THE POLITICAL ECONOMY OF THE DORMANT COMMERCE CLAUSE

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INTRODUCTION

The text of the Constitution contains one commerce clause. However, the Supreme Court has always behaved as though there were two commerce clauses, one "active" commerce clause granting power to Congress to regulate matters affecting commerce among the states, and another "dormant" commerce clause governing state regulatory activity affecting interstate commerce in the absence of congressional action. In practice, if not in textual fact, there are two commerce clauses.

Although the theory underlying both commerce clauses was originally derived from the single overriding concern with developing a national marketplace,[1] the jurisprudence of the two commerce clauses has diverged to the point that active and dormant commerce clause principles often conflict. The Court's obeisance to economic localism in its dormant commerce clause opinions contradicts the strong bias in favor of economic nationalism that dominates the Court's active commerce clause decisions. This anomaly has become especially pronounced since the "constitutional revolution" of 1937.

In its post-1937 active commerce clause decisions, the Court consistently has recognized the systemic implications of virtually all economic transactions, even relatively insignificant individual transactions that are conducted locally. Conversely, in its dormant commerce clause decisions, the Court often has been willing to ignore the systemic implications of state regulatory behavior that affects broad segments of the national economy, choosing rather to emphasize that only unrelated local transactions are being regulated. The Court effectively has established a macroeconomic active commerce clause and a microeconomic dormant commerce clause. This Article addresses that anomaly.

More specifically, this Article investigates two related phenomena. The first is the domestication of the active commerce clause — that is, the transformation of the commerce clause in its "active" form from one of the primary obstacles to progressive social and economic reform in the first part of this century, to the benign lapdog it has become in the Court's modern cases. This phenomenon is undoubtedly familiar to any student who has successfully completed a basic constitutional law course.

The second, less familiar phenomenon is the contrary role the Court's dormant commerce clause jurisprudence continues to play in channeling the development of capitalism in the modern era. This Article will argue that the prevailing intellectual currents in the Court's dormant commerce clause jurisprudence directly contradict the economic premises that inform the Court's modern active commerce clause doctrine. Moreover, this Article will argue that this conflict carries ideological overtones: the Court continues to treat dormant commerce clause cases against a backdrop of many of the same conservative economic theories and presumptions that animated its now-derided

1. *See infra* notes 3-13 and accompanying text.

active commerce clause decisions in the period leading up to the constitutional revolution of the thirties. The "revolution" in economic thinking on the Court thus is less complete than is usually assumed.

The commerce clause once caused the Supreme Court a great deal of trouble. In the hands of a very conservative Court the commerce clause provided the basis for some of the most reviled opinions the Court has ever issued.[2] The traditional version of this tale has a happy ending: after effectively thwarting the popular will during a period of grave economic crisis, the Court and the country were saved when Justice Roberts switched his vote in an important economic regulation case,[3] the Four Horsemen of Reaction retired soon thereafter, and President Roosevelt quickly appointed several vigorous young New Dealers to the Court. Thus was the country's economic system saved and, the story goes, the Court taught a harsh lesson about the limits of its constitutional power over economic matters.

The traditional tale is misleading, however, because it ignores the persistence of economic themes in the dormant commerce clause cases that the Court was forced to abandon in the active commerce clause area. More specifically, the Court continues to be influenced in its dormant commerce clause rulings by the intellectual remnants of nineteenth century neo-classical economics. Like neo-classical economics, modern dormant commerce clause theory is premised upon a transactional, microeconomic model of economic behavior. The Court's dormant commerce clause decisions treat economic actors in isolation from the full macroeconomic context in which they operate. Although the Court has accepted in theory the concept of a national market in both its dormant and active commerce clause decisions, the Court nevertheless regularly rejects commerce clause challenges to state actions that fragment the national marketplace by regulating economic activities that are clearly national in scope. This fragmentation leads inevitably to inadequate regulation, and to the dilution of public political power in a context defined by ever-increasing concentrations of private economic power. The Court's adherence to an outmoded set of economic premises cultivates an overriding conservative bias in commerce clause discussions, which makes comprehensive national economic regulation and coordination more difficult to achieve.

Modern commerce clause scholarship has not recognized the inconsistencies of the Court's approach. In fact almost all of the scholarly literature implicitly accepts the Court's own biases.[4] This is reflected in the vernacular of

2. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (striking down Agricultural Adjustment Act of 1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down Bituminous Coal Conservation Act of 1935); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down federal regulation of commerce in goods produced with child labor).

3. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

4. The debate that exists within the scholarly literature is concerned mostly with the details and focus of the Court's indeterminate approach to dormant commerce clause analysis. The primary focus of the debate is whether the Court should employ an explicit balancing approach or simply limit its task to prohibiting state protectionism. *See infra* notes 169-72 and accompanying text.

the dormant commerce clause debate, which usually concentrates on defining the extent to which the Court's current approach properly protects federalism or state sovereignty interests. Because it is usually defined in this way, the debate concedes the most important issue at the outset by assuming that the states have a natural role to play in regulating economic activity. It is not surprising, therefore, that most recent articles have recommended that the Court adopt an even more passive approach toward state regulation of national economic activities. The Court should intervene, so the argument usually goes, only to prevent discrimination by one state against another.[5]

This Article is presented in five sections. The first section addresses the origins and early application of the national market concept in the Marshall Court's commerce clause decisions. This section also discusses the ideological significance of the national market in the Court's early years, and the reasons for the Court's drift away from a strong nationalist position in the years immediately following Chief Justice Marshall's death.

The second section of this Article outlines the intellectual framework of neo-classical economics. It describes several of the particular tenets of neo-classical economics, many of which were translated into commerce clause theory by the Court beginning in the mid-nineteenth century. This discussion also concentrates on the normative basis of neo-classical economics, especially its role in explaining the operation of an unfettered economic market in terms that did not allow for consideration of fundamental changes in political control or regulation of economic activity. This section also includes a brief discussion of the successors to neo-classical economic theory and a recent attempt to revive some aspects of neo-classical thought.

Sections three and four analyze the Court's application of neo-classical economic ideas in its commerce clause decisions. Section three describes the Court's ill-fated attempt to import directly into active commerce clause theory many of the presumptions and intellectual models of neo-classical economics. This section concludes by discussing the complete abandonment of these notions after the constitutional crisis of 1936. Section four describes the odd persistence of the same neo-classical concepts in dormant commerce clause decisions that have now been explicitly abandoned in active commerce clause decisions. This section begins with the Taney Court's modifications of the Marshall Court's commerce clause jurisprudence, and traces the dormant commerce clause through the Court's adoption of Chief Justice Stone's standard and the application of that standard in some recent cases.

5. *See, e.g.*, Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (arguing that the dormant commerce clause should be abandoned altogether, and that state laws regulating commerce should be invalidated by the Court only if they have been preempted by congressional regulation, or if they are so egregiously discriminatory that they violate the privileges and immunities clause of Article IV); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1093 (1986) ("the Court is concerned and should be concerned only with preventing purposeful [state] protectionism.").

