this extent artificially isolated and separated the Iowa market from the rest of the nation. From the perspective of creating and maintaining a single national market, this is what rendered the statute objectionable and it was for this reason that the majority, who shared this perspective, held that it was inconsistent with the Commerce Clause.

This, then, is how the *Lochner* era Court constitutionalized free movement of goods: a common or uniform regulatory regime was necessary to maintain a single national market, and that regime was created by the Constitution when it granted Congress exclusive power to regulate interstate commerce. The uniform regime will be either the nationwide absence of regulation on interstate commerce or the national regulation imposed by Congress. In the words of Justice Bradley, one of the economic union's most powerful advocates on the Court:

[I]t may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.¹¹⁴

¹¹² *Leisy*, 135 US at 123 (emphasis added).

¹¹³ *Id.* at 128-30 (Gray dissenting). The proposition that under their police power the states could validly regulate domestic liquor had been established, against a due process challenge, in *Mugler v Kansas* two years earlier. 123 US 623, 661-64 (1887).

¹¹⁴ *Robbins v Shelby County Taxing District*, 120 US 489, 494 (1887) (invalidating state tax on basis that interstate commerce cannot be taxed at all by a state, even though tax does not discriminate against it).

In this manner the *Lochner* era Court read the economic doctrine of laissez-faire into the Constitution against the states under the dormant Commerce Clause as well as the Due Process Clause of the Fourteenth Amendment. But the national market vision that underlay it did not require a complete regulatory vacuum so that the Court did not necessarily apply this economic doctrine against the federal government. To the contrary, with matters it considered essential to the construction and efficient running of a national economy and marketplace, the *Lochner* era Court was quite willing to expand congressional regulatory power under the positive aspect of the Commerce Clause and so reduce that of the states under the negative.¹¹⁵ On the other hand, armed also with the weapon of substantive due process to limit state power over purely internal affairs, the single market vision was not necessarily compromised by denying federal power in areas for which the Court believed no regulation at all constituted the best form of uniform national regulation.¹¹⁶

¹¹⁵ If congressional power is exclusive under the positive aspect of the Commerce Clause, then any expansion in its scope reduces the remaining commerce power of the states. In other words, the Court's interpretation of the dormant Commerce Clause created a zero-sum game with respect to state and federal power over commerce.

¹¹⁶ Moreover, of those state statutes that were sustained by the Court against dormant Commerce Clause challenges during the *Lochner* era, a large number concerned the regulation of two specific subjects with respect to which there were compelling independent grounds for affirming concurrent state power. These two subjects—the very two subjects referred to in the dissenting opinion in *Leisy*—were state inspection and quarantine laws and state laws authorizing the erection of bridges and dams across navigable rivers. As to inspection and quarantine laws, an express provision of the Constitution clearly assumes the validity of the former and arguably implies that of the latter. Article I, section 10, clause 2 states that “[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.” Consequently, it would have been difficult to apply the exclusive power rationale to a subject that the Constitution expressly envisages the states regulating. As to bridges and dams across navigable rivers, the Court was faced not only with the precedent of *Cooley*, which could perhaps be read broadly to suggest that all regulation concerning navigable rivers is a “local” aspect of interstate commerce and thus subject to concurrent state and federal power, but also with Chief Justice Marshall's opinion in *Willson v The Black Bird Creek Marsh Co*, which is even more directly on point. In *Willson*, the case that introduced the idea (and terminology) of dormant Commerce Clause analysis, Marshall sustained a state statute authorizing a dam across a navigable creek flowing into the Delaware River, even though the dam obstructed navigation of the creek by a vessel sailing under a federal coastal license. Marshall held that the statute aimed at enhancing health and property values and, as it was neither “repugnant to the power to regulate commerce in its dormant state” nor in conflict with any congressional statute on the subject, was a valid exercise of the state's police power. 27 US (2 Pet) 145, 150-52 (1829). Faced with these two inherited instances of concurrent state power to “directly” affect interstate commerce, which it would have found difficult either to justify or to overrule, the *Lochner* era Court may simply have let them stand as “exceptions” whose application was limited to their specific subject-matters.

From the perspective of a single market, it is highly instructive to compare *Leisy's* definition of prohibited state laws under the Commerce Clause with a very famous one given by the European Court of Justice to determine which member state laws violate the equivalent, but far more specific, provision of European Union "constitutional" law—Article 30 of the Treaty of Rome.¹¹⁷ It is instructive because the latter definition, announced in the landmark 1974 case of *Procureur du Roi v Dassonville*,¹¹⁸ is universally acknowledged as representing the high-water mark of the European Court of Justice's judicial activism on behalf of the free movement of goods and the creation of a single market throughout Europe at the expense of the regulatory authority of the member states.

Article 30 of the Treaty of Rome provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States." In *Dassonville*, the European Court of Justice was asked to interpret the meaning of "measures having equivalent effect" to quantitative restrictions. Its answer, which is quoted in virtually every subsequent Article 30 case, was that "[a]ll trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" and are thus prohibited (unless they come within the limited exceptions listed in Article 36).¹¹⁹ Applying this test, the Court held that a 1934 Belgian law requiring imports of spirits to be accompanied by a certificate of origin issued by the Government of the originating country violated Article 30 and the principle of the free movement of goods throughout the Community, since by making the indirect importation of spirits via a third member state more difficult than direct importation from the producing state, the law could at least potentially restrict the total amount of spirits imported.¹²⁰ Although by including potential effects on imports the *Dassonville* definition goes even further in the direction of diluting state regulatory authority in favor of a

¹¹⁷ In calling the Treaty of Rome the "Constitution" of the European Union despite the fact that technically it is an international treaty, I am following what is now a standard view. For major works tracing the European Court of Justice's jurisprudence that transformed the Treaty into a constitution, see generally J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L J 2403 (1991); G. Federico Mancini, *The Making of a Constitution for Europe*, in *The New European Community: Decisionmaking and Institutional Change* 177 (Robert O. Keohane and Stanley Hoffman, eds, 1991).

¹¹⁸ Case 8/74, [1974] ECR 837.

¹¹⁹ Id at 852, 858-59.

¹²⁰ Id at 861-63.

single market than the Supreme Court did in *Leisy*, the critical parallel of including both direct and indirect effects on imports is obvious and striking. Moreover, just as we shall see that during the New Deal era the Supreme Court definitively shifted away from the constitutionalization of free movement, so too the European Court of Justice has very recently, and presumably in response to the enormous criticism of its activist, non-textually-justified position, begun to reset the balance between the goal of a single market and state regulatory authority.¹²¹

The result in *Leisy* was, of course, anathema to the prohibitionist movement and within a few months Congress had accepted Chief Justice Fuller's invitation to intervene on behalf of the states by passing the Wilson Act,¹²² whereby Congress authorized the states to do what *Leisy* said they otherwise constitutionally could not: subject imported intoxicating liquor, even if in original packaging, to the same restrictive state laws as domestically produced liquor. Faced with little choice, the Court upheld the Wilson Act,¹²³ but seven years later it resumed the fight against the prohibitionists for free movement of goods across state lines by declaring that the Commerce Clause grants to all individuals the right to import liquor for their own use so that Congress could only authorize states to regulate the "incidental" right of resale.¹²⁴ With the Court's withdrawal of its invitation to Congress, mail-order sales of liquor to residents of dry states flourished. Thomas Reed Powell relates an anecdote about the mailman in Illinois who remarked to a consignee, "Professor, your box of books is leaking."¹²⁵

The final chapter of the story before the Eighteenth Amendment closed the book for fourteen years was the Webb-Kenyon Act of 1913, which challenged the Court-protected right to import by federally prohibiting the importation of liquor in violation of state law.¹²⁶ In *Clark Distilling Co v Western Maryland Railway Co*, the Court reaffirmed the principle of *Leisy*, that under the Commerce Clause the interstate movement of intoxicants, like all other articles of commerce, was free from all state control absent

¹²¹ See Joined Cases C-267 & 268/91, *Keck and Mithouard*, [1995] 1 CMLR 101, 124-25 (ECJ 1993) (holding that the *Dassonville* definition no longer applies to member state laws restricting or prohibiting "certain selling arrangements," which now violate Article 30 only if they have a discriminatory effect on the marketing of imported goods).

¹²² See note 92.

¹²³ *In re Rahrer*, 140 US 545, 562-65 (1891).

¹²⁴ *Rhodes v Iowa*, 170 US 412, 424 (1898); *Vance v W.A. Vandercook Co*, 170 US 438, 444-45 (1898).

¹²⁵ Powell, *Vagaries and Varieties* at 157 (cited in note 85).

¹²⁶ See note 92.

congressional authorization, but nonetheless held the Act constitutional, partly on the basis of other recent precedents affirming what became known as the "federal police power."¹²⁷ Indeed, the *Leisy* principle survived as the governing interpretation of the Commerce Clause until it became very "distinguished" during the New Deal era.¹²⁸ More generally, despite its ultimate defeat on the liquor issue by the forces of prohibition, the national market vision which informed the majority's view of the scope of exclusive congressional power and its broad definition of forbidden state measures survived right up to the New Deal, even though its dominance was sometimes temporarily eclipsed and often challenged by those on the Court and elsewhere with a different vision of the purpose of the Commerce Clause, the proper judicial function, or both.¹²⁹

B. The New Deal Era

As we have seen, during the *Lochner* era the dominant interpretation of the negative implications of the Commerce Clause was that in the absence of congressional action, the movement of goods in interstate commerce was free from all state control. Thus, even where the Due Process Clause permitted the states to regulate a particular article of commerce (such as liquor) under its police power,¹³⁰ that power was limited by the Commerce Clause to the regulation of purely domestic trade in that good and did not extend to the regulation of imports of it from other states. Accordingly, although discrimination against out-of-state goods was certainly sufficient to constitute a violation of the Commerce Clause on the part of a state, it was not necessary.

During the period from 1938 to 1945, this strongly nationalist conception of the Commerce Clause as mandating a common market was rejected in favor of one that effectively understood

¹²⁷ 242 US 311, 320-26 (1917). Among the precedents cited were the *Lottery Case*, 188 US 321, 363-64 (1903) (Congress can prohibit interstate carriage of lottery tickets.), and *Hoke v United States*, 227 US 308, 323 (1913) (upholding Mann Act prohibition of interstate white slave trade).

¹²⁸ Technically, the *Leisy* principle was distinguished in *Duckworth v Arkansas*, to apply only to regulations of the use and sale of liquor and not its transportation through a state. 314 US 390, 393 (1941). In *Carter v Virginia*, *Leisy* was cited by Justice Frankfurter in his concurrence as "still on the books." 321 US 131, 139 (1944) (Frankfurter concurring). The Eighteenth Amendment overruled *Leisy* by granting the states concurrent power to enforce its provisions, but it was of course repealed in 1933 by the Twenty-first. Despite the technicality of distinguishing *Leisy*, it was effectively overruled in *Duckworth* and *Carter*.

¹²⁹ For the contemporary academic contribution to this debate, see the works cited in note 85.

¹³⁰ See note 113.

the clause as establishing only a customs union among the states, so that the only limitation it placed on their sovereignty was the duty of nondiscrimination against out-of-state goods. This represented a very significant enhancement of state power. The early New Dealers on the Court expressly defended this understanding of the clause as the only one consistent with the proper exercise of the judicial function and the presumption of constitutionality that attaches to the social and economic policy choices of elected legislatures, state or federal. Under their influence, the Court upheld virtually every state regulation challenged on Commerce Clause grounds until 1945 when Chief Justice Stone had a change of heart and introduced the balancing test of state and national interests that remains the official position today. Although even under this balancing test state interests are significantly more protected than under the common market position that prioritizes the national interest in unrestricted trade, there is good reason to believe this official position masks an actual practice of adhering to a nondiscrimination standard.¹³¹

The 1938 decision in *South Carolina Highway Department v Barnwell Brothers, Inc.*¹³² is the watershed one in which Justice Stone announced a radical reconsideration of the Court's dormant Commerce Clause jurisprudence, expressly pegging the judicial function under this clause to the substantially reduced one that it was newly employing for the Due Process Clause, and that he would officially unveil in his famous footnote two months later in *Carolene Products*.¹³³ In *Barnwell*, the Court upheld a South Carolina statute limiting the weight and width of all motor trucks using the state's highways against a Commerce Clause challenge, *even though* the Court accepted the trial court's findings that the statute resulted in a large amount of interstate commercial truck traffic being barred from the state.¹³⁴

Justice Stone's opinion for the Court contains two important points that emphatically mark the change in Commerce Clause analysis, both of which incorporate positions typical of New Deal constitutionalism. First, contrary to the national market conception, discrimination against interstate commerce is necessary for a violation of the Commerce Clause. As Stone states:

¹³¹ See Eule, 91 Yale L J at 474-84 (cited in note 88).

¹³² 303 US 177 (1938).

¹³³ See 304 US at 152 n 4 (1938).

¹³⁴ 303 US at 182.