The final section summarizes the conservative bias that the Court has built into its dormant commerce clause decisions. This section analyzes how this bias has affected the Court's consideration of cases involving the state as a market participant and the recent spate of state corporate takeover statutes. The section then discusses the interrelationship of the political principle of federalism and the economic decentralization required by the neo-classical dormant commerce clause. This section concludes with a consideration of the proper regulatory role of the states, and urges that the Court should require stronger, rather than weaker, judicial oversight of state regulatory activities.

I.
THE IDEOLOGY OF "COMMERCE": THE INTELLECTUAL ORIGINS OF THE NATIONAL MARKET

The views of Chief Justice John Marshall provide the logical starting point for any analysis of commerce clause theory. In *Gibbons v. Ogden*,[6] Marshall defined his theory of the commerce clause around the organizing concept of the national market. Marshall definitively rejected all attempts to limit the meaning of the term "commerce" to simple "traffic, to buying or selling, or the interchange of commodities."[7] Instead, he proposed a more expansive definition of "commerce" that encompassed "commercial intercourse between nations, and parts of nations in all its branches. . . ."[8] Moreover, Marshall wrote, the reach of congressional power to regulate commerce among the states extends within state borders as well: "[the commerce] power must be exercised whenever the subject [of commerce] exists."[9] In Marshall's prose, the word "commerce" became a term of art expressing the principles of economic nationalism.[10]

These sentiments were expressed in the portion of the *Gibbons* opinion that addressed Congress's power to act under the active commerce clause. The *Gibbons* decision did not need to go further: the Court struck down a New York steamship monopoly because its existence conflicted directly with a congressional statute. Therefore only the active commerce clause was implicated. Characteristically, Marshall did not stop after making the single point necessary to decide the case. He went on to discuss, in dicta, the matter of what he would later term "the power to regulate commerce in its dormant state."[11]

As in his discussion of the active commerce clause, Marshall's discussion of the dormant commerce clause was guided by the objective of establishing a

6. 22 U.S. (9 Wheat.) 1 (1824).
7. *Id.* at 189.
8. *Id.* at 189-90.
9. *Id.* at 195.
10. *See also* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 84-114 (1953) (arguing that the common definition of the term "commerce" in the eighteenth century included all gainful economic activity).
11. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

single economic market, governed by rules enacted at the national level. Marshall ascribed to the appellant in *Gibbons* the notion that the power to regulate commerce granted in Article I "implies by its nature full power over the thing to be regulated, [and] it excludes, necessarily, the action of all others that would perform the same operation on the same thing."[12] Marshall then endorsed the idea that the regulation of commerce is within the exclusive domain of the national government, but deferred final judgment on the exclusivity interpretation until a later date. "There is great force in [the exclusivity] argument," Marshall concluded, "and the court is not satisfied that it has been refuted."[13]

The conventional wisdom is that the active commerce clause portion of Marshall's opinion in *Gibbons* merely reflected the widespread perception during the early years of the Republic that the new constitutional government had been formed primarily to control the commercial anarchy that had prevailed under the Articles of Confederation.[14] Justice Johnson's concurring opinion in *Gibbons* stated flatly that the states' "iniquitous laws and impolitic measures" regarding commerce were "the immediate cause, that led to the forming of a convention."[15]

Most scholars thus have translated Marshall's nationalism into a noncontroversial political application of the Golden Rule. Under this interpretation Marshall merely saved the states from themselves by installing the federal government as a sort of paterfamilias, which would have the authority to restrain the disputatious and selfish family of states for the greater good of all. The unobjectionable intent of Marshall's effort, according to this view, was to realize James Wilson's goal of "bury[ing] all local interests and distinctions" in order to become "one nation of brethren."[16]

This interpretation of Marshall's commerce clause opinions ignores a crucial motivating feature of Marshall's thought. Felix Frankfurter identified this feature when he wrote that "[l]ocal government was associated in [Marshall's] mind with the petty bickerings of narrow ambition and a dangerous indifference to rights of property."[17] The conventional wisdom emphasizes the *Gibbons* opinion's ideologically neutral attack on parochial selfishness among the states. However, Marshall's opinions upholding broad national authority also

12. 22 U.S. (9 Wheat.) at 209.

13. *Id.*

14. *See* Stern, *That Commerce Which Concerns More States Than One,* 47 HARV. L. REV. 1335, 1340-41 (1934) ("the need for centralized commercial regulation was universally recognized as the primary reason for preparing a new constitution"); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1053, at 504 (1833) (lack of central government power to regulate commerce "was one of the leading defects of the Confederation, and probably as much as any one cause conduced to the establishment of the Constitution").

15. Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 224 (Johnson, J., concurring).

16. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 166-67 (M. Farrand ed. 1937).

17. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, & WAITE 14 (1937).

provided an immediate means of forestalling any nascent popular impulses to regulate property and wealth at the state level. The impetus for the constitutional convention thus came not only from the source noted by Justice Johnson; another, perhaps equally compelling factor was the leveling sentiment expressed most pointedly in the rebellion of impecunious Massachusetts farmers led by Daniel Shays.

The proximate cause of the rebellion in Massachusetts has been attributed to various factors: popular outrage over inequitable poll taxes,[18] disenchantment with the governmental expense incurred by the payment of high interest on state securities owned largely by wealthy urban merchants,[19] a revolt against a state judicial system regarded by the Shaysites as corrupt, inefficient, expensive, and prejudiced in favor of creditors over debtors,[20] or a more general reaction by traditional agrarian segments of society against the growing influence of the mercantile values of competitive individualism.[21]

Whatever the source of the immediate spark for the rebellion, the result was that the revolt "separated the citizens of Massachusetts into two class-conscious groups — debtors and creditors."[22] While Shays's ragtag revolutionaries were defeated militarily,[23] their cause did exert some political influence at the next state legislative elections.[24] Although this populist-influenced legislature granted only a few of the insurgents' demands,[25] the opponents of Shays were convinced that far greater changes were threatened.[26]

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18. *See* Hansen, *The Significance of Shays' Rebellion*, 39 S. ATLANTIC Q. 305, 306-07 (1940); Farnsworth, *Shays' Rebellion*, 12 MASS. L.Q. 29, 36-37 (1927).

19. R. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION 129-34 (1954).

20. *Id.* at 134-36. The Shaysites' objections to the Massachusetts judicial system can also be viewed as a response to the changing nature of law at the time. Law was outgrowing its prior concentration on religious matters and "increasingly supported the sanctity of contract and provided a means for the regular collection of debts and loans." D. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 13 (1980).

21. *See* D. SZATMARY, *supra* note 20, at 1-18.

22. R. TAYLOR, *supra* note 19, at 167. For a discussion of the fashions of historical scholarship that have led periodically to the deprecation of the class factor in Shays' Rebellion, see D. SZATMARY, *supra* note 20, at xi-xiv.

23. *See* D. SZATMARY, *supra* note 20, at 98-114.

24. In the election of June 1787, Governor James Bowdoin, who had led the Massachusetts state government against the Shaysites, was turned out of office by a large majority and replaced by John Hancock, who was perceived to be more disposed to support the interests of the rebels. In addition, approximately half of the state senators and three-fourths of the state representatives failed to gain reelection to the legislature. *See* D. SZATMARY, *supra* note 20, at 114; R. TAYLOR, *supra* note 19, at 165. The class divisions within the Massachusetts legislature would later define the political battle over that state's ratification of the Constitution. "The leaders [of the Federalists and Anti-Federalists] were types of their respective parties; wealth, learning and social position on the one side; natural ability, energy, and aggressive democracy, on the other." 2 F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1765-1895, at 41 (1970).

25. *See* R. TAYLOR, *supra* note 19, at 166.

26. The nature of these fears can be detected in a description of the new legislature offered by Theodore Sedgwick (a vigorous opponent of Shays Rebellion and later a leader of the Massachusetts effort to ratify the new federal Constitution):

The general appearance of the house indicates violent contests. On one side are men

None of this was lost on those designing a new, stronger union. One historian has observed that "Shays' Rebellion assumed the stature of a national event because it offered a model for domestic dissidence in every state."[27] This dissidence reflected not only political goals, but economic goals as well. The framers of the Constitution recognized that the Shaysites' objectives " 'certainly mean the abolition of debts' and a 'division of property,' a program that would gain support everywhere state fiscal policies pressed hard on debt-ridden farmers."[28] The new government was in part a response to this populist pressure. One of the primary motivations of those organizing the new regime was, to borrow Madison's forthright phraseology, to protect "the minority of the opulent against the majority."[29] John Marshall accepted the view that the "chief obstacles to Lockean law and order in America had proven to be the more democratic fringes of its dominant middle class,"[30] and his nationalism was merely another expression of this attitude.

Nevertheless, the idea of the national market — adopted by economic aristocrats with the intention of justifying and preserving their dominant positions — contained the seeds of a new economic order largely antagonistic to the interests of the ideological successors to Chief Justice Marshall. Marshall shared with later generations of economic conservatives one central belief: that the resources controlled by an economically powerful minority should not be subject to the dictates of a government controlled by a political majority that is potentially hostile to the existing economic hierarchy. In other words, Marshall and later generations of economic conservatives have sought to insulate from political control economic arrangements under which a few private actors determine key policies concerning the production, distribution, and use of the nation's economic wealth.

Marshall's political ideology of nationalism, which was developed partly in order to legitimate and perpetuate the hierarchies of pre-industrial market capitalism, ironically became the tool with which subsequent generations would begin exercising political control over later manifestations of the very economic arrangements Marshall sought to preserve. Marshall's conservative successors continued to pursue his ideological goal of preserving private con-

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> of talents, & of integrity, firmly determined to support public justice and private faith, and on the other there exists as firm a determination to institute tender laws, paper money, to disband the troops and in short to establish iniquity by law. At present nothing has taken place from which one can be certain on which side will be the majority.

Id. (quoting letter from Sedgwick to Nathan Dale, June 3, 1787, Sedgwick Papers, Mass. Historical Soc.).

27. P. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787, at 178 (1983).

28. *Id.* (quoting 9 THE PAPERS OF JAMES MADISON 144 (W. Hutchinson ed. 1962)).

29. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 16, at 431; *see also* Madison's discussion in *Federalist No. 10* of the inability of democracy to cope with "[t]he diversity in the faculties of men from which the rights of property originate. . . ." THE FEDERALIST NO. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

30. R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 86 (1968).

trol over matters of economic policy, but only by slowly whittling away at Marshall's organizing principle of the national market. Marshall's early statement of the national market turned out to be prescient, but for reasons that Marshall himself would probably lament. His strong statement of the principle eventually provided the intellectual framework for addressing commerce on a systemic rather than a transactional basis; consequently, it provided the conceptual foundation to support modern interventionist economic policies. Marshall would posthumously win the battle over the meaning of commerce, but only by losing the war over control of the country's economic destiny.

The seeds of change unwittingly planted by Marshall in *Gibbons*, however, would not sprout for more than one hundred years. Marshall's economic nationalism developed progressive overtones only after the widespread dislocations of the Depression in the 1930s undermined the credibility of economic conservatives, and caused the Court to revamp radically its views on the constitutional principles governing relations between the political structure and the economy. In the intervening period between Marshall's death and the constitutional revolution in the 1930s, economic conservatives gradually abandoned Marshall's nationalism and embraced a theory emphasizing local control over economic affairs. This shift stemmed in part from the changing nature of relations between the economic elite and the local and state governments in the years following *Gibbons*. The federal government turned out to be a less potent engine for economic development than the Federalists had hoped. The immediate congressional response to Hamilton's *Report on Manufactures*,[31] for example, was less than overwhelming.[32] More importantly, the need to stifle popular regulatory efforts on the state level turned out to be less pressing than the conservatives of Marshall's day had anticipated. The history of early American economic relations between the states and the incipient business sector was one of strong mutual assistance. In a quite literal sense the business of government was business. As one commentator has noted:

> [T]he elected official replaced the individual enterpriser as the key figure in the release of capitalist energy; the public treasury, rather than private saving, became the main source of venture capital; and community purpose outweighed personal ambition in the selection of large goals for local economies. "Mixed" enterprise was the customary organization for important innovations, and government every-

31. *See* 3 A. HAMILTON, THE WORKS OF ALEXANDER HAMILTON 192 (J. Hamilton ed. 1850). This report, along with other reports Hamilton submitted on related economic themes, proposed what has been described as a "grand and imperial" plan involving the federal government in private economic development. "A fully negotiable funded debt, drained originally from the small-property classes and met by taxes paid by the masses, was to be used by an emerging moneyed class to create profitable, speculative enterprises in lands, industry, and finance." J. DORFMAN & R. TUGWELL, EARLY AMERICAN POLICY: SIX COLUMBIA CONTRIBUTORS 33 (1960).

32. *See* D. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 146-65 (1980).

where undertook the role put on it by the people, that of planner, promoter, investor and regulator.[33]

The cooperative atmosphere that developed between states and private economic interests in the pre-Civil War period may explain the Court's willingness to relax Marshall's strong principle of economic nationalism soon after Marshall's death. One need not go beyond the conflicting opinions in *Mayor of New York v. Miln*[34] — which was decided only a year after Marshall's death — to find evidence indicating the Court's movement away from Marshall's broad empowerment of the federal government in *Gibbons*. The "turbulence and follies of democracy"[35] had been tamed, the Shaysites were becoming a foggy memory, and the need for a strong federal power to counteract eddies of localized popular discontent accordingly was no longer viewed by the economic elite as quite so compelling.

II.
THE IDEA OF THE NATIONAL MARKET AND THE EVOLUTION OF ECONOMIC THEORY

The story of the active commerce clause's evolution after John Marshall's death is a reflection of the dislocations caused by rapid industrialization and the concurrent development of economic theory to explain and justify the trauma of massive changes in the economic structure of society. The commerce clause tale takes the Supreme Court in a full circle, starting with the very broad notion of commerce articulated in *Gibbons*. During the second period, extending from Chief Justice Marshall's death until 1936, the Court severely contracted the concept of commerce. Finally, in the third period that began with the constitutional revolution in 1937, the Court effectively eliminated judicially-enforceable limits on the power of Congress to act under the authority of the commerce clause, and revived a definition of the term "commerce" closely resembling that proposed originally by Chief Justice Marshall.