The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. . . . It was to end these practices that the commerce clause was adopted.¹³⁵

Accordingly, apart from discriminating against interstate commerce "under the guise of regulation," the Commerce Clause permits the states to exercise their otherwise valid police powers for any purpose, even if in doing so they materially interfere with interstate commerce: "so long as the state action does not discriminate, the burden [on interstate commerce] is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."¹³⁶

This is clearly a quite different test from the one applied in *Leisy* and its progeny, where any state action restricting the interstate movement of goods was unconstitutional. Moreover, in a far less famous footnote than the one making a similar, if broader, point two months later, Justice Stone suggests that the rationale behind the discrimination standard is that "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."¹³⁷ Such a "representation-reinforcing" conception of the Commerce Clause is very far removed from that held by the Court during the *Lochner* era. Finally, on this point, Stone made clear that the assumption of the district court below (and of the *Lochner* era Court) that Commerce Clause review applies a more rigorous standard to state regulation of interstate traffic than does Due Process review to state regulation of purely intrastate traffic was mistaken: the same test applies in both cases.¹³⁸

Second, as to the nature of this common test under the Commerce Clause and the Fourteenth Amendment, the Court will presume the constitutionality of the legislative judgment and

¹³⁵ Id at 185-86 (citation omitted).

¹³⁶ Id at 189.

¹³⁷ Id at 185 n 2.

¹³⁸ Id at 187.

defer to it unless it is without rational basis. The determination of whether the burdens imposed on interstate commerce by even-handed state regulation are too great “is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest.” Justice Stone continued:

In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.¹³⁹

Here, nondiscriminatory regulation of a subject of local concern meant that the state has “acted within its province.” In resolving the second prong of the test, courts are no more entitled because interstate commerce is affected to sit as legislatures determining “fairly debatable questions as to [the legislative judgment’s] reasonableness, wisdom and propriety” than they are elsewhere.¹⁴⁰ This is a classic statement of New Deal judicial philosophy.

Barnwell was followed by a period of seven years in which the Court upheld under the dormant Commerce Clause virtually every challenged state regulation of goods that it considered.¹⁴¹ In

¹³⁹ Id at 190 (citation omitted).

¹⁴⁰ Id at 190-91.

¹⁴¹ I intend to exclude from the scope of this statement two other types of regulation considered under the dormant Commerce Clause. First, regulation concerning the free movement of persons (as distinct from goods). In *Edwards v California*, 314 US 160 (1941), the Court unanimously struck down the California “anti-Okie law” that made it a criminal offense to knowingly bring a nonresident indigent into the state. Although five justices held that the statute violated the dormant Commerce Clause, the other four held that the right to travel was a national right of citizenship granted by the Privileges and Immunities Clause of the Fourteenth Amendment. Moreover, considered under the rubric of the dormant Commerce Clause, the statute at issue in *Edwards* clearly failed even the scaled-back test of *Barnwell* since it patently discriminated against out-of-state indigents.

The second excluded category is state taxation, certain instances of which the Court continued to invalidate under the dormant Commerce Clause after 1938—often over vigorous dissents by the early New Deal justices (especially Justices Black and Douglas). See, for example, *McLeod v J.E. Dilworth Co*, 322 US 327, 330-31 (1944) (invalidating Arkansas sales tax). In excluding taxation cases from my treatment, I am following tradition, which considers them separately from ordinary “police power” regulation. See, for example, Justice Stone’s statement in *Di Santo v Pennsylvania*, 273 US 34, 43 (1927) that in state tax cases “other considerations may apply.” My own justification for this exclusion is that since “misuse” of the power of taxation to protect domestic goods is such a direct and well known danger to the free movement of goods that (even) customs unions typically place constraints on its exercise, it is again not inconsistent with the post-1938 conception of the dormant Commerce Clause that the Court should have continued to

Milk Control Board v Eisenberg Farm Products, decided in the year following *Barnwell*, the Court, over the dissents of the two remaining horsemen (Justices McReynolds and Butler), determined that a Pennsylvania statute setting a minimum price to be paid to milk producers in the state could constitutionally be applied to purchases of milk bound for sale out-of-state.¹⁴² The convicted milk dealer argued that the statute unconstitutionally regulated and burdened interstate commerce in that by raising the cost of milk to him, it had the same effect as an export duty.¹⁴³ The precise basis of the Court's decision is a little unclear. Justice Roberts's opinion refers to the fact that the effect on interstate commerce is incidental because only a small fraction of the milk produced in Pennsylvania is shipped out-of-state, and also distinguishes the measure from the New York statute invalidated in *Baldwin v Seelig* five years previously on the ground that the latter was a protectionist measure equivalent to a tariff barrier on imports since its sole aim was the converse one of applying New York's minimum-price law to out-of-state milk imported into the state.¹⁴⁴

To the extent that it was the nonprotectionist aim and effect of the Pennsylvania statute that justified it to the Court, we can again see the difference between free movement and nondiscrimination norms. The Court did not deny the defendant's claim that the state statute was equivalent to an export duty, but from the perspective of preventing states from discriminating against out-of-state goods this was irrelevant. In enacting the statute, Pennsylvania was electing to discriminate against its own milk in the New York market in order to ensure minimum prices to its producers, and this legislative decision does not raise the "representation-reinforcement" concerns that, according to Justice Stone's footnote in *Barnwell*, underlie the nondiscrimination standard. Pennsylvania milk dealers such as the defendant were represented in the legislature; they merely lost. But from the perspective of the national market, state measures restricting exports violate the principle of free movement of goods across state lines no less than import restrictions.¹⁴⁵ This perhaps ex-

carefully review state taxation measures. *Barnwell* did not abolish the Clause but scaled it back; in effect, certain types of state regulatory activity (not including taxation) were excluded from its scope.

¹⁴² 306 US 346, 352-53 (1939).

¹⁴³ *Id.* at 348.

¹⁴⁴ *Id.* at 353, distinguishing *Baldwin v Seelig*, 294 US 511 (1935).

¹⁴⁵ This is why, for example, in the European Union restrictions on exports are generally treated in the same manner as restrictions on imports. See EU Treaty Articles 16 (abolishing customs duties on exports) and 34 (prohibiting quantitative restrictions, or

plains the dissents of the two surviving horsemen, Justices McReynolds and Butler, who argued that "the Supreme Court of Pennsylvania properly concluded that under former opinions of this Court the questioned regulations constituted a burden upon interstate commerce prohibited by the Federal Constitution."¹⁴⁶ This clearly indicates that as far as they were concerned, the Court was departing from its Commerce Clause precedents.

This curt but restrained critique of the Court's reformulation and reinterpretation of the Commerce Clause constraints on the states by its two longest-serving members¹⁴⁷ was repeated as to content, if not as to style, two years later by the Court's newest member and most fervent advocate of a common market conception of the Commerce Clause. Justice Robert Jackson, in only his third month on the Court, unleashed a vehement attack on the new Commerce Clause philosophy and the resulting trend of extending state power over interstate commerce in his concurring opinion in *Duckworth v Arkansas*, decided in December 1941.¹⁴⁸ In *Duckworth*, the Court upheld under the Commerce Clause an Arkansas statute that required those transporting intoxicating liquor through the state to apply for and obtain a permit at the cost of a nominal fee. Distinguishing the *Bowman* and *Leisy* precedents on the basis that the present scheme of regulation was narrower and less restrictive in operation since it concerned transportation of liquor alone and not sale or use, Chief Justice Stone, in what was perhaps his first foray into the methodology of balancing state and national interests, held that the statute did not violate the Commerce Clause because "it does not . . . interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state."¹⁴⁹

Jackson concurred in the result but not in the reasoning, resting his decision on the Twenty-first Amendment, which had granted the states "a much greater control over interstate liquor traffic than over commerce in any other commodity," rather than on what he saw as "an unwise extension of state power over interstate commerce."¹⁵⁰ He then launched into a scathing attack on

measures having an equivalent effect, on exports).

¹⁴⁶ *Eisenberg*, 306 US at 354 (McReynolds and Butler dissenting).

¹⁴⁷ Justice Brandeis, who started sitting on the Court in 1915 in between Justice McReynolds (1914) and Justice Butler (1922), retired on February 13, 1939, two weeks before the decision in *Eisenberg*.

¹⁴⁸ 314 US 390, 397 (1941) (Jackson concurring).

¹⁴⁹ *Id.* at 393-96 (majority opinion).

¹⁵⁰ *Id.* at 397-99 (Jackson concurring).

the Court's expansive reading of state power under the Commerce Clause. "Recently the tendency has been to abandon the earlier limitations and to sustain more freely such state laws [affecting interstate business] on the ground that Congress has power to supersede them with regulation of its own." But, he continued, "[t]he practical result is that in default of action by us they [the states] will go on suffocating and retarding and Balkanizing American commerce, trade and industry." A little later he added, "The Court's present opinion and tendency would allow the states to establish the restraints and let commerce struggle for Congressional action to make it free."¹⁵¹

Justice Jackson then proceeded to reject the indivisible philosophy of judicial restraint that was the essential core principle of the earliest New Dealers on the Court and which underlay the majority's view that review under the Commerce and Due Process Clauses is identical. "If the reaction of this Court against what many of us have regarded as an excessive judicial interference with legislative action is to yield wholesome results, we must be cautious lest we merely rush to other extremes." It was one thing to strike down state laws regulating such purely internal matters as maximum hour and minimum wage laws, but quite another to protect national commerce from diverse regulatory regimes. He continued:

[T]o let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national society. It is the movement and exchange of goods that sustains living standards, both of him who produces and of him who consumes. This vital national interest in free commerce among the states must not be jeopardized.¹⁵²

Accordingly, he rejected the trend of adding to the permissible state restraints on national commerce.

Justice Jackson was of course reacting not merely to the results of the Commerce Clause cases since 1938, but also to the conception of the Clause held and vigorously asserted by three of the first four Roosevelt appointees, Justices Hugo Black, Felix Frankfurter, and William O. Douglas,¹⁵³ all of whom subscribed explicitly and firmly to a minimalist view of the judicial role in

¹⁵¹ *Id.* at 400-01.

¹⁵² *Id.* at 401.

¹⁵³ Justice Stanley Reed was Roosevelt's second appointee to the Court, in 1938, on the retirement of Justice Sutherland.

Commerce Clause cases, as elsewhere. These three consistently held that the Commerce Clause by itself empowers the Court to strike down only actual and patent discrimination against interstate commerce on the part of the states; anything short of this is a matter of legislative and not judicial policymaking. In doing so, of course, they categorically rejected the national market conception that Jackson sought to revive.¹⁵⁴

The strength and depth of Justice Jackson's belief in the vision of a single national market as expressed in this concurrence, and even more famously in his opinion for the Court in the 1949 case of *H.P. Hood & Sons, Inc v DuMond*,¹⁵⁵ was unique on the Court at this time and harks back to the earlier era and its defenders such as Justice Bradley. But Jackson was far from alone among his contemporaries in identifying and commenting upon the trend of enhancing state power in Commerce Clause cases. Justices Black, Frankfurter, and Douglas expressly referred to and relied on the unbroken line of cases that we have just looked at in their opinions dissenting from the partial abandonment of the *Barnwell* approach that was shortly to occur.¹⁵⁶ Moreover, in his Judge Stephens Lectures at the University of Kansas School of Law in 1946, published in book form with the title *A Declaration of Legal Faith* the following year, sitting Supreme Court Justice Wiley Rutledge described his view of the recent constitutional history of the positive and negative aspects of the Commerce Clause, and the connection between them, as follows:

¹⁵⁴ While all three justices joined the opinions for the Court upholding state regulatory power under the *Barnwell* approach, Black and Douglas dissented vigorously when the majority departed from this approach in *Southern Pacific*, and Black and Frankfurter did likewise in *H.P. Hood & Sons, Inc v DuMond*, 336 US 525 (1949). See text accompanying notes 173-74.

¹⁵⁵ In *Hood*, Justice Jackson argued that:

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy . . . has as its corollary that the states are not separable economic units.

. . .

The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.

. . .

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . .

336 US 525, 537-39 (1949).

¹⁵⁶ See text accompanying notes 173-74.

The negative pendulum [of the Commerce Clause], like the positive one, has swung back and forth between the state and the national poles of power. . . . At times, especially when the federal commerce power was by way of being contracted, the prohibitive arc was lengthening. The sum of the two effects, where they conjoined, was to outlaw the possibility of regulation in broad areas of commerce. But, just as in recent years the permissive scope for congressional commerce action has broadened . . . the prohibitive effect of the clause has been progressively narrowed. *The trend has been toward sustaining state regulation formerly regarded as inconsistent with Congress' unexercised power over commerce.* To the extent this has occurred, the positive and negative pendulums have moved more and more in unison, not as mutually exclusive but as more mutually tolerant.¹⁵⁷

The result, Justice Rutledge continued, is that "the scope of judicial intervention has been narrowed by the more recent trends, affecting both the affirmative and the prohibitive workings of the clause. Greater leeway and deference are given for legislative judgments, national and state, formally expressed."¹⁵⁸

In writing his scathing *Duckworth* concurrence, which he relied upon again two years later in a case upholding a Virginia statute that was a more restrictive version of the one in *Duckworth*,¹⁵⁹ Justice Jackson may have been fighting a battle for the Commerce Clause soul of now-Chief Justice Stone,¹⁶⁰ who, after declaring the terms of the general judicial retreat of 1938 in *Carolene Products* and *Barnwell*, appears to have continued the process of rethinking his position on the Commerce Clause after assuming his new office. He was perhaps influenced in this process by the views of Professor Noel Dowling, with whom he is known to have corresponded and whose highly influential 1940 article, *Interstate Commerce and State Power*, argued for a judicial policy of balancing state and national interests as a preferable middle position between the strict judicial restraint demanded by the earliest New Deal appointees and Justice Jackson's activism on behalf of the national market.¹⁶¹ In any event, by the time of *Parker v Brown*, decided in 1943, Chief Justice Stone appears to have departed somewhat from his earlier ap-

¹⁵⁷ Wiley Rutledge, *A Declaration of Legal Faith* 68-70 (Kansas 1947) (emphasis added).