The conservative ideological bias of the Court's treatment of commerce during the period between the Civil War and the constitutional revolution is so universally recognized that it has become a cliche.[36] But the doctrinal de-

33. Lively, *The American System*, 29 BUS. HIST. REV. 81 (1955).

34. 36 U.S. (11 Pet.) 102 (1837). *Miln* involved a New York statute requiring incoming ships to make detailed reports on passengers, file a bond for each foreigner brought into the port of New York, and consent in advance to remove any passenger upon the request of the mayor. The Supreme Court voted 6-1 to uphold the statute as a legitimate exercise of the state's police power. Only Justice Story dissented, and he noted that his views reflected those of the late Chief Justice. After hearing the first oral argument in *Miln*, Justice Story wrote that Marshall's "deliberate opinion was, that the act of New York was unconstitutional; and that the present case fell directly within the principles established in the case of *Gibbons v. Ogden* and *Brown v. The State of Maryland*." *Id.* at 161 (Story, J., dissenting) (citations omitted).

35. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 16, at 51.

36. Even many prominent modern conservatives oppose a return to the constitutional theory adopted by the Court during this period. *See, e.g.*, Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

velopment that permitted these biases to blossom into constitutional law began in the Court led by Marshall's successor, Chief Justice Taney. The following description of the Taney Court's "modification of the [Marshall Court's] trajectory" in the contract clause area also summarizes the overall theme of Taney Court decisions regarding the allocation of constitutional power to regulate commerce generally: "Taney promoted a dynamic, viable relationship between state regulatory power, based ultimately on the principle of popular sovereignty, and the powers of corporations which rested on higher-law assumptions about the proper place of property and contracts in the American constitutional order."[37] This "dynamic, viable relationship" could easily be turned by later Courts into a mechanism to forestall virtually all forms of regulation that interfered with the use of capital. After the Civil War, the Court limited national economic regulation with a vengeance in order to protect even more rigorously "the proper place of property . . . in the American constitutional order." By utilizing a narrow definition of commerce to prevent federal regulation of economic activity, and incorporating a set of natural law concepts into the fourteenth amendment to prevent state regulation of economic activity, the Court provided a virtually impenetrable cloak for the activities of the burgeoning private sector.

It is important to reiterate these obvious points about the effects of the Court's commerce clause rulings that culminated in the constitutional crisis of 1936, but they do not reveal the full measure of the Court's identification with the economic interests being served by the constriction of the term "commerce" during this period.

The decisions restricting Congress's commerce power articulated a theory of commerce and economics that subtly incorporated the unique perspectives of the neo-classical economic theories that also developed during this period. Like the Court's rulings on commerce and substantive due process, the principles of neo-classical economics strongly supported laissez-faire economic policies, and resisted popular control of corporate and industrial activity.

Denying the significance of the national market was a staple of neo-classical thought. The Social Darwinist specifics of the Court's substantive due process theory of the period[38] were in fact less crucial to the Court's overall development of conservative constitutional theory than the broader inculcation of the neo-classical perspective toward the general nature of modern economic organization. The Court eventually abandoned these principles in the active commerce clause area. However, as the Article argues in Section IV below, these ideas were not relegated to the status of historical artifacts in 1937; they became absorbed into the Court's dormant commerce clause jurisprudence, where they continue to exert influence over the Court's actions. For this reason, it is necessary to explore the nature of these ideas in greater depth.

37. H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 84 (1982).

38. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

A. Neo-Classical Economics and the Idea of the National Market

In one of the decisions in the late 1930s marking the Supreme Court's professed abandonment of constitutional conservatism in economic matters, the Court described the gamut of theoretical possibilities for structuring the national economy: "It is . . . immaterial that . . . state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes. . . ."[39] Yet in a significant way Adam Smith and John Maynard Keynes are not the polar opposites the 1939 Court supposed. Both Smith and Keynes shared a common perspective on the discipline of economics: they were both concerned with the overall economic system, in particular the interrelationship of the industrial structure, long-term economic growth, and the distribution of resources. This Article argues that the Court's dormant commerce clause jurisprudence has subtly rejected the systemic, macroeconomic approach to economic theory utilized by both Smith and Keynes, in favor of a microeconomic approach derived from the tenets of neo-classical economics. This approach, which coincides with the dictates of modern economic conservatism, belies the Court's protestations of neutrality in the economic field.

Like the Supreme Court's commerce clause jurisprudence, the development of modern economic thought in the West can also be divided into three periods, which roughly coincide with the analogous periods of commerce clause development. Publication of Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations* in 1776 and Keynes's *General Theory of Employment, Interest, and Money* in 1936 signaled respectively the beginning of periods one and three. The neo-classical economic theory that defines period two is more difficult to date because no one theorist clearly embodies the departure from prior thought. However, it unquestionably dominated mainstream economic thought from the late nineteenth century until Keynes's refutation of central neo-classical principles in 1936.

This Article is concerned primarily with neo-classical economics because the neo-classical preoccupation with microeconomic analysis provided much of the intellectual structure to the Court's commerce clause decisions during the era labeled period two, and because it continues to prevail as a guiding intellectual construct in the dormant commerce clause area. It is important, however, to note the continuity between certain fundamental aspects of Adam Smith's thought and the tenets of neo-classicism. Adam Smith's work represents an extension into the economic arena of a body of ontological assumptions that also informed the political theory of Thomas Hobbes and John Locke. These assumptions — termed "possessive individualism" by the political theorist C. B. Macpherson[40] — simultaneously provided the underpinnings for both the liberal state and market capitalism. Macpherson cites several basic postulates that define this theory:

39. Osborn v. Ozlin, 310 U.S. 53, 62 (1940).

40. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

(i) What makes a man human is freedom from dependence on the wills of others.
(ii) Freedom from dependence on others means freedom from any relations with others except those relations which the individual enters voluntarily with a view to his own interest.
(iii) The individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society. . . .
(iv) Although the individual can not alienate the whole of his property in his own person, he may alienate his capacity to labor.[41]

From these four propositions, it follows that society consists simply of a series of market relations between independent economic actors. This fifth postulate provides the philosophical starting point for both Adam Smith and the neo-classical economists.

Smith's contribution to the moral and theoretical foundation of capitalism was a theory describing how individual acts of selfishness by members of society unwittingly formed a coherent economic system that was both rational and desirable. This systemic focus is the primary distinction between Smith's intellectual perspective and that of the neo-classical economists. Smith was concerned with the economic organism as a whole. The object of Smith's study was the economic structure as a self-regulating system; the individual transactions within that structure were important only to the extent that they acted together as part of the overall market organism.

Smith viewed the market mechanism as an almost magical device to bind together and rationalize otherwise disparate and even hostile actions by individual economic actors. Like Thomas Hobbes, Smith recognized that the threatened violence implicit in the nature of civil government was necessary to establish the ground rules of a competitive economy, and to protect the winners of the competition for goods in that economic environment.[42] But within the very basic parameters of these capitalistic ground rules, Smith believed that the limited capacity of individuals to consume would provide an effective restraint on the destabilizing potential of individual avarice. In one of his favorite illustrations, Smith pointed out that the capacity of the human stomach imposes a natural limit on the ability of the rich to pursue their immense desires, and in order to dispose of the excess they will necessarily "divide with the poor the produce of all their improvements."[43] Natural limitations of this

41. *Id.* at 263-64.

42. "The acquisition of valuable and extensive property . . . necessarily requires the establishment of civil government." A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 670 (E. Canaan ed. 1937). "Civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all." *Id.* at 674 (footnote omitted). *Compare* T. HOBBES, LEVIATHAN 130-34 (Everyman's Ed. 1973).

43. A. SMITH, THE THEORY OF MORAL SENTIMENTS 264 (6th ed. 1966). *Moral Sentiments* was published 17 years before *Wealth of Nations*, but the example would reappear in the later volume. *See* A. SMITH, *supra* note 42, at 164. Smith went on to assert that the rich, after more than adequately satisfying their natural appetites, would create new, artificial appetites for

sort represented one aspect of the famous "invisible hand" that Smith found operating throughout the economic system he described.[44]

The other important aspect of Smith's "invisible hand" was competition: Smith believed that the natural, inherent limitations on an individual's ability to consume basic economic resources were augmented by external limitations on the accumulation of economic power imposed by other individuals competing for the same economic resources. The invisible hand would provide the impetus for rationalizing industrial manufacturing because it would force producers to mechanize and segment labor in ever-more efficient systems of production. It would automatically regulate prices by requiring producers to compete for purchasers. It would regulate incomes by forcing labor to compete for jobs. It would even regulate population, because large families would be economically viable only until they outstripped the market's capacity to absorb the additional laborers.[45] The details are undoubtedly familiar, but the important point is that Smith treated these details as significant only because they formed a larger system; he was concerned primarily with the macroeconomic consequences of individual behavior.

Of course, Smith's benign view of the future of industrial capitalism turned out to be wrong in several fundamental respects. He did not anticipate the impact the industrial revolution would have on the operation of the market. Smith's quaint description of a ten-employee pin factory at the beginning of *Wealth of Nations*[46] bears only a historical relation to the industrial behemoths that would rule the economic landscape only a hundred years later. As the individual components of the marketplace grew and combined, the operation of the "invisible hand" changed as well. Although Smith recognized and warned against the potential hazards of monopoly,[47] he did not understand the extent to which capital-intensive industrialization would force a monopolistic or oligopolistic structure on many segments of the marketplace. He was also wrong about the likely form of ownership structure within advanced industrial capitalism. Smith believed that the corporate form would not survive, since it lacked the capacity for willful self-interest necessary to drive individuals to greater feats of commercial production.[48] Smith therefore did not foresee that the corporate form of business organization would negate many of the

"conveniences and ornaments of building, dress, equipage, and household furniture" to distinguish themselves from the less fortunate. *Id.* But to Smith the important thing was that the inherent limits on the consumption of necessities such as food induce the wealthy to satisfy the natural needs of the lower classes.

44. For an examination of the themes represented by the "invisible hand" metaphor, see Macfie, *The Invisible Hand in the Theory of Moral Sentiments*, in THE INDIVIDUAL IN SOCIETY: PAPERS ON ADAM SMITH 101-25 (1967).

45. *See* A. SMITH, *supra* note 42, at 79-81.

46. *Id.* at 4-5.

47. *See id.* at 147, 596-98.

48. The organizations Smith described more closely resembled trading guilds rather than the modern corporation. But his belief in corporate inefficiency, the corporate tendency toward monopolization of markets, and the deleterious segregation by corporations of individual producers from particular customers, *see id.* at 128-29, are equally applicable to the modern form.

natural characteristics that he believed would limit individual accumulation and consumption of wealth. The removal of these constraints would undercut many of Smith's observations about the operation of the market. It would also exaggerate the importance of other characteristics of the market economy that Smith dismissed too lightly or ignored altogether, such as the problem of class differentiation and the inevitable demands of an educated working class for greater political and economic power. Finally, Smith did not have to address the problems presented after his death by a business cycle of economic expansion and contraction that became increasingly violent as the economic system became more complicated.

Although Adam Smith inaugurated the new capitalist era in history, the neo-classical economists would have the job of dealing with these various factors that Smith either did not or could not have foreseen.[49] The neo-classical economists shared with Smith the ontological assumptions of liberal capitalism.[50] But their approach to the discipline of economics was fundamentally different. Whereas Smith had taken a wide variety of economic details and woven them together into a tapestry that represented the entire economy, the neo-classical economists concentrated on the details and simply took on faith that the overall structure of capitalism would take care of itself.

Three characteristics define the neo-classical break with the classical tradition. First, the neo-classical theorists redefined economics as a "scientific" discipline.[51] Neo-classical economic tracts overflow with numerical distillations of economic reality.[52] The neo-classical economists took the subject of economics away from the philosophers (Adam Smith had held the chair in

49. I am ignoring the work done by economists such as Malthus, Ricardo, Mill, and Marx during the intervening period between the publication of *Wealth of Nations* and the rise of neo-classical economics, because I am interested primarily in the development of capitalist theory, its ideological uses, and its incorporation into constitutional law. Much of the work done by classical economists, not to mention Karl Marx, during the intervening period emphasized macroeconomic theory, and cast grave doubt upon Smith's optimistic projections concerning the future of capitalism. Hence the application of the term "dismal science." *See* Carlyle, *The Present Time*, in LATTER DAY PAMPHLETS 53 (1850). Neo-classical economics was intended to rebut the pessimistic critics of Smith's laissez-faire system, a task that was accomplished by shifting the focus of economic analysis from the system to its components. Neo-classical economics thus brought forward Smith's strong advocacy of an unregulated marketplace, combined it with the characteristic nineteenth-century faith in progress, and provided a handy endorsement of the status quo.

50. *See supra* text accompanying note 38.

51. The French neo-classical economist Leon Walras was an extreme example of this tendency: "he vigorously maintained that the status of economics as pure science should never be compromised by bringing the work of the theorist closer to the problems of practical affairs." W. BARBER, A HISTORY OF ECONOMIC THOUGHT 199 (1967).

52. William Stanley Jevons spoke for many of his neo-classical compatriots as well as himself when he wrote that "[m]y theory of Economics . . . is purely mathematical in character." W. JEVONS, THEORY OF POLITICAL ECONOMY 3-4 (1870). Alfred Marshall is a notable exception to this generalization. *See* A. MARSHALL, *Review of Jevons' Theory of Political Economy*, in MEMORIALS OF ALFRED MARSHALL 98-99 (A. Pigou ed. 1929). For a general discussion of the mathematical school of neo-classical economics, see L. HANEY, HISTORY OF ECONOMIC THOUGHT 587-605 (3d ed. 1936).

Moral Philosophy at the University of Glasgow) and gave it to a group of technicians. This transformation in the discipline served a subtle legitimating function: in transforming "political economy" into "economics," the new scientists ostensibly took the political judgments out of economics and provided a sheen of scientific necessity to the existing system and all its frailties and inequities.[53] A recent review of two books written by modern political economists suggests the significance of the change in nomenclature during the nineteenth century.