¹⁵⁸ *Id.* at 68.

¹⁵⁹ *Carter v Virginia*, 321 US 131, 138 (1944) (Jackson concurring).

¹⁶⁰ Stone was sworn in as Chief Justice on July 3, 1941, and took his seat on October 6.

¹⁶¹ 27 Va L Rev 1, 19-28 (1940).

proach. Although upholding California's marketing scheme for raisins, which included a minimum-price regulation for producers, the Chief Justice did not expressly employ the available, and straightforward, nondiscrimination rationale used in *Barnwell*.¹⁶² Possibly the fact that, unlike the case with the minimum-price regulation upheld in *Eisenberg*, most of the raisins were exported to other states prompted Stone to at least acknowledge the national interest involved.¹⁶³ He stated the relevant test as follows: "the reconciliation of the power thus granted [to Congress under the Commerce Clause] with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved."¹⁶⁴ Because of the Secretary of Agriculture's policy of cooperating with the promotion of the state program, Stone was easily able to conclude that in this particular case both interests pointed towards upholding the state scheme.¹⁶⁵

Southern Pacific Co v Arizona, decided in 1945 over the dissents of Justices Black and Douglas, was the first major case since 1938 to invalidate a state statute regulating goods on Commerce Clause grounds.¹⁶⁶ It is also the case that is usually cited as formally ushering in the modern balancing approach to the Commerce Clause. This approach entails, as Chief Justice Stone makes clear in his majority opinion, a role for the Court in excess of that so emphatically stipulated in *Barnwell*; hence the dissents. On the other hand, even if taken at face value as a description of what the Court actually does in Commerce Clause cases, this new role explicitly acknowledges and takes into account state interests in a way that the *Lochner* era's national market vision did not.

At issue in *Southern Pacific* was an Arizona statute regulating the length of both passenger and freight trains operating in the state. Clearly, as in *Barnwell*, this statute had a significant impact on interstate transportation, requiring either detours to avoid the state, decoupling of longer trains before en-

¹⁶² *Parker*, 317 US 341, 362 (1943). *Parker* is better known as a leading antitrust case that established the "state action" doctrine, which holds that state action is immune from federal antitrust law. Since this doctrine is a matter of the interpretation of the Sherman Act rather than a principle of constitutional law (i.e., it does not say that the states could not constitutionally be subject to the Act), it is not a further instance of a preexisting constitutional constraint on state power lifted by the Roosevelt era Court.

¹⁶³ Compare *id* at 345 with text accompanying notes 142-46.

¹⁶⁴ *Id* at 362.

¹⁶⁵ *Id* at 368.

¹⁶⁶ 325 US 761, 783-84 (1945). Again, this statement does not include state tax cases or *Edwards v California* (free movement of persons). See note 141.

tering the state, or the added cost of shorter trains for the whole length of the interstate journey.¹⁶⁷ Citing *Parker* and his own 1927 dissenting opinion in *Di Santo v Pennsylvania* which had rejected the then-dominant direct-indirect burden test as too formalistic, Chief Justice Stone stated that between the extremes of statutes that are plainly either within or outside state power

lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.¹⁶⁸

Moreover, it is "this Court, and not the state legislature, [which] is under the commerce clause the final arbiter of the competing demands of state and national interests."¹⁶⁹

This duty of balancing state and national interests thus added a third prong to the two stated to exhaust the judicial task in *Barnwell*, for the existence of a rational basis for the state's legislative judgment to regulate train lengths even-handedly does not, contrary to *Barnwell*, automatically render the state statute valid. Rather, the strong national interest in an adequate, economical, and efficient railway system means that in passing safety measures, a state cannot go beyond what is "plainly essential" to achieve that end; only Congress may do so, through a nationwide rule.¹⁷⁰ In effect we are back at *Cooley*, for the decision whether there is a need for uniform regulation appears to determine the strength of the national interest involved. Indeed, in attempting to justify the different treatment of interstate highways and railways in the two cases, Chief Justice Stone stated that the former but not the latter were "local" under the *Cooley* test so that states have far more extensive control over highways than railways. And in terms of justifying this differential classification, Stone pointed to the fact that, unlike railways, the states build, own, and maintain highways and are responsible for their safety.¹⁷¹ In these circumstances, he argued, regulations that apply even-handedly to domestic and interstate shippers are a sufficient safeguard against regulatory abuse.¹⁷² This, of course, is

¹⁶⁷ Id at 773.

¹⁶⁸ Id at 768-69 (internal citation omitted), citing *Parker*, 317 US at 362, and *Di Santo v Pennsylvania*, 273 US 34, 43-45 (1927) (Stone dissenting).

¹⁶⁹ *Southern Pacific*, 325 US at 769.

¹⁷⁰ Id at 781-82.

¹⁷¹ Id at 783.

¹⁷² Id.

the real judgment that the Court is required to make under Stone's test, as it was under all the previous tests: when is non-discriminatory state regulation of interstate commerce sufficient to pass muster under the Commerce Clause. For the *Lochner* era Court, the general answer was never; since 1938, the answer had been always; now in 1945 the answer was seemingly less clear and categorical, as under the original *Cooley* test.

In dissent, Justices Black and Douglas predictably flung back at Chief Justice Stone his statements in *Barnwell* concerning the proper judicial role, and condemned the majority for abruptly departing from a long line of recent decisions. Justice Black accused the Court of once again acting as a "super-legislature" in overruling the state legislature's judgment for which there was a clear rational basis and in its place deciding that it is unwise government policy to regulate the length of trains. In another classic statement of the essential principle of New Deal constitutionalism, which applied to both the Commerce and Due Process Clauses, he stated that

the determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. Someone must fix that policy—either the Congress, or the state, or the courts. A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government.¹⁷³

In a separate dissent, Justice Douglas restated for the umpteenth time the early New Dealers' basic view that "the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted" and that "[w]hether the question arises under the Commerce Clause or the Fourteenth Amendment, . . . the [state] legislation is entitled to a presumption of validity."¹⁷⁴

After the flurry of Commerce Clause activity that we have documented during the late 1930s and 1940s ending with *Southern Pacific* and *Hood*—which despite Justice Jackson's nationalist rhetoric appears to have invalidated a New York milk regula-

¹⁷³ Id at 789 (Black dissenting). See also id at 788 n 4 (accusing Court of acting as a "super-legislature"); id at 790-91 (condemning majority for departing from a long line of precedents).

¹⁷⁴ Id at 795-96 (Douglas dissenting).

tion scheme on straightforwardly protectionist grounds¹⁷⁵—the Court largely forgot about the Clause until the mid-1970s when its interest waxed again for a period of about ten years. During this period, however, the Court made no more than interstitial changes to the immediate post-war approach.¹⁷⁶ There is a good deal of academic controversy over whether in terms of the Court's actual practice, official doctrine aside, this approach is more accurately described as balancing state and national interests case-by-case or as promoting a constitutional norm of equal treatment, whereby state laws are invalidated only, but then automatically, if they have (in one version) discriminatory impact on out-of-state goods or (in the other version) a protectionist purpose.¹⁷⁷ Under the balancing test, discrimination would be sufficient but not necessary for a violation, as arguably in *Southern Pacific* itself. But whichever of these positions one takes, it seems clear that the modern approach is both more permissive towards state regulatory authority than the nationalist model of the *Lochner* era and less permissive than during the New Deal period itself.

IV. PREEMPTION

The third way in which the Court enhanced state regulatory power during the New Deal era was through its modification of the doctrine of preemption. Congress's power to preempt state law and state lawmaking authority in an area of otherwise concurrent constitutional power is clearly an enormously important one from the perspective of federalism. Despite its great practical impact on the states, however, this power is generally assumed to raise no difficult issues—other perhaps than that of when it has been exercised—and certainly no interesting ones. Accordingly, it has largely been ignored by constitutional scholars.

In previous work, I have attempted to point out what these scholars have missed in so doing and how the general assumption they share is seriously mistaken.¹⁷⁸ For present purposes, let me summarize the relevant parts of my previous work in the following four propositions. First, the principle of preemption is independent of, and additional to, the principle of the supremacy of federal law since unlike the latter it is not limited to cases of actual conflict between state and federal law.¹⁷⁹ Second, Congress's

¹⁷⁵ See Regan, 84 Mich L Rev at 1262-68 (cited in note 88).

¹⁷⁶ See Eule, 91 Yale L J at 427 (cited in note 88).

¹⁷⁷ See note 88.

¹⁷⁸ See generally Gardbaum, 79 Cornell L Rev 767 (cited in note 3).

¹⁷⁹ Accordingly, the power of preemption cannot derive from the Supremacy Clause,

power to preempt state law and lawmaking authority, as contrasted with the operation of the Supremacy Clause to trump state laws that conflict substantively with federal enactments, was not definitively acknowledged and established until the beginning of the second decade of this century during the *Lochner* era when the Court, as we have seen in the section on the dormant Commerce Clause, was generally animated by concerns for the national market and the uniformity of regulation.¹⁸⁰ Third, from the time that the power of preemption was established until the New Deal era, the Court held that federal legislation in a given area automatically preempts state law and lawmaking authority in that same area, just as a federal law automatically trumps conflicting state laws under the Supremacy Clause.¹⁸¹ Fourth, during the New Deal era, the Court substantially revised its preemption doctrine by replacing this automatic feature with a new requirement that state law is preempted if and only if Congress intends the federal statute in question to have this effect, and has clearly manifested such intent.¹⁸² This change from a presumption of preemption to one of nonpreemption enhanced the constitutional position of the states and was part of the Court's attempt to restructure and reset the federalism balance in the new context.¹⁸³ In my earlier work, I have defended each of these four propositions at considerable length and it is not necessary or appropriate to repeat my entire analysis here. Instead, I will focus only on the three historical claims, which are the most relevant ones for present purposes, and even here only to the extent necessary to show that the pattern they disclose is entirely consistent with that seen in the other areas already analyzed.¹⁸⁴

The Supreme Court did not clearly and unequivocally recognize a congressional power of preemption until the second decade of the twentieth century. At this time, the clash between the increasingly exercised regulatory powers of both state and federal governments, and the need perceived by the Court for uniform regulation that we saw in the dormant Commerce Clause context, made resolution of an issue that had remained unresolved—and at times highly controversial—throughout the nineteenth

but stems rather from the Necessary and Proper Clause of Article I. See *id.* at 770-85.

¹⁸⁰ See *id.* at 795-805.

¹⁸¹ *Id.* at 801-05.

¹⁸² *Id.* at 805-07. See also David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U Colo L Rev 51, 53-55 (1973).

¹⁸³ Gardbaum, 79 Cornell L Rev at 806 (cited in note 3). For a similar argument, see Lessig, 1995 S Ct Rev at 167-68 (cited in note 15).

¹⁸⁴ The rest of this section is largely a summarized version of my argument in Gardbaum, 79 Cornell L Rev at 795-807 (cited in note 3).

century particularly urgent. For the forty years or so prior to 1910, the Court had exhibited both confusion and ambivalence regarding the impact of federal legislation on the states: does the general, constitutionally concurrent state lawmaking authority in a given area end where there is *any* federal legislation of that same area (preemption), or is it only the case that particular state laws are trumped where they actually *conflict* with the content of the federal legislation (supremacy)?¹⁸⁵ The period from 1912-1920 marked the end of the prevailing confusion, with the Court issuing for the first time consistently clear and explicit statements of genuine preemption principles: it is not merely current conflicting state laws that are overridden by a federal law on the same subject, but also the general authority of the state to enact any laws in that area in the future—even those that are consistent with and supplement federal law.¹⁸⁶ The effect of congressional action is to end the concurrent power of the states and thereby to create exclusive power at the federal level from that time on; a result that the principle of supremacy cannot by itself accomplish.