> From the first use of the term [political economy] by the Huguenot exile Antoine de Montchretien in 1614, through John Stuart Mill, economic theorists called themselves political economists. But they began as mercantilist advisers, concerned about trade as a source of sovereign power. As they increasingly distinguished wealth and welfare as goals in their own right, they focused on the laws of a market arena that was supposedly free from political constraint. Economic transactions were to be analysed [sic] as if they depended only upon the comparison and free exchange of values. The discipline progressed only in so far as economic man left behind his less rational persona as political animal.[54]

The *a priori* assertion that economic values could be divorced from political values also indicated the new discipline's relation to the existing power structure. "Economic theory can ignore political analysis only when the underlying distributions of power and wealth remain unquestioned."[55]

The second and third characteristics of neo-classical economics further illustrate the allegiance between neo-classical economics and the status quo. The second characteristic of neo-classical economics is its ahistorical nature. The third is its focus on microeconomic analysis. Unlike Adam Smith, the neo-classical economists typically did not address directly (and often not even tangentially) the long-term prospects for capitalism, although the very nature of their work implied that the long-term prospects were undoubtedly positive. Instead of analyzing long-term trends and patterns, the neo-classical economists concerned themselves with the analysis of short-term economic phenomena, such as questions related to price theory. Moreover, their analysis was usually based on hypothetical models of perfect competition.[56]

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53. There is some irony in this aspect of neo-classical thought, since many of its proponents intended their work to rebut the very different claims of scientific inevitability proposed by Karl Marx. Instead of refuting these claims, the neo-classicists simply substituted different forms of inevitability by positing abstract conditions of pure competition and natural economic equilibrium, toward which the neo-classical economists asserted the capitalist economy would naturally gravitate.

54. Maier, Book Review, Times Literary Supp., May 6-12, 1988, at 491, col. 1.

55. *Id.*

56. Some neo-classical economists, such as Leon Walras, were careful to note that the perfect competition paradigm was situated in the area of pure, rather than applied economics. *See* L. WALRAS, ELEMENTS OF PURE ECONOMICS 40 (W. Jaffee trans. 1954). But this distinction dissolved in the mind of many others when they contemplated the practical application of

This ahistorical approach complemented the neo-classical emphasis on microeconomics — analysis of the decisions of discrete economic actors such as individuals and businesses — to the exclusion of macroeconomics — analysis of the economic activity of the economy as a whole. The microeconomic focus of neo-classical economists followed naturally from their policy bias against political manipulation of the marketplace and their common assumption that malfunctions in the operation of a market economy would be both temporary and self-correcting. The microeconomic emphasis of neo-classical theory provided a highly effective pedagogical tool for implementing and perpetuating the doctrine's anti-interventionist policy goals. Economists and political figures who are trained by neo-classical economists to view economic affairs from a radically decentralized perspective are unlikely to pursue blasphemous policies involving centralized planning or regulation.

The microeconomic perspective colored all of neo-classical thought. Even when a neo-classical economist did attempt long-term analysis, as in Alfred Marshall's discussion of price theory in his *Principles of Economics*,[57] it focused sharply on an isolated fragment of the economy (such as the market for fish) rather than the changing composition of the overall economic structure. Moreover, the concept of time itself was filtered through the neo-classical view that economic variables such as price levels and the relation between interest rates and the level of investment would gravitate toward a natural equilibrium. Marshall introduced some measure of sophistication into this scheme by differentiating carefully among factors affecting short-term and long-term equilibrium of supply and demand,[58] but he did not question the primary neo-classical fallacy. He persisted in assuming that the equilibrium was a static, natural fact, which could not be manipulated by producers (due to competitive pressures and natural limits on demand) and should not be manipulated by governments.[59] While these anti-interventionist theories did

their work. The pure competition paradigm led many neo-classical theorists to take an unrealistically rosy view of many of the economic changes they were witnessing. For example, although Alfred Marshall recognized that companies could achieve dominance in certain limited "specialized" markets, he asserted that this dominance would be temporary and could not be expanded outside those narrow confines into the general market. Upon a company's expansion into the general market the protective natural characteristics that distinguish the pure competition model would take over and single-firm dominance would be prevented. *See* 1 A. MARSHALL, PRINCIPLES OF ECONOMICS 285-87 (9th ed. 1961). Similar considerations led the American neo-classical economist John Bates Clark to conclude — again based on the perfect competition model — that the naturally competitive characteristics of market participants, along with technical innovation, would prevent concentration of economic power from undermining the market. *See* J. CLARK, THE CONTROL OF TRUSTS 36-55 (1901) (arguing against the breakup of monopolies, statutory limitations on corporate size, price controls, excess profits taxes, and socialization of private economic enterprises; arguing in favor of the "rescuing of competition" through actions such as the elimination of tariffs).

57. *See* A. MARSHALL, *supra* note 56, at 369-80.

58. *Id.* at 363-80.

59. "[T]he socio-economic organism," Marshall wrote, "is more delicate and complex than at first sight appears. . . . [I]ll-considered changes might result in grave disaster." *Id.* at 712. Socialistic intervention in the economy would not only "deaden the energies of mankind,

no particular damage when confined to metaphysical debates about the nature of "value," it led to disastrous policy failures when the economic system nearly collapsed in the 1930s because of falling aggregate demand that was inexplicable by reference to the principles' of neo-classical economics. Although neo-classical contentions about economic equilibrium could at least be defended theoretically when applied to microeconomic analysis of price levels of particular products, they were wholly inadequate when applied to broader macroeconomic problems such as those that confronted the world during the Depression.

B. The Idea of the National Market After Keynes

The Depression ended the neo-classical dominance of economic policy-making. This fall from grace was greatly aided by the simultaneous development of John Maynard Keynes's very different theories. The outline of this story is well known. By the 1930s it had become clear that the neo-classical economists had gotten many things wrong: unemployment was not a temporary phenomenon, as the neo-classical economists had insisted, but had become endemic throughout the industrialized West; industrial concentrations were making a mockery of the "perfect competition" model by monopolizing many markets and setting prices at will;[60] and — most importantly — the economy failed to revive itself during the Depression, contrary to the assumptions made on the basis of neo-classical principles.

For the purpose of the present discussion, the key aspect of Keynes's response to the failure of neo-classical economics was his insistence that the economy be treated as an organic whole. Keynes's work amounted to a total reorientation of economic theory, and demonstrated that the linkages in a market economy were far more intricate than the neo-classical economists had supposed. Keynes revealed, for example, that linkages between savings and investment were significantly more complicated than the neo-classical economists had believed. These two key components of the industrial economy did not, as neo-classical theory asserted, tend toward a natural equilibrium, with the interest rate serving as the balancing factor.[61] Instead, investment (and the employment it generates) was susceptible to influence by other factors un-

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and arrest economic progress," but also "might probably destroy much that is most beautiful and joyful in the private and domestic relations of life." *Id.* at 713.

60. Near the end of the neo-classical period, a few economists came to recognize the growing dominance of certain markets by a few firms. *See* E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933); J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933). The rise of corporate monopolies did not cause neo-classical economists to question the basic verities of their theory. They simply ackowledged the existence of monopolies, absorbed these facts into their laissez-faire doctrine, and proceeded as if for theoretical purposes the new corporate monoliths were identical to Adam Smith's pin factory. *See, e.g.*, J. CLARK, *supra* note 56.

61. J. KEYNES, GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 165 (1936).

related to interest rates, such as the prospective yield on capital.[62] These factors were in turn heavily influenced by projected deficiencies in aggregate demand.[63] On a very basic level, if a particular company can foresee no demand for the products of increased production capacity, then it would be irrational for the company to invest in an expansion of its production facilities. If similar decisions are made by a number of industries, aggregate income and effective demand stagnate. If this situation occurs in an environment where high unemployment permits wage reductions, then aggregate demand could even begin to contract, and the race toward total economic collapse ensues.

Although Keynes's argument is infinitely more subtle and complex, the significant point is simply that economic decisions that are perfectly rational as a matter of microeconomics cumulatively lead to macroeconomic disaster. Thus, microeconomic principles of self-interested investor activity cannot be expected to take care of macroeconomic problems of low investment levels, high unemployment, and shrinking demand for goods and services.

Besides revealing the basic fallacies of neo-classical economics, Keynes's work had another, perhaps equally important, consequence. To the neo-classical economists, political input into private economic decision-making was economic anathema. By establishing that reliance upon microeconomic decision-making alone could not suffice to keep the modern industrial economy operating, Keynes's theory virtually required the exercise of substantial political control over the use of private wealth. Keynes did not deny that the influence of private economic power over economic policy would persist, but rather made economic policy a legitimate matter for political debate. The decisions of private economic actors could now be guided (or even overruled) based on contrary popular political conceptions of the common good. Moreover, the economic decisions of individual economic actors were to be judged on a scale of costs and benefits to society as a whole. Private good was no longer the sole measure of public good. The term "political" was thus once again linked with the term "economy."

The explicit introduction of politics into economic theory has profound implications. Edward VII (then Prince of Wales) unintentionally predicted these implications in 1895 with his quip that "we are all socialists now-a-days."[64] Of course, "socialism" takes many forms.[65] If the term is taken to

62. *Id.* at 141.

63. *See generally id.* at 147-64. The situation is further complicated by the fact that investment decisions are not, as the neo-classical economists implicitly assumed, always governed by purely rational judgments and expectations. Investment decisions are often subject to whims created by the mass psychology of financial speculation, threats to the political sensibilities of the business class posed by the occasional electoral success of reformist political movements, and the general need for a social and political atmosphere characterized by a "delicate balance of spontaneous optimism." *Id.* at 162.

64. G. ST. AUBYN, EDWARD VII: PRINCE AND KING 254 (1979).

65. For an illuminating discussion of the definitional problem, see M. DOBB, WELFARE ECONOMICS AND THE ECONOMICS OF SOCIALISM: TOWARD A COMMONSENSE CRITIQUE 121-52 (1969).

mean simply the existence of substantial political regulation of the national economy, then even the United States is in this weak Keynesian sense "socialist."

Obviously there are more rigorous definitions of the term "socialist," and equally obviously Keynes did not end the debate over macroeconomic policy. Keynes antagonized political conservatives by legitimating government intervention as an element of mainstream economic policy, but he was also criticized by those on the left for his embrace of certain market mechanisms.[66] Indeed, Keynes specifically eschewed socialism in its most traditional form: "It is not the ownership of the instruments of production," Keynes wrote, "which it is important for the state to assume."[67] Others, such as the "left Keynesians" at Cambridge University, integrated Keynes's observations into a more socialistic policy orientation.[68] More recently, the split among Keynesians has broadened. One group, the "neo-Keynesians," has moved right.[69] Another group, the "post-Keynesians," moved distinctly left.[70]

The Keynesian revolution also produced a modern Thermidor in the form of monetarism. Monetarism is essentially a repackaging of the quantity theory of money. This theory — which asserts simply that "one of the normal effects of an increase in the quantity of money is an exactly proportional increase in the general level of prices"[71] — was a central principle of neo-classi-

66. Keynesian theory envisioned only partial government intervention, directed toward those aspects of the economy relating to spending and demand. Keynes believed that traditional market forces should continue to determine virtually all aspects of economic supply (i.e., the details of production). *See* J. KEYNES, *supra* note 61, at 378-81. He would therefore leave primary control over certain fundamental economic decisions to those dominating the private sector. In other words, he would leave the capitalist hierarchy intact. This led the American Marxist Paul Sweezy to complain that "[t]he Keynesians tear the economic system out of its social context and treat it as though it were a machine to be sent to the repair shop there to be overhauled by an engineer state." P. SWEEZY, THE THEORY OF CAPITALIST DEVELOPMENT: PRINCIPLES OF MARXIAN POLITICAL ECONOMY 349 (1970).

67. J. KEYNES, *supra* note 61, at 378.

68. *See, e.g.*, M. DOBB, AN ESSAY ON ECONOMIC GROWTH AND PLANNING (1960); M. DOBB, ON ECONOMIC THEORY AND SOCIALISM (1955); M. DOBB, POLITICAL ECONOMY AND CAPITALISM: SOME ESSAYS IN ECONOMIC TRADITION (1937); J. ROBINSON, ECONOMIC HERESIES: SOME OLD-FASHIONED QUESTIONS IN ECONOMIC THEORY (1973); J. ROBINSON, ON RE-READING MARX (1953); P. SRAFFA, PRODUCTION OF COMMODITIES BY MEANS OF COMMODITIES: PRELUDE TO A CRITIQUE OF ECONOMIC THEORY (1960).

69. *See* A. LEIJONHUFVUD, ON KEYNESIAN ECONOMICS AND THE ECONOMICS OF KEYNES: A STUDY IN MONETARY THEORY (1968).

70. This group "asserted the feasibility of full-employment priorities, and emphasized the case for (1) a recovery, restructuring and redistribution of resources; served by (2) an active fiscal and demand-management policy, and a reduction to secondary importance of monetary policy; (3) a renewal of the primary public-spending role stressed by Keynes himself; and (4) specific planning in the big business sector, jointly negotiated by government, management, and unions." S. HOLLAND, THE GLOBAL ECONOMY: FROM MESO TO MACROECONOMICS 26 (1987).

71. I. FISHER, THE PURCHASING POWER OF MONEY: ITS DETERMINATION AND RELATION TO CREDIT INTEREST AND CRISES 157 (rev. ed. 1920). *See generally* M. FRIEDMAN, *The Quantity Theory of Money: A Restatement*, in THE OPTIMUM QUANTITY OF MONEY AND OTHER ESSAYS 51 (1969).

cal economics.[72] Because monetarism's primary theoretical concern is inflation, the theory quite naturally regained prominence during the inflationary period of the late 1970s. But monetarism is, in reality, a mechanism for rearguing the case for neo-classical economics *in toto*. The monetarists argue that inflation is the result primarily of excessive spending by government, and that such spending is only likely to "crowd out" private expenditure.[73] These arguments are vehicles for a more pervasive attack on the regulatory state and government intervention in the economy generally.[74] These arguments are, in other words, only partly economic. The other part is political. "The pace and passion with which the monetarists have sought to roll back the frontiers of the state clearly implies more of the 'personal view' with which Friedman subtitles his *Free to Choose* rather than the 'positive economics' of his scientific pretensions."[75]

C. *Modern Attempts to Revive Neo-Classical Theory*

The most recent offshoot of neo-classical economics is the "rational expectations" school.[76] This group of economists further refines the defensive, anti-interventionist rhetoric of monetarism. Whereas the neo-classical economists asserted the mathematical certainty that a laissez-faire economy would succeed, the rational expectations school asserts the fatalistic proposition that economic knowledge cannot be assembled with sufficient precision at the macroeconomic level to justify government intervention in the economy. In other words, they maintain that no macroeconomic policy at all is better than what they consider bad policy based on incomplete or inaccurate information. Somewhat ironically, the rational expectationists resurrect the fiercely microeconomic orientation of neo-classical economics by using scientific models to prove that there are limits to scientific modeling.