As I have claimed in my previous work, the first case in which the Court invalidated a state statute on preemption grounds was *Southern Railway Co v Reid*, decided in 1912.¹⁸⁷ In *Reid*, the Court held that the Interstate Commerce Act had “taken possession of the field” of interstate railroad rate regulation and that consequently both existing state laws (including the North Carolina statute requiring transportation of tendered freight at issue) and future exercises of state lawmaking authority in the field had been “superseded.” The Court stated that “if the State and Congress have a concurrent power, that of the

¹⁸⁵ See, for example, *Morgan's Steamship Co v Louisiana Board of Health*, 118 US 455, 464 (1886) (“whenever Congress shall undertake to provide . . . a general system of quarantine . . . all state laws on the subject will be abrogated, at least so far as the two are inconsistent”); *Reid v Colorado*, 187 US 137, 146-48 (1902) (stating both positions).

¹⁸⁶ Thus in *Charleston & Western Carolina Railway Co v Varnville Furniture Co*, Justice Holmes stated

that [the alleged absence of conflict between state and federal law] is immaterial [under preemption analysis]. When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.

237 US 597, 604 (1915) (citation omitted). In *New York Central & Hudson River Railroad Co v Tonsellito*, Justice McReynolds stated that “Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State.” 244 US 360, 362 (1917).

¹⁸⁷ 222 US 424 (1912). See Gardbaum, 79 Cornell L Rev at 803 (cited in note 3); see also Lessig, 1995 S Ct Rev at 166 (cited in note 15).

State is superseded when the power of Congress is exercised.”¹⁸⁸ All that was needed to find preemption was “specific action” by Congress “covering the matters which the statute of North Carolina attempts to regulate.”¹⁸⁹

Having in *Reid* employed the newly acknowledged power of preemption to strike down a state statute for the first time, the Court was to do so on many other occasions between 1912 and 1920; this was, of course, in addition to those state statutes struck down even in the absence of federal action under the dormant Commerce Clause.¹⁹⁰ An important and distinctive feature characterized the congressional power of preemption that the Court acknowledged and applied for the first time during these years: preemption was an automatic consequence of federal legislative action in a given field. The Court made no systematic reference to congressional intent as the necessary trigger for preemption (or to “occupation of a field” as the evidence of that intent); rather, as it stated in *Reid*, where the states and Congress have concurrent power, “that of the State [was] superseded when the power of Congress [was] exercised.”¹⁹¹ Or, as Chief Justice White stated the following year, “[I]t must follow in consequence of the action of Congress [the Hepburn Act of 1906] that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject.”¹⁹²

The preemptive effect of federal legislation was conceived of as an automatic feature of the Constitution’s structure—just like the trumping effect of federal law on conflicting state law under the Supremacy Clause. Indeed, this conception of preemption was derived by the Court from its invention of a new jurisdictional category of “latent exclusivity” that it thought followed from the “paramount” nature of federal power over interstate commerce granted by the Supremacy Clause: Congress had something less than exclusive power from the outset but more than merely concurrent power with the states. Under latent exclusivity, the states had “permissive” power to act until Congress exercised its “inherent” power under the Commerce Clause,¹⁹³

¹⁸⁸ *Id.* at 436.

¹⁸⁹ *Id.* at 437.

¹⁹⁰ See Alexander Bickel and Benno Schmidt, *The Judiciary and Responsible Government, 1910-1921* 264-76 (Macmillan 1984) for details of some of the other preemption decisions during this decade.

¹⁹¹ *Reid*, 222 US at 436.

¹⁹² *Chicago, Rock Island & Pacific Railway Co v Hardwick Farmers Elevator Co*, 226 US 426, 435 (1913).

¹⁹³ Justice Harlan first used these terms in *Reid v Colorado*, 187 US 137, 148-50

preemption was thus originally understood more as a doctrine concerning the constitutional allocation of power over commerce than in the modern sense as a general, discretionary power of Congress.

The modern approach to preemption replaced this original one during the New Deal era when the Court first qualified the power by rejecting its automatic operation in favor of a new requirement that a federal statute would have preemptive effect only if Congress clearly and affirmatively manifested its intent that it should do so. As the Court frequently pointed out, this new understanding created a presumption of nonpreemption—in place of what in effect was previously an irrebuttable presumption of preemption. The first case in which the Court clearly announced and applied its new approach was *Mintz v Baldwin*,¹⁹⁴ decided in 1933, after which the Court consistently reaffirmed the centrality of intent throughout the New Deal period, culminating in the *locus classicus* of modern preemption doctrine, *Rice v Santa Fe Elevator Corp.*,¹⁹⁵ decided in 1947.

In *Mintz*, the issue was the continuing validity of state regulation to prevent infectious cattle diseases in light of Congress's Cattle Contagious Diseases Acts of 1903 and 1905.¹⁹⁶ Having found no substantive conflict between the state and federal statutes in an area of concurrent power, the Court stated the circumstances under which state authority can nonetheless be preempted as follows:

Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order [at issue]. The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear.¹⁹⁷

Although the Court cited two cases from the founding period of preemption in support of this statement, nothing in these or any other cases from that period gave such a central and necessary role to congressional intent in preemption analysis.¹⁹⁸

(1902).

¹⁹⁴ 289 US 346 (1933).

¹⁹⁵ 331 US 218 (1947).

¹⁹⁶ 289 US at 348. The Acts in question were 32 Stat 791 (1903) and 33 Stat 1263 (1905).

¹⁹⁷ *Mintz*, 289 US at 350 (citation omitted).

¹⁹⁸ Although there were a few isolated references to congressional intent in cases prior to 1912, such as the 1902 case of *Reid v Colorado*, 187 US at 148, once preemption was firmly and unequivocally established, there was little if any reference to clearly mani-

The qualification of Congress's power of preemption was both a reaction to the increased exercise of existing federal legislative authority prior to 1937 as the Roosevelt Administration attempted to counter the effects of the Great Depression, and an intrinsic part of the Court's restructuring of federalism after 1937. The new constitutional strategy was the reverse of the old one: in place of relatively constrained federal powers coupled with the automatic preemption of the states when these powers were exercised, the Court combined the enlargement of the permissible scope of congressional power with a presumption that state authority survives the exercise of these powers unless clearly ended by Congress. The most explicit statement of this reconstruction of federalism came from Justice Frankfurter, albeit in 1947 and in the context of a dissenting opinion that expressed an even stronger presumption against preemption than the majority was willing to impose. Frankfurter stated as follows:

Federal legislation . . . must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.¹⁹⁹

A similar statement of the connection between federal commerce power and preemption had been made by Justice Stone shortly before he assumed the office of Chief Justice in 1941, also in dissent. He wrote that

At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power [as the majority was here engaging in] by vague inferences as to what Congress might have

festated congressional intent to preempt as a necessary condition of the exercise of the power. See text accompanying notes 191-92.

¹⁹⁹ *Bethlehem Steel Co v State Labor Relations Board*, 330 US 767, 779-80 (1947) (Frankfurter dissenting).

intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.²⁰⁰

Indeed, Stone sought to narrow Congress's power of preemption as far as possible without denying it altogether, for in his dissent he relied on

the long established principle of constitutional interpretation that an exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be fairly reconciled or consistently stand together."²⁰¹

While this statement could be read to deny the existence of a separate power of preemption altogether by asserting that only the principle of supremacy limits concurrent state power—a radically narrow view of federal power that harks back to nineteenth century controversies on the issue²⁰²—Justice Stone's earlier statement makes clear what he meant. Only an unambiguous express preemption provision (with which the attempted exercise of state power would conflict) or an actual first-order conflict between the substance of federal and state laws should operate to preempt the states.²⁰³

Whereas in *Mintz*, the Court did not specify how Congress can clearly manifest its intention to preempt the states but only that it is required to do so, *Rice* sets out both the classic statement of the presumption against preemption and specifies the various ways in which the necessary congressional intent to pre-

²⁰⁰ *Hines v Davidowitz*, 312 US 52, 75 (1941) (Stone dissenting). *Hines* was an atypical preemption case in that it dealt with a state statute regulating the registration of aliens, a particular issue over which according to Black's opinion for the Court, "[a]ny concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as its power to tax." *Id.* at 68 (majority opinion). And again, even if power over this subject is not exclusive to Congress (and the Court did not consider it necessary to consider this question), it "is not an equal and continuously existing concurrent power of state and nation, but [rather] whatever power a state may have is subordinate to supreme national law." *Id.* (footnote omitted). Because of the traditional claims of the national government on all matters dealing with immigration, naturalization, and aliens, the majority in *Hines* effectively treated this subject as uniquely governed by the old and generally discarded conception of latent exclusivity, so that any federal legislation in the area would preempt the states.

²⁰¹ *Id.* at 80 (Stone dissenting), quoting *Sinnot v Davenport*, 63 US (22 How) 227, 243 (1859).

²⁰² See Gardbaum, 79 Cornell L. Rev. at 787-800 (cited in note 3).

²⁰³ This view of Congress's power of preemption was shared, as we shall see, by Justice Frankfurter. See text accompanying notes 207-08.

empt may be evidenced. Writing for the Court, Justice Douglas began his preemption analysis by setting out the modern first principles:

Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act [United States Warehouse Act] unless that was the clear and manifest purpose of Congress.²⁰⁴

He proceeded to list several ways in which such a purpose may be evidenced:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject [citing *Hines*] Or the state policy may produce a result inconsistent with the objective of the federal statute.²⁰⁵

It may be noted that Douglas omitted from this list the most straightforward and unproblematic way for Congress to manifest its intent to preempt: namely, by express provision. This omission is particularly surprising since the majority held the challenged state law was (partially) preempted on this ground. It interpreted the 1931 Amendments to Section 29 of the United States Warehouse Act that “the power, jurisdiction, and authority” of the Secretary of Agriculture conferred under the Act “shall be exclusive with respect to all persons” licensed under the Act as clearly manifesting Congress’s purpose of “terminating the [previous] dual system of regulation.”²⁰⁶

It might well be thought that Douglas’s specification of the ways in which Congress may evidence its “clear and manifest purpose” to preempt actually dilutes the New Deal Court’s presumption against preemption in that by recognizing “implied preemption,” it accepts as conclusive evidence of congressional

²⁰⁴ *Rice*, 331 US at 230 (citation omitted).

²⁰⁵ *Id* (citation omitted). Justice Douglas acknowledged the distinction between the congressional power of preemption and the principle of supremacy when he added, “[i]t is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the states undisturbed except as the state and federal regulations collide.” *Id* at 230-31.

²⁰⁶ *Id* at 233-34, quoting 39 Stat 486, 490 (1916), as amended in 46 Stat 1463, 1465 (1931).

purpose actions that seem far from unambiguous in this regard. This, at least, was the view of Justices Frankfurter and Rutledge in dissent. Frankfurter reiterated the narrower view of Congress's power of preemption that he had expressed a few months earlier in *Bethlehem Steel Co v New York State Labor Relations Board*²⁰⁷ and that he shared with Chief Justice Stone, who had died the previous year, although of course even the majority view was far more restrictive than the automatic conception that the Court had unanimously rejected. According to Frankfurter, who disagreed with the majority's interpretation of the relevant section of the Act, the states are preempted only by a clear and express congressional provision or as the result of an actual, irreconcilable conflict between state and federal laws.²⁰⁸

V. INCORPORATION OF THE BILL OF RIGHTS AGAINST THE STATES

The issue of the precise relationship of the constitutional limitations imposed on the states by the Fourteenth Amendment to those imposed on the federal government by the Bill of Rights has had a long and troublesome history. Beginning in the mid-1880s, the Court acknowledged for the first time that some of the rights included in the Bill of Rights may also bind the states because they are so fundamental that their violation would constitute a denial of due process of law. Under this "fundamental rights" approach to the issue, the Court during the 1920s in particular applied a number of the more central rights contained in

²⁰⁷ 330 US 767, 779-80 (1947) (Frankfurter separate opinion).

²⁰⁸ Justice Frankfurter expressed these views as follows:

And so we have once more the duty of judicially adjusting the interests of both the Nation and the State, where Congress has not clearly asserted its power of preemption so as to leave no doubt that the separate interests of the States are left wholly to national protection.

...

Suffice it to say that due regard for our federalism . . . favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered.

Rice, 331 US at 241 (Frankfurter dissenting). He concluded that, "[s]o long as full scope can be given to the . . . [federal] legislation without undermining non-conflicting State laws, nothing but the clearest expression should persuade us that the federal Act wiped out [State authority]." *Id* at 245.

It was not until the early 1990s that the Court made overtures toward Stone's and Frankfurter's position by imposing a "plain statement rule" of statutory interpretation in preemption cases, *Gregory v Ashcroft*, 501 US 452, 460-61 (1991) (rule requires Congress to make clear in the language of the statute if it intends to preempt state law), although the Court does not appear to consider this "rule" inconsistent with the doctrine of implied preemption, which it continues to recognize.

the first eight amendments—such as free speech and free exercise of religion—against the states for the first time. By contrast, the record of the Court during the New Deal era was less expansive on the subject, bringing to a virtual halt this previous trend of incorporating new constitutional rights against the states—a trend that would not start again until the 1960s.

The fundamental rights approach that the Court adopted when it considered the general issue of the relationship of the Fourteenth Amendment to the Bill of Rights for the first time in the 1884 case of *Hurtado v California*, was simply a particular application of substantive due process under which all fundamental rights, including the right to contract, were deemed part of the “liberty” protected against the states by the Due Process Clause of the Fourteenth Amendment.²⁰⁹

In *Twining v New Jersey*, the Court affirmed this approach to the Bill of Rights and set out at considerable length its methodology for applying it in the context of rejecting the defendant’s claim that a right against self-incrimination was guaranteed against the states. The Court stated that although some of the rights in the Bill of Rights may also apply against the states, this is not because of their enumeration in the first eight amendments, but because they are “included in the conception of due process of law.”²¹⁰ Under this approach, the key question is whether “the exemption from self-incrimination is . . . a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government.”²¹¹ In answering this broad question, however, the Court looked overwhelmingly to the historical meaning of “due process of law” within the common law tradition, which it stated to be an important, albeit not necessarily a conclusive, aid. Its historical analysis focused first on certain familiar “great instruments [of the English common law] in which we are accustomed to look for the declaration of . . . fundamental rights,” such as Magna Carta, the Petition of Right, and the Bill of Rights (1689), and then on the question whether the privilege was conceived in the United States to be fundamental and inherent in the concept of due process at the time the first ten amendments were proposed and ratified.²¹² Finding that in neither case was

²⁰⁹ 110 US 516, 535-36 (1884) (holding that Fifth Amendment right to indictment by grand jury in federal felony cases does not apply to the states).

²¹⁰ 211 US 78, 99 (1908).

²¹¹ *Id.* at 106.

²¹² *Id.* at 107-10. Altogether the Court’s historical analysis of the meaning of due process of law within the common law tradition occupied over fifteen of the sixteen pages of

the privilege against self-incrimination considered an essential part of due process of law, the Court concluded that there was no reason to strain the meaning of the term contained in the Fourteenth Amendment by including this privilege within it.²¹³

Nonetheless, under this fundamental rights approach, the *Lochner* era Court did apply a number of important rights contained in the Bill of Rights against the states for the first time. In 1897, the Court held that the right to compensation for private property taken for public use contained in the Takings Clause of the Fifth Amendment was also guaranteed against the states under the Fourteenth Amendment.²¹⁴ In *Meyer v Nebraska*, decided in 1923, the Court declared that the "liberty" guaranteed by the Due Process Clause includes not only the right of the individual to contract but also, among other things, "the right of the individual . . . to worship God according to the dictates of his own conscience,"²¹⁵ and it clarified this language by explicitly holding that the Fourteenth Amendment includes protection of the right to free exercise of religion in *Pierce v Society of Sisters* in 1925.²¹⁶ In *Gitlow v New York*, also decided in 1925, the Court acknowledged that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States."²¹⁷ Finally, in *Powell v Alabama* in 1932, it held that the indigent's right to appointed counsel in capital cases, which was part of the Sixth Amendment guarantee of assistance of counsel, applied to the states as well as to the federal government.²¹⁸

In principle, and notwithstanding vigorous opposition from Justices Black and Douglas for the apparent inconsistency, the

the opinion dealing with the defendant's due process claim.

²¹³ After concluding its lengthy historical analysis, the Court added that

[e]ven if the historical meaning of due process of law . . . did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. . . . It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law.

Id. at 113.

²¹⁴ *Chicago, Burlington and Quincy Railroad Co v Chicago*, 166 US 226 (1897).

²¹⁵ 262 US 390, 399 (1923).

²¹⁶ 268 US 510, 534-35 (1925).

²¹⁷ 268 US 652, 666 (1925). The "incorporation" of these two First Amendment rights was explicitly reaffirmed during the 1930 term. See *Stromberg v California*, 283 US 359, 368 (1931) (freedom of speech); *Near v Minnesota*, 283 US 697, 707 (1931) (freedom of the press).

²¹⁸ 287 US 45, 59-73 (1932).

Court during the New Deal period continued to adhere to the *Lochner* era's fundamental rights approach to the Due Process Clause as it applied specifically to the Bill of Rights, even though it rejected this approach (under the guise of substantive due process) as a general one for interpreting the clause. In practice, however, the Court subtly reinterpreted the fundamental rights approach in a way that made it significantly more difficult to successfully claim that state infringement of a right recognized against the federal government was a violation of due process. As a result, the very clear trend over the previous fifteen years of recognizing new constitutional rights against the states was largely brought to a halt and did not really emerge again until the entire approach was abandoned in favor of "selective incorporation" during the 1960s, when most of the Bill of Rights dealing with the rights of the criminally accused was incorporated against the states.²¹⁹

Palko v Connecticut, decided in 1937, was the case in which the Court, while ostensibly adhering to the fundamental rights approach, nonetheless reinterpreted it in a manner that in practical terms was far more favorable to the states. *Palko* held that a state statute permitting appeal by the state for error of law and retrial in criminal cases did not violate the Due Process Clause even though the Court assumed for the sake of argument that such a statute would have violated the Double Jeopardy Clause of the Fifth Amendment if enacted by Congress.²²⁰

As we have seen, the test announced in *Twining*, although framed in broad and universalistic terms, focused in its application primarily on whether the particular right at issue could be deemed fundamental or essential to due process of law as understood within the common law tradition. After 1908, and particularly in the 1920s when the Court incorporated most of the First Amendment, this contextual methodology became even more central and conclusive than in *Twining* itself. Thus, in *Meyer*, the

²¹⁹This is not to say that the Court failed to protect the constitutional rights that had already been incorporated against the states. Indeed, as is well-known, in a series of cases starting with *Schneider v State*, 308 US 147, 162-63 (1939), and culminating in the second flag salute case, *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943), the Court exhibited unprecedented concern for freedom of speech and of the press. Moreover in *Cantwell v Connecticut*, 310 US 296, 303-07 (1940), the Court invalidated a state statute on free exercise of religion grounds for the first time. It is, however, to cast some doubt on the received wisdom that the New Deal Court was an unqualified defender of civil liberties. For a discussion of the Hughes Court as the source of modern First Amendment jurisprudence, see David Hildebrand, *Free Speech and Constitutional Transformation*, 10 Const Comm 133 (1993). On the Hughes Court's civil rights record, see Higginbotham and Smith, 76 Minn L Rev 1099 (cited in note 14).

²²⁰302 US 319, 322-23 (1937).

Court stated that the Due Process Clause of the Fourteenth Amendment includes all "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,"²²¹ and elsewhere it said that the clause requires state action to "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²²² Indeed, only three years before his opinion for the Court in *Palko*, Justice Cardozo had summarized the test applied in such cases as *Hurtado*, *Twining*, and *Powell* as whether a state violates a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²²³

In *Palko*, after expressly rejecting the doctrine of total incorporation and listing both those rights that the Court had and had not previously incorporated, Justice Cardozo sought to identify the "rationalizing principle" that explains and justifies the line of division between the two lists. He suggested that this principle was whether the right in question was "of the very essence of a scheme of ordered liberty." He continued as follows:

Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [the right to trial by jury and immunity from prosecution except upon indictment]. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.²²⁴

At this point, Cardozo made explicit in a footnote exactly what he had in mind: "Compulsory self-incrimination is part of the established procedure in the law of Continental Europe. . . . Double jeopardy too is not everywhere forbidden."²²⁵ This appears to create an additional hurdle for any right that is claimed to be "fundamental." Henceforth, not only must the right be fundamental to the notion of liberty within the particular context of the history and practices of the common law tradition, but also

²²¹ *Meyer*, 262 US at 399.

²²² *Herbert v Louisiana*, 272 US 312, 316 (1926).

²²³ *Snyder v Massachusetts*, 291 US 97, 105 (1934) (citation omitted).

²²⁴ *Palko*, 302 US at 325-26 (citation and footnotes omitted).

²²⁵ *Id* at 326 n 3 (citation omitted).

universally; only such rights as are universally recognized as fundamental to liberty and justice across different legal systems are part of the due process of law for the purpose of the Fourteenth Amendment. Of course, as the decisions of the Court over the next twenty years were to prove, few of those rights not already recognized by the Court could realistically pass muster under such a test. Justice Butler dissented from the decision.²²⁶

This new universalistic inquiry and its implications were identified thirty years later by Justice Byron White in the heyday of the Warren Court's rejection of the fundamental rights approach. Writing for the Court in the 1968 case of *Duncan v Louisiana*, which held the Sixth Amendment right to jury trial applicable to the states and thereby overruled the precedents to the contrary,²²⁷ Justice White explained the differences between the *Palko* test and the current one as follows:

In one sense recent cases applying provisions of the first eight Amendments to the States represent a new approach to the 'incorporation' debate. Earlier the Court can be seen as having asked . . . if a civilized system could be imagined that would not accord the particular protection. [Citing *Palko*.] The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.

White then spelled out the practical difference between these two approaches. He continued,

When the inquiry is approached in this way the question whether the State can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases. . . . A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has

²²⁶ Id at 329 (Butler dissenting).

²²⁷ 391 US 145, 157-58 (1968), overruling *Walker v Sauvinet*, 92 US 90 (1875), *Maxwell v Dow*, 176 US 581 (1900), *New York Central Railroad Co v White*, 243 US 188 (1917), and *Wagner Electric Manufacturing Co v Lyndon*, 262 US 226 (1923).

undertaken to construct such a system. . . . In every State . . . the structure and style of the criminal process . . . are the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.²²⁸

Although White correctly dates the “old”, universal approach to Cardozo’s opinion in *Palko*, it would be inaccurate to paint the fundamental rights approach *as a whole* with this brush. As we have seen, prior to *Palko*, the Court had consistently emphasized that whether a right is to be deemed fundamental for due process purposes is to be determined contextually within the common law tradition.

Having in its holding in *Palko* rejected application of the Fifth Amendment’s Double Jeopardy Clause to the state statute at issue in the case, while approving in dicta previous decisions refusing to incorporate the Fifth and Sixth Amendment rights against self-incrimination, to prosecution by indictment, and to trial by jury,²²⁹ the Court five years later conspicuously refused to apply its own 1938 expansion of the Sixth Amendment right to counsel against the states. In *Johnson v Zerbst*, over the dissents of Justices Butler and McReynolds, the Court had held that the Sixth Amendment requires federal courts to provide indigent defendants with appointed counsel in all cases where their life or liberty is at stake.²³⁰ In its 1942 decision in *Betts v Brady*, however, the Court held that this rule does not apply to the states since criminal trials conducted without defense counsel are not necessarily either “shocking to the universal sense of justice” or “offensive to the common and fundamental ideas of fairness and right” that define the due process limitation on state power under the Fourteenth Amendment.²³¹ Distinguishing the 1932 *Powell* precedent as applying only to capital cases, the Court held that due process requires appointment of counsel only in those particular trials where the “totality of facts” indicate that counsel is necessary to ensure “fundamental principles of fairness.”²³² *Betts* was later famously overruled in the 1963 case of *Gideon v Wainwright*, which fully incorporated the Sixth Amendment right.²³³

In fact, the only major new constitutional provision that the Court applied against the states between *Palko* and the Warren

²²⁸ *Duncan*, 391 US at 149-50 n 14.

²²⁹ *Palko*, 302 US at 323-24 (citations omitted).

²³⁰ 304 US 458, 462-63 (1938).

²³¹ 316 US 455, 462, 473 (1942).

²³² *Id.* at 462-64.

²³³ 372 US 335, 345 (1963).

Court era was the Establishment Clause of the First Amendment, which it incorporated in the 1946 case of *Everson v Board of Education*,²³⁴ although it was not until 1962 that the Court actually invalidated state action on Establishment Clause grounds.²³⁵ In the well known 1947 case of *Adamson v California*, the Court affirmed *Twining* and the *Palko* dicta by rejecting the claim that the privilege against self-incrimination bound the states under the Due Process Clause.²³⁶ Writing for the Court, in a generally unilluminating opinion (at least in comparison with the other two opinions in the case), Justice Reed appears to have applied the type of abstract, "natural law"-style of reasoning called for under the *Palko* standard; certainly there was none of the detailed historical and contextual analysis that characterized the Court's opinion in *Twining*.²³⁷ Reed stated that "[i]t seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it." And again, "[w]hen evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes."²³⁸

The case is best known as the one in which Justice Black (in dissent) first set out in full force his theory of total incorporation of the Bill of Rights by the Fourteenth Amendment, and Justice Frankfurter responded by rejecting total or selective incorporation in favor of granting independent standing and meaning to the textual provision "due process of law." It is important and interesting to note, however, that in this one major area in which Black's twin commitments to textualism and judicial restraint on the one hand and the rights of the states on the other led to something of a conflict, Frankfurter's commitments to both did not.

²³⁴ 330 US 1 (1946). This fact is ironic because the Establishment Clause surely fails the universal test of *Palko*. Many "civilized" countries (including England) still have established state religions.

²³⁵ *Engel v Vitale*, 370 US 421 (1962) (invalidating nondenominational prayer composed by state officials that was required to be recited in public schools every morning).

²³⁶ 332 US 46, 53-58 (1947).

²³⁷ In his *Adamson* concurrence, Justice Frankfurter greatly praised the opinion in *Twining*, saying that it "shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court." *Adamson*, 332 US at 59 (Frankfurter concurring).

²³⁸ *Adamson*, 332 US at 56, 57 (majority opinion).

For Justice Black (and for Justice Douglas), the fundamental rights approach was simply substantive due process under a different name, inviting the Court to engage in the type of "natural law" reasoning that had elsewhere been used to illegitimately limit state power under the Constitution. The appeal of total incorporation was the appeal of textualism generally: by tying the meaning of the vague text of the Due Process Clause to the text of the first eight amendments, it would do away with the type of reasonableness and fundamental fairness tests that enabled the Court to usurp the policymaking function of state legislatures. According to Black,

It is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation. . . . It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has [recently] been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights. [Citing *Betts*.] But this formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.²³⁹

Moreover, Black insisted that the Fourteenth Amendment incorporated the first eight amendments and nothing more. Unlike the *Lochner* era Court, which found open-ended lists of rights included in the Due Process Clause (as illustrated, for example, by *Meyer*), Black consistently rejected claims that the Due Process Clause entailed rights against the states that were not specifically listed in the text of the Bill of Rights.²⁴⁰

Frankfurter's concurrence in *Adamson* was in large part a response to Black's argument, showing that here as elsewhere the connection between textualism and protection of the states can be maintained. What separated Frankfurter from Black in the incorporation controversy was not textualism as a method of constitutional interpretation, but different views as to which approach to the Due Process Clause textualism required. Whereas

²³⁹ Id at 90 (Black dissenting).

²⁴⁰ See, for example, *In re Winship*, 397 US 358, 377-86 (1970) (Black dissenting from decision that Due Process Clause protects the criminally accused against conviction except upon proof beyond a reasonable doubt).

for Black textualism required total incorporation as the only plausible way to tie the vague Due Process Clause to constitutional text, for Frankfurter such a move was a betrayal of textual analysis since the presence of the clause at the end of the Fifth Amendment clearly indicated that it was not reducible to, or a shorthand statement of, other specific clauses in that amendment but had independent meaning and "potency."

In his concurrence, Frankfurter relied on the universalistic spirit of *Palko* to reject the defendant's due process claim: "To suggest that it is inconsistent with a truly free society to . . . take into consideration that one who has full opportunity to make a defense remains silent is . . . to confound the familiar with the necessary."²⁴¹ Moreover, Frankfurter defended this conception of due process as alone consistent with a proper regard for the position and power of the states. He suggested that the great Supreme Court Justices of the past who were best known for promoting the interests of liberty and human dignity rejected total incorporation because "they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War."²⁴² And rejecting Black's claim that the fundamental rights approach, which Frankfurter believed the only one consistent with textualist principles, was tantamount to licensing personal preference, he stated that "[a]n important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review."²⁴³

It was not until the 1960s that a majority of the Court would side with Justice Black over Justice Frankfurter—and even then neither completely nor whole-heartedly—when it abandoned the fundamental rights approach for that of selective incorporation. The result was to overrule virtually every criminal procedure precedent of the previous sixty years and, notwithstanding Black's "illusory apprehension," to enhance significantly the power of the Court to invalidate state legislation. In the span of ten years starting in 1961, the Warren Court incorporated

²⁴¹ *Adamson*, 332 US at 62-63 (Frankfurter concurring). And again:

The notion that to allow jurors to do that which sensible and right-minded men do every day [make inferences from silence in the face of evidence which one has the power to contradict] violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process.'

Id at 60.

²⁴² Id at 62.

²⁴³ Id at 68.

against the states every right of the criminally accused contained in the Bill of Rights except the Fifth Amendment's requirement of a grand jury indictment.²⁴⁴

VI. STATE JUDICIAL POWER

Thus far in this Article, I have explained the ways in which during the New Deal era the Court enhanced state legislative power as compared with the previous era. In this part, I discuss four different ways in which the Court also enhanced state judicial power.

A. The *Erie* Doctrine

The landmark 1938 decision of *Erie Railroad Co v Tompkins*, decided on the same day as *Carolene Products*, reaffirmed the general doctrine of enumerated federal powers and, under its authority, transferred lawmaking power over a wide and important range of issues from the federal courts to the state courts where, according to the majority, the Constitution had placed it. *Erie* declared unconstitutional the power of the federal courts to develop their own uniform body of unwritten "general jurisprudence" displacing state common law that had been authorized in

²⁴⁴ *Mapp v Ohio*, 367 US 643, 655 (1961) (Fourth Amendment right against unreasonable search and seizure); *Robinson v California*, 370 US 660, 666 (1962) (Eighth Amendment prohibition on cruel and unusual punishment); *Gideon v Wainwright*, 372 US 335 (1963) (the right to counsel in all felony cases, overruling *Betts*); *Malloy v Hogan*, 378 US 1, 8 (1964) (right against compelled self-incrimination, overruling *Twining* and *Adamson*); *Pointer v Texas*, 380 US 400, 406 (1965) (right to confront opposing witnesses); *Klopfer v North Carolina*, 386 US 213, 223 (1967) (right to a speedy trial); *Washington v Texas*, 358 US 14, 19 (1967) (right to compulsory process for obtaining witnesses); *Duncan v Louisiana*, 391 US 145, 150 (1968) (right to jury trial in criminal cases); *Benton v Maryland*, 395 US 785, 796 (Fifth Amendment prohibition on double jeopardy, overruling *Palko*); *Schillb v Kuebel*, 404 US 357 (1971) (right to be free from excessive bail).

Having incorporated the whole Bill of Rights except the Second, Third, and Seventh Amendments (in addition to the grand jury provision of the Fifth), the only remaining issues for the Warren Court were (a) did such rights apply in the same manner to the states as to the federal government, and (b) was the meaning and content of the due process guarantee against the states limited to the specific rights contained in the Bill of Rights? Prior to the 1960s, the Court had held on at least two occasions that in answer to (a) a lesser standard applies to the states. *Wolf v Colorado*, 338 US 25, 33 (1949) (Although the general right of security against arbitrary police intrusion binds the states, the exclusionary rule as a specific manifestation of that right does not.); *Roth v United States*, 354 US 476 (1957) (The First Amendment imposes fewer limits on state regulation of obscenity than it does on federal regulation.). During the 1960s, the Court determined that incorporated rights apply in exactly the same way to both governments. On the second question, the Court in 1970 held that the Due Process Clause requires the states to apply the beyond a reasonable doubt standard of proof in criminal cases even though no such requirement applies to the federal government under the Bill of Rights. *In re Winship*, 397 US 358 (1970).

Swift v Tyson and exercised by them for the whole of the subsequent ninety-six years.²⁴⁵ Henceforth, a federal court deciding an issue or claim based on state law (typically under its diversity jurisdiction) must apply only state law, including state common law, and in so doing follow the decisions of the courts of the relevant state. Contrary to previous practice, “[t]here is no federal general common law” to be applied.²⁴⁶ As Hart and Sacks proclaimed in their famous teaching materials, “Probably no single decision in the whole of Anglo-American legal history ever overturned so many prior decisions at a single stroke as *Erie* Overnight, whole treatises were rendered obsolete.”²⁴⁷ In abolishing the category of federal law that these treatises expounded, *Erie* reallocated lawmaking powers between state and nation, enhancing the scope and impact of state law as declared by state courts.²⁴⁸

Justice Brandeis’s opinion for the majority in *Erie* overruled *Swift v Tyson* on two separate grounds. First, as a matter of statutory interpretation, *Swift* had wrongly interpreted the Rules of Decision Act, originally enacted as Section 34 of the Judiciary Act of 1789. This provision, still in its original form in 1938, provided that

The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.²⁴⁹

In *Swift*, Justice Story had held that the term “laws of the several states” did not include state court common law decisions and so left the federal courts exercising diversity jurisdiction free in matters of “general jurisprudence” (though not in matters of peculiarly local concern) to develop their own independent federal common law and apply it in disregard of state judicial decisions as to the common law in that state.²⁵⁰ Relying on the “more re-

²⁴⁵ *Erie Railroad Co v Tompkins*, 304 US 64, 77-78 (1938), overruling *Swift v Tyson*, 41 US (16 Pet) 1, 17-18 (1842).

²⁴⁶ *Erie*, 304 US at 78. See also *id* at 78-80.

²⁴⁷ Hart and Sacks, *The Legal Process* at 1338-39 (cited in note 18).

²⁴⁸ At about the same time as *Erie* was decided, of course, the Federal Rules of Civil Procedure came into effect. Although these had the converse effect to *Erie* (where previously federal courts applied state procedural rules, they now applied uniform federal ones), unlike *Erie*, the Federal Rules were not constitutionally required. Indeed, their promulgation was the result not of any constitutional decision on the part of the Court, but of statutory authorization—under Congress’s 1934 Rules Enabling Act.

²⁴⁹ Federal Judiciary Act of 1789, 1 Stat 73, 92 (1789).

²⁵⁰ *Swift*, 41 US at 14-21.

cent research of a competent scholar," Justice Brandeis held that Story's interpretation of Section 34 was wrong: the purpose of the section was to ensure that in diversity cases the federal courts will apply unwritten as well as written state law absent a controlling enacted federal law.²⁵¹

The second, and more controversial, ground of the decision was a constitutional one. The majority's conclusion that as a matter of constitutional law "there is no federal general common law" rested on the traditional doctrine of enumerated powers and the principle of federalism that it incorporates. According to Justice Brandeis,

Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.²⁵²

In other words, the Constitution simply does not grant to any branch of the federal government—Congress or the federal courts—the type of general lawmaking authority that the federal courts had been authorized to exercise in *Swift*. Consequently, "in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."²⁵³

Most of the controversy that the constitutional ground of the decision has generated relates to its scope and meaning,²⁵⁴ but some also concerns its necessity given the first ground: in particular, Justice Brandeis's statement that "[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century."²⁵⁵ In his concurring opinion, Justice Reed for one argued that the first ground should have sufficed; the majority's decision to hold the *Swift* construction of Section 34 unconstitutional instead of merely erroneous was both unnecessary and "questionable" on the merits.²⁵⁶ By contrast, the two surviving

²⁵¹ *Erie*, 304 US at 72-73 & n 5. The reference was to Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv L Rev 49, 51-52, 81-88, 108 (1923).

²⁵² *Erie*, 304 US at 78. See also id at 78-80.

²⁵³ Id at 78. See also id at 78-80.

²⁵⁴ See, for example, John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv L Rev 693, 700-06 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 Harv L Rev 1682, 1683 (1974); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U Pa L Rev 1231, 1310-24 (1985).

²⁵⁵ *Erie*, 304 US at 77.

²⁵⁶ Id at 90-92 (Reed concurring).

horsemen, Justices Butler and McReynolds, characteristically seeking to maintain the pre-New Deal era status quo in this area as in the others that we have considered, defended the *Swift* doctrine and dissented from both grounds of the decision.²⁵⁷

The *Erie* decision itself was far from the New Deal Court's last word on the subject of "the *Erie* doctrine." In a series of cases extending through *Guaranty Trust Co v York* decided in 1945,²⁵⁸ the Court expanded and extended the doctrine—and with it the scope of state law and the power of state courts—in a number of different directions, none of which was clearly implied in the original decision. The first extension addressed the following issue: precisely which state courts are the federal courts bound to follow on matters of state law? The lower federal courts did not initially consider that *Erie* limited their discretion under *Swift* to diverge from decisions of lower state courts, but only from decisions of the highest state courts. In four cases decided on the same day during the 1940 term, the Supreme Court corrected the lower federal courts on this important point. In *Fidelity Union Trust Co v Field*, the Court held that a federal court in New Jersey was bound to follow a decision of a state trial court, the New Jersey Court of Chancery, "in the absence of more convincing evidence of what the state law is."²⁵⁹ This was so even though the decision might not be followed by the higher New Jersey state courts themselves. In the three other cases, the Court applied this principle to the decisions of intermediate state appellate courts.²⁶⁰

The second general category of post-*Erie* New Deal era extensions to the doctrine concerned its application to procedural law. *Erie* itself prevented the federal courts from developing their own substantive common law, but said nothing about the procedural principles to be applied in diversity cases. During 1941, the Court decided three cases that extended *Erie* to procedural or quasi-procedural issues. In *Klaxon Co v Stentor Electric Manufacturing Co*, the Court held there was no general federal law governing conflict of laws by finding that a federal court in a diversity case must employ the choice of law rule of the state in which it sits rather than its own choice of law rule. It did so on the basis of the underlying *Erie* rationale of opting to promote consistency between federal and state courts within the same

²⁵⁷ Id at 80-90 (Butler dissenting).

²⁵⁸ 326 US 99 (1945).

²⁵⁹ 311 US 169, 177-78 (1940).

²⁶⁰ *Six Companies v Joint Highway District No 13*, 311 US 180 (1940); *West v A.T.&T.*, 311 US 223 (1940); *Stoner v New York Life Insurance Co*, 311 US 464 (1940).

state rather than (as *Swift* had sought to promote) uniformity among federal courts themselves.²⁶¹ On the same day, the Court held in *Griffin v McCoach* that federal courts must apply state rather than federal procedural rules in a statutory interpleader case.²⁶² Third, in *Vandenbark v Owens-Illinois Glass Co*, the Court held that federal courts are bound to follow the most recent authoritative decision of a state court in matters of state law even when that decision was handed down after the cause of action arose or (in the case of a court of appeals) after entry of judgment by the federal trial court. Thus, where the Ohio Supreme Court expressly overruled its precedent barring tort claims in worker compensation cases after the federal trial court had dismissed the plaintiff's claim on the basis of this (then-governing) precedent, the Court held that the federal appeals court was bound to reverse the trial judge even though his decision was correct (under the *Erie* doctrine) when made. The Court in *Vandenbark* expressly stated that its decision was contrary to the federal court practice of ignoring later overruling state court decisions during the *Swift* era.²⁶³

The most important extension of the *Erie* doctrine by the New Deal Court occurred in *Guaranty Trust*, decided in 1945. In this case, the Court determined that although the *Erie* doctrine distinguishes between substantive law (which the federal courts are barred from developing in matters of general common law) and procedural law (which the federal courts may develop) in diversity cases, the distinction between the two depends on the effect of the law in question on the outcome of the case. If the use of a federal procedural rule would affect the outcome of the case, this rule is deemed "substantive" for *Erie* purposes and thus the federal court must apply the state procedural law. The Court justified this "outcome determination test" (as it became known) on the basis of the *Erie* rationale that results of litigation should not turn on whether suit is filed in federal or state court within a particular state. Applying this test to the issue at hand, the Court held that a federal court in a diversity case must apply state and not federal law on the issue of timeliness of suit.²⁶⁴

²⁶¹ 313 US 487, 496 (1941).

²⁶² 313 US 498, 503-04 (1941). The Federal Interpleader Statute authorizes nationwide service of process, which of course state courts as a general matter do not. As all first year students undoubtedly know, interpleader is a device by which a person who admits an obligation but is unsure to whom it is owed deposits money or property with the court and serves notice on the possible claimants so that they can dispute ownership among themselves. Rewards are a classic situation for the use of interpleader.

²⁶³ 311 US 538, 540-43 (1941).

²⁶⁴ 326 US at 109-12.

The Court continued to expand the *Erie* doctrine until the mid-1950s,²⁶⁵ but beginning in the late 1950s and continuing until the mid-1960s, the Warren Court not only called a halt to further expansion but in a series of cases firmly swung the pendulum back towards the federal courts.²⁶⁶

B. Abstention

In *Erie*, the Court reallocated constitutional power between federal and state judiciaries by holding that federal courts are bound by the previous decisions of state courts on questions of state common law arising in diversity cases. By contrast, under the doctrine of abstention that the New Deal Court created and developed as an exercise this time in judicial rather than constitutional federalism, the federal courts must in certain specified circumstances postpone or decline exercising their lawful jurisdiction in order to allow state courts (rather than themselves) to decide questions of state law raised in cases filed in federal court. The effects of the two forms of this doctrine developed by the New Deal Court—"Pullman" and "Burford" abstention—were to transfer jurisdiction of certain types of cases brought in federal court to state courts, to enhance both the role of state law in cases brought on both state and federal law grounds and the role of state courts in interpreting that law, and to promote the independence of state government organs in carrying out domestic policy.

Pullman abstention is named after the 1941 case of *Railroad Commission of Texas v Pullman Co*, in which the Court through Justice Frankfurter held that where the action of a state is chal-

²⁶⁵ For example, in *Berhardt v Polygraphic Co of America, Inc*, 350 US 198, 203 (1956), the Court stated that the "outcome determination test" required that state law be followed wherever a federal procedural rule might conceivably, rather than definitely would, affect the outcome of the case.

²⁶⁶ In *Byrd v Blue Ridge Rural Electric Cooperative, Inc*, 356 US 525, 540 (1958), the Court restricted the "outcome determination test" by holding that in a diversity case, the federal standard—under which the decision whether a plaintiff in a negligence case is an employee for purposes of workmen's compensation is left to the jury—was to apply rather than the state practice, which left the matter to the judge. The Court stated that the federal interest in the federal courts as an "independent system for administering justice to litigants who properly invoke its jurisdiction" was a countervailing interest which had to be balanced against the state's interest in applying its rule and the uniformity and forum-shopping concerns underlying *Erie*.

In the 1965 case of *Hanna v Plumer*, 380 US 460, 471-72 (1965), the Court substantially restructured the *Erie* doctrine by effectively holding that wherever there is a rational basis for classifying a federal rule as "procedural," that rule can constitutionally be applied in diversity cases notwithstanding either a contrary state rule or its effect on the outcome of the litigation. Thus, only in unquestionably substantive matters does *Erie* apply to forbid the development of federal common law rules in diversity cases.

lenged in federal court on the basis both of unsettled state law and federal constitutional grounds, the federal court should decline to exercise jurisdiction until the state law issue has been definitively answered by the state courts in the hope that this will resolve the case and avoid the necessity of addressing the federal constitutional question.²⁶⁷ In *Pullman*, the plaintiffs challenged in federal court an order of the Commission aimed at preventing black Pullman conductors from being in charge of sleeping cars, basing their claim on federal constitutional (equal protection and due process) grounds and also on the Commission's alleged lack of statutory authority under state law to issue such an order. Applying the two principles that such "sensitive" constitutional questions should be answered only if absolutely necessary and that "needless friction with state policies" should be avoided where possible, the Court ordered the federal tribunal to abstain from exercising jurisdiction over the case until definitive resolution of whether the order was lawful under state law had been attained in the course of state court proceedings to be initiated. Only then, and if their constitutional claims were still relevant, could the parties return to federal court.²⁶⁸

Writing for the Court, Justice Frankfurter expressed one of the major purposes of abstention as follows:

[Under the] doctrine of abstention [which is] appropriate to our federal system . . . the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.²⁶⁹

After *Pullman*, the Court frequently required abstention by the federal courts in similar situations.²⁷⁰ During the 1960s, however, the Warren Court expressed concern about the inevitable delays that *Pullman* abstention entails and in the years following Frankfurter's retirement in 1962 always found a reason not to

²⁶⁷ 312 US 496, 501 (1941).

²⁶⁸ *Id.* at 497-502.

²⁶⁹ *Id.* at 501, quoting *Cavanaugh v Looney*, 248 US 453, 457 (1919), and *Di Giovanni v Camden Fire Insurance Association*, 296 US 64, 73 (1935).

²⁷⁰ See, for example, *Shipman v DuPre*, 339 US 321, 322 (1950); *City of Meridian v Southern Bell Telephone and Telegraph Co.*, 358 US 639, 640-41 (1959).

require the federal court to abstain so that the doctrine fell into disuse.

Burford or “administrative” abstention derives from the 1943 decision in *Burford v Sun Oil Co*, in which by a five-four majority the Court held that in an action to enjoin the execution of an order of the Texas Railroad Commission granting *Burford* a permit to drill new oil wells, the federal district court—in which suit was filed on both federal question and diversity grounds—should, “as a matter of sound equitable discretion,” have declined to exercise jurisdiction and dismissed the case.²⁷¹ Here, as Frankfurter argued in dissent, there was no uncertainty in the state law as there was in *Pullman* since the Texas legislature had established “narrowly defined standards of law . . . for review of the orders of its Railroad Commission.”²⁷² Moreover, both the majority and the dissenters considered the federal constitutional issue a minor one and treated the case essentially as one of diversity jurisdiction so that avoiding the constitutional issue did not appear to be a motivating factor for the majority.²⁷³

Rather, the motivating factor appears to have been exclusively considerations of comity and respect for the capacity of the states to manage basic issues of state policy on their own, free from federal interference. According to Justice Black’s opinion for the Court, which quoted from Justice Stone’s 1935 opinion in *Pennsylvania v Williams* refusing to allow a federal court to assume management of a state building and loan association solely on the basis of diversity jurisdiction, “it ‘is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.’”²⁷⁴ Arguing that the specialized system of judicial review established by the state should not be disturbed, Black continued, “Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review.”²⁷⁵ He concluded that given the adequacy of the state scheme of judicial review of the Commission’s decisions and the fact that the Court retains the right to review the state supreme court’s handling of any federal questions involved, “a sound respect for the independence of state action requires the federal

²⁷¹ 319 US 315, 318 (1949).

²⁷² *Id* at 342 (Frankfurter dissenting).

²⁷³ See *id* at 318 (majority opinion); *id* at 344–45 (Frankfurter dissenting).

²⁷⁴ *Id* at 318, quoting *Pennsylvania v Williams*, 294 US 176, 185 (1935).

²⁷⁵ *Burford*, 319 US at 327.

equity court to stay its hand."²⁷⁶ In his concurring opinion, Justice Douglas also emphasized the special federalism concerns raised by federal court review of state administrative agencies: "If the federal courts undertook to sit in review . . . of this state administrative agency, they would in effect actively participate in the fashioning of the state's domestic policy."²⁷⁷ In a vigorous dissent, Frankfurter argued that the *Pullman* factors justifying abstention were absent here, and that even though he spoke "as one who has long favored the entire abolition of diversity jurisdiction," he could not condone what amounted to partial abolition by judicial decree.²⁷⁸

Burford abstention was invoked again by the Court in similar circumstances and on similar grounds in the 1951 case of *Alabama Public Service Commission v Southern Railway Co.*,²⁷⁹ but since that time the Court has not ordered abstention on *Burford* grounds, although lower federal courts have continued to rely on this doctrine in the exercise of their discretion.²⁸⁰ During the 1960s and 1970s, the Court made clear that *Burford* abstention could not be invoked to exclude federal court jurisdiction in civil rights cases.²⁸¹

C. Territorial Jurisdiction of State Courts

The topic of territorial (or personal) jurisdiction concerns the issue of whether a court has authority to compel a defendant to appear before it. Principles of territorial jurisdiction primarily operate to limit the geographical reach of a state's judicial power. In the particular context of the United States, these principles have been viewed in part through the lens of federalism as a means of regulating and coordinating the competing claims of state judicial authorities. Thus, the Supreme Court has over the years developed rules to regulate such competing claims despite the fact that the Constitution contains no specific limitations on each state's assertion of territorial jurisdiction. The New Deal Court changed the preexisting rules to ones that increased the territorial reach of each state's judicial authority.

²⁷⁶ Id at 334.

²⁷⁷ Id at 335 (Douglas concurring).

²⁷⁸ Id at 337-39 (Frankfurter dissenting).

²⁷⁹ 341 US 341, 350 (1951).

²⁸⁰ See Julia A. Davies, *Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 UC Davis L Rev 1, 15-21 (1986).

²⁸¹ See, for example, *McNeese v Board of Education*, 373 US 668, 673-74 (1963) (refusing to order abstention by distinguishing *Burford* from situation where state administrative procedures were used for handling school desegregation disputes).

The governing set of rules from 1878 until 1945 was established in the leading case of *Pennoyer v Neff*, which premised them on a theory of state sovereignty. According to this case, since the states retain their independent existence, the principles of “public law” apply to them under which “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” Conversely, “no State can exercise direct jurisdiction and authority over persons or property [outside] its territory.”²⁸² As Justice Field explained:

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power, and be resisted as mere abuse.²⁸³

This “territorial” basis for judicial authority required the physical presence of a defendant or his property within the state and thus involved valid assertions of jurisdiction that were mutually exclusive. A state court could obtain jurisdiction over a nonresident defendant only by service of process within the state—either in person or by seizing her property in the state, which acts as constructive notice of process.²⁸⁴ The Court added that after the adoption of the Fourteenth Amendment, the assertion of jurisdiction by a state court in violation of these rules constitutes denial of due process.²⁸⁵

In the landmark case of *International Shoe Co v Washington*, decided in 1945, the Court radically rewrote these rules. This case involved a Delaware shoe-making corporation based in Missouri with no office or store in Washington that shipped shoes to customers in that state after soliciting their orders through commissioned agents who went door-to-door exhibiting samples. State law treated these agents as employees and in a suit to recover payments from the corporation due to its unemployment compensation fund, the state served process upon one of the agents within the state and also by registered mail to the defendant in Missouri. The defendant denied that Washington had territorial jurisdiction over it since it was not present in the state.²⁸⁶

²⁸² 95 US 714, 722 (1877).

²⁸³ Id at 720 (citation omitted).

²⁸⁴ Id at 723-24.

²⁸⁵ Id at 733.

²⁸⁶ 326 US 310, 312-15 (1945).

Although in rejecting the defendant's due process claim, the Court did not expressly overrule *Pennoyer* but paid lip service to its requirement of the defendant's presence within a state, its dilution of the definition of "presence" amounted to a clear rejection of the territorial basis for jurisdiction that underlay the requirement in favor of rules premised upon notions of fairness. Henceforth, as Chief Justice Stone explained,

due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."²⁸⁷

After stating that because the notion of corporate personality is a fiction, a corporation's "presence" can be manifested only by the activities of its authorized agents, Stone continued:

[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.²⁸⁸

Thus, if a corporate defendant satisfies this reasonableness test, it is *deemed* "present" in the state for jurisdictional purposes; it does not pass the test because it *is* "present."

Clearly, unlike the territorial basis of personal jurisdiction, a reasonableness test does not involve bright line rules but depends rather "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." Applying these standards, the Court found that the defendant's systematic and continuous activity within the state, where it enjoyed the benefits and protections of the state's laws, established sufficient contacts with the state to render the state's attempts to enforce the obligations thereby incurred eminently reasonable.²⁸⁹

Justice Black wrote a separate opinion to voice his disagreement with what he considered the majority's vague and ille-

²⁸⁷ Id at 316, quoting *Milliken v Meyer*, 311 US 457, 463 (1940).

²⁸⁸ Id at 316-17 (citation omitted).

²⁸⁹ Id at 319-20.

gitimately activist “natural law” standard that would introduce unnecessary uncertainty and did not go far enough in the direction of affirming state judicial authority. According to Black, by announcing “vague Constitutional criteria,” the Court had “introduced uncertain elements . . . tending to curtail the exercise of State power to an extent not justified by the Constitution.”²⁹⁰

He then continued:

I believe that the Federal Constitution leaves to each State, without any “ifs” and “buts,” a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court’s notion of “fair play,” however appealing that term may be.²⁹¹

Despite Black’s reservations about the qualifications attached by the majority to the expansion of state judicial authority, that this was the effect of *International Shoe* cannot be doubted. Justice Thurgood Marshall later summed up the content and impact of the new rules as follows:

[T]he relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction. The immediate effect of this departure from *Pennoyer*’s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants.²⁹²

D. Choice of Law

In an analogous fashion to its restructuring of the personal jurisdiction of state courts, the Court in this period also substantially reduced the constitutional restrictions on the ability of state courts to apply domestic substantive law in cases with multi-state implications. As one leading commentator put it, “the 1930s witnessed a retreat from [previous] rigid limitations on a state’s opportunity to apply its own law to cases with which it had contact[s].”²⁹³ As with personal jurisdiction, during the New

²⁹⁰ Id at 323 (Black concurring in judgment) (citation omitted).

²⁹¹ Id at 324-25.

²⁹² *Shaffer v Heitner*, 433 US 186, 204 (1977) (footnote omitted).

²⁹³ James A. Martin, *Constitutional Limitations on Choice of Law*, 61 Cornell L Rev 185, 230 (1976).

Deal period the Court rejected the old territorial approach under which it was assumed there was only one constitutionally permissible law to be applied in each case. Although this fundamental change in approach began in 1930, it was not until further refinements were made in the middle and at the end of the decade that this change was translated into Court decisions routinely upholding the application of forum law against constitutional challenge. By thus putting the "choice" into choice of law, the net result of the Court's activity was once again to enhance the constitutional powers of state courts and also the potential authority within each state of its laws.

Prior to the 1930 case of *Home Insurance Co v Dick*,²⁹⁴ the predominant territorial-vested-rights theory of Joseph Beale's First Restatement had been virtually constitutionalized by the Supreme Court, under the rubric of the Due Process and Full Faith and Credit Clauses.²⁹⁵ Under the sway of this theory, with its assumption that there is only one applicable law to a given case, the Court vigorously policed parochial choice of law by state courts. In *Dick*, the Court declared unconstitutional under the Due Process Clause the Supreme Court of Texas's affirmation of the trial court's decision to apply a two-year Texas statute of limitations in a dispute over a contract entered into and performed in Mexico, and made between Mexican residents, rather than a one-year contract provision that was in accord with Mexican law to which the contract was expressly made subject.²⁹⁶ Despite this result, however, the reasoning of Justice Brandeis's opinion appeared to reject the territorial premise that if Mexican law applied to this case properly filed in a Texas court, then under any conceivable circumstances Texas law could not. Rather, the basis for the decision was that on the particular facts of the case there were insufficient contacts with Texas to justify the application of its statute of limitations, with the implication that greater contacts might have permitted the state court to choose whether to apply Texas or Mexican law.²⁹⁷

²⁹⁴ 281 US 397 (1930).

²⁹⁵ US Const, Art IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." See, for example, *New York Life Insurance Co v Dodge*, 246 US 357, 369-73 (1918) (Where a contract for a life insurance policy was bought in Missouri and covered a Missouri domiciliary, but was completed by acceptance of the company's home office in New York, the company's rights vested under New York law which must accordingly be applied by the Missouri court under the Due Process Clause.).

²⁹⁶ *Dick*, 281 US at 407.

²⁹⁷ *Id* at 408.

In the four years following this first modern case, the Court consolidated its new "significant contacts" approach to the constitutional limitations on choice of law, but this approach did not prevent it from continuing routinely to invalidate applications by a state of its own law.²⁹⁸ From 1935 on, however, the Court upheld the application of forum law by state courts against due process and full faith and credit challenges in every major choice of law case that it decided. This change in outcomes was prompted by two further refinements of its new approach. In the 1935 case of *Alaska Packers Assn v Industrial Accident Commission of California*, the Court introduced the idea of "interest analysis," under which the governmental interests of the competing state jurisdictions are appraised and the party challenging the "prima facie right" of every state to enforce its own statutes in its own courts assumes the burden of showing that the interests of the foreign state are superior to those of the forum.²⁹⁹ Four years later, in *Pacific Employers Insurance Co v Industrial Accident Commission*, the Court went even further towards reducing its function in choice of law cases by rendering this prima facie right virtually irrebuttable where a statute of the forum state declares itself to apply exclusively to persons and events inside the state.³⁰⁰ As a result of these developments, together with later more interstitial ones, a number of scholars in the field have expressed the view that it is unclear if there are now any constitutional limitations on state choice of law.³⁰¹

²⁹⁸ See, for example, *Bradford Electric Light Co v Clapper*, 286 US 145, 154-55 (1932) (application of forum law by federal district court in New Hampshire rather than Vermont Workmen's Compensation Act violated full faith and credit); *Hartford Accident & Indemnity Co v Delta & Pine Land Co*, 292 US 143, 150 (1934) (state court could not apply its own statute to an insurance contract case where interest of the forum had slight connection to substance of the contract).

²⁹⁹ 294 US 532, 547-48 (1935). In *Alaska Packers*, the Court held that the state in which the employment relationship had been formed could apply its own worker compensation law to an employee injured in another state.

³⁰⁰ 306 US 493, 503-05 (1939) (holding that state of employment does not have a special interest to which state court in state where accident occurred is required to defer under full faith and credit). The third major choice of law case of this period was *Skiriotes v Florida*, 313 US 69, 77 (1941) (state's interest in regulating conduct of its citizens permits it to apply its law outside state's territorial waters).

³⁰¹ See, for example, the section entitled, "Scholarly Reaction to *Hague*," in James A. Martin, *Conflict of Laws: Cases and Materials* 338-42 (Little, Brown 2d ed 1984). Despite this scholarly skepticism, the Court reaffirmed that there are some such limitations by holding in 1985 that the application of Kansas law to all claims arising under a class action suit against a Delaware corporation with its principal place of business in Oklahoma brought by plaintiffs from all fifty states was sufficiently arbitrary and unfair as to exceed constitutional limits. *Phillips Petroleum Co v Shutts*, 472 US 797 (1985).

VII. CONCLUSION

The New Deal period is almost universally understood as one of the few truly fundamental watersheds in American constitutional history, dividing the modern era from what went before.³⁰² In terms of specifying the precise nature of the constitutional revolution that was wrought, a second account often coexists as part of the current received wisdom alongside the nationalist one on which I have focused in this Article. This is that the Roosevelt era Court brought about an economic revolution: a revolution in the relationship of government to the economy. In this account, the Court rejected the enhanced constitutional status previously afforded contract and property rights that had resulted in the marking off of a sphere ruled by market outcomes and common law baselines with which government was presumptively forbidden to interfere.³⁰³

This is all, of course, extremely familiar. What is perhaps less familiar is the notion that these two standard accounts—the nationalist and the economic—ought to, but generally do not, coexist uneasily with each other since they are substantially in conflict. They are in conflict because the nationalist account asserts that during the New Deal era, the constitutional authority of the states was *reduced*, while the economic account asserts that the authority of all governments, including state governments, was

³⁰² As I stated above, see note 5, with one exception the work of recent “revisionist” historians of the New Deal era does not challenge the notion that what the Supreme Court did in this period amounted to a constitutional revolution; rather it challenges the timing (1937), and the explanation (response to outside pressures) of this revolution.

³⁰³ See, for example, Ackerman, *We the People* (cited in note 1) (the Reconstruction era constitutional amendments that We the People rejected in 1937 contained the two principles of (1) enhanced constitutional protection for contract and property rights, and (2) limited federal power); Horwitz, *Transformation of American Law* at 3 (cited in note 1) (In addition to the nationalist revolution, there was “a fundamental shift in the constitutional relationship of government to the economy.”).

Although this second account thus often exists alongside the nationalist one, it is typically subordinated to the latter. For example, despite the two principles that Ackerman states We the People rejected in 1937, he focuses almost exclusively on the second one and the task of justifying the Supreme Court’s switch from opposing to embracing FDR’s legislative program and activist national government. Similarly, although Sunstein acknowledges both the economic (the New Deal revolution involved a general rejection of common law or market baselines for distinguishing between governmental “action” and “inaction”) and nationalist (it also involved rejecting “traditional notions of federalism”) characterizations of the constitutional revolution, see Sunstein, 101 Harv L Rev at 425 (cited in note 1), his analysis of enhanced governmental power focuses on the enhanced federal government power and the new federal administrative state. Indeed, his discussion is so colored by the nationalist understanding that he criticizes the New Deal for carrying too far the faith in national rather than local regulation. *Id.* at 505. In his discussion too, Horwitz focuses on the relationship of the *federal* government to the economy.

expanded.³⁰⁴ One resolution of this conflict is to reject the nationalist account as presenting a distorted and simplistic picture of the revolution as a whole as I have suggested. By focusing exclusively on Congress's commerce power and ignoring other major constitutional changes, including changes that enhanced state power over commerce, the straightforward nationalist story is unable to comprehend the larger picture in which an increase in federal powers went hand-in-hand with the states being direct beneficiaries of much that the Court did in this period.

But my analysis also suggests that the economic account, though true, is only a partial truth. Whereas the nationalist story is distorted because it focuses exclusively on the Commerce Clause, the only additional change that proponents of the economic account generally take into account is the death of substantive due process,³⁰⁵ to the exclusion of the other enhancements of state power that I have identified. The fact that reasonable regulation by both state and federal governments of "private" economic activity was now constitutionally permissible for the first time tells us little about the scaling back of the dormant Commerce Clause, Congress's power of preemption, and the incorporation doctrine, or the various increases in state judicial power that occurred. And yet, as we have seen, these were important and quite typical—if overlooked—components of the revolution.

The most central and all-embracing feature of the constitutional revolution, one that underlies all the changes made, is in fact the one that emerged clearly and unequivocally from the mouths of the revolutionaries themselves. They viewed the activist federal courts as the chief culprits of the previous era and, as a result, reallocated power from them to state and federal legislatures—and to state courts—by substantially reducing the scope of judicial review. In place of the elaborate and distinct doctrinal structures that had been erected around various constitutional clauses to hem in governmental actors, henceforth they would be subject only to a reasonableness test absent clear limitations in the text of the Constitution. Accordingly, the revolution

³⁰⁴The gravitational pull of the nationalist account that is generally responsible for the failure to acknowledge the direct enhancement of state power in many areas of constitutional law is also responsible, I believe, for the failure to appreciate the tension between the two accounts. Since regulation is assumed to mean national regulation, the two accounts are mistakenly thought in effect to be two sides of the same coin.

³⁰⁵Sunstein also takes into account the Contracts Clause. See note 19.

was not essentially or primarily an attack on either the states and their regulatory abilities or on contract and property rights; its target was first and foremost the public policymaking pretensions of the federal judiciary.

The fact that the constitutional revolution of the New Deal period unshackled and empowered the states in so many different areas also suggests that the standard contemporary connection between support for the role of the “states as states” and political conservatism is a contingent and not a necessary one. It was the particular and specific alignment of forces that during the Warren Court era pitted the federal government (courts, Congress, and President) against those using the rhetoric of “states’ rights” to oppose civil rights and racial desegregation, as it had been during the Civil War era and the battle over slavery. During the years between these two eras on which this Article has focused, however, the context and alignment of forces was quite different. To a significant degree, the *Lochner* era federal courts took the lead in constraining state power in order to resist the reformist agendas of the Populist and Progressive movements, which had their greatest triumphs at the state legislative level and threatened to undermine what the courts viewed as the twin constitutional norms of freedom of contract and the national economy. In rejecting the notion that these norms are inscribed in the Constitution, and thereby liberating the states to do their part in the task, the Roosevelt era Court realized the vision expressed by Justice Brandeis in the course of a powerful dissent from a 1932 decision invalidating a state statute on substantive due process grounds: “There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”³⁰⁶

³⁰⁶ *New State Ice Co v Liebman*, 285 US 262, 311 (1932) (Brandeis dissenting).