Rational expectation theorists justify their conclusions by reasserting the primary importance of microeconomic behavior much more forcefully than

72. However, the concept antedated neo-classical economics in the works of David Hume and David Ricardo. *See* Hume, *Of Money*, in WRITINGS ON ECONOMICS 33 (E. Rotwein ed. 1955); D. RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (P. Sraffa ed. 1951).

73. The monetarist argument is summarized in Azarchs & Nell, *Monetarism: Conservative Policy and Monetary Theory*, in FREE MARKET CONSERVATISM: A CRITIQUE OF THEORY AND PRACTICES 40-41 (E. Nell ed. 1984).

74. *See generally* N. KALDOR, THE SCOURGE OF MONETARISM (2d ed. 1986); M. DESAI, TESTING MONETARISM (1981); Kaldor, *The New Monetarism*, in FURTHER ESSAYS ON APPLIED ECONOMICS 3 (1978).

75. S. HOLLAND, *supra* note 70, at 24. The moral, philosophical, and epistemological bases of the monetarist position are also discussed extensively in the work of Professor Friedman's European counterpart, Friedrich von Hayek. *See* von Hayek, *The Pretense of Knowledge*, 77 SWEDISH J. OF ECON. 433 (1975); F. VON HAYEK, THE PURE THEORY OF CAPITAL (1941); F. VON HAYEK, THE ROAD TO SERFDOM (1944).

76. The rational expectations school traces its origins to a 1961 article by John Muth. *See* Muth, *Rational Expectations and the Theory of Price Movements*, 29 ECONOMETRICA 315 (1961).

the monetarists. In simplified form, their argument is that individual market actors will always be able to outsmart government policy makers, and circumvent the best-laid Keynesian plans. Two rational expectation theorists describe the "conundrum facing the economist" as follows:

> In order for [an economic] model to have normative implications, it must contain some parameters whose values can be chosen by the policymaker. But if these can be chosen, rational agents will not view them as fixed and will make use of schemes for predicting their values. If the economist models the economy taking these schemes into account, then those parameters become endogenous variables and no longer appear in the reduced-form equations for the other endogenous variables. If he models the economy without taking the schemes into account, he is not imposing rationality.[77]

The rational expectations school demonstrates that although the tone of the rhetoric of economic conservatism has changed over the years, the underlying arguments and objectives have not. The rational expectations theorists' main target is government regulation. Like their neo-classical predecessors, the rational expectations theorists assert that economic analysis should be content to focus on the economic decisions of private individuals and firms, and the macroeconomic consequences should be left largely to the operation of the invisible hand. Considerations of macroeconomic policy creep in, but only in the guise of assisting rational microeconomic decision-making. Two rational expectations proponents have employed this technique to draw specific "implications for constitutional law."

> A majority group, say, the workers, who control the policy might rationally choose to have a constitution which limits their power, say, to expropriate the wealth of the capitalist class. Those with lower discount rates will save more if they know their wealth will not be expropriated in the future, thereby increasing the marginal product and therefore wage and lowering the rental price of capital, at least for most reasonable technological structures.[78]

In the final analysis, rational expectations theory, like its predecessors, is merely an extensive apologia for the perpetuation of existing economic hierarchies. Antagonism toward the concept of democratic control of capital comes naturally to such a theory. Perhaps this explains why some rational expectations theorists find the countermajoritarian constitutional metaphor appealing.

> [T]he most useful way to think about government policy is as a choice of *rules of the game* to which government is committed for some length of time. This is why democratic governments have con-

77. Sargent & Wallace, *Rational Expectations and the Theory of Economic Policy*, in RATIONAL EXPECTATIONS AND ECONOMETRIC PRACTICE 213 (R. Lucas & T. Sargent eds. 1982).

78. Kydland & Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, in RATIONAL EXPECTATIONS AND ECONOMETRIC PRACTICE, *supra* note 77, at 632.

> stitutions that are difficult to change and legal systems that respect precedents and "due process." So it is that quite recent developments in economic theory are reintroducing into macroeconomic policy discussions important considerations that were momentarily swept aside by the stress of the Great Depression and by the intellectual response of Keynesianism. We need, in Buchanan and Wagner's useful terminology, an "economic constitution" and we are at last beginning to develop the economic theory that will be helpful in designing it.[79]

The fact that the monetarist and rational expectation arguments are cast in these particular forms indicates that even the would-be successors to the neo-classical economists must accommodate the change in the economic landscape since Keynes's day. Whereas the nineteenth century neo-classical economists framed their arguments in terms of scientific certainty, their twentieth-century successors must base their arguments against state intervention on normative grounds. For example, the claim that unemployment results from workers pricing themselves out of jobs — common to traditional neo-classical economics and its monetarist and rational expectations successors — takes on a very different cast today than it did in the nineteenth century. Today a proposition of this sort must be sold as a political principle as well as an economic formulation. Today the value judgments underlying such a principle, and the costs and benefits that will be incurred if it is adopted, must be justified to the very people who suffer the consequences of an economy built around such propositions. Moreover, neo-classical principles of economic organization must be justified in terms of the overall macroeconomic effect of government action or inaction. Although conservative economists persevere in advocating a microeconomic analytical perspective focusing on private economic decisions unfettered by political intervention, Keynes and his progeny have forced the debate over economic policy irrevocably onto the national political stage. The latter-day neo-classical economists can no longer win the battle for deregulation and decentralization simply by defining economic reality in such a way that these policies are unavoidable.

Yet in the midst of this constantly changing landscape of economic thought, it is remarkable that public discourse concerning economic affairs in this country is still governed to a large extent by the framework and vernacular established by neo-classical economics. In particular, the remainder of this Article will concentrate on the microeconomic orientation of neo-classical thought, especially as it is utilized to decentralize economic policy and thereby diminish national power to coordinate economic decision-making, regulate production and distribution, reallocate wealth, and reorient the use of capital through centralized planning or public ownership of production facilities. The

79. R. LUCAS, MODELS OF BUSINESS CYCLES 104 (1987) (quoting J. BUCHANAN & R. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES (1977)) (emphasis in original).

Supreme Court has played a significant role in framing economic issues in these terms. The next section discusses the Court's role in dictating the terms of debate over economic issues in active commerce clause cases leading up to the constitutional revolution of 1937, culminating in the ostensible abandonment of the neo-classical perspective in favor of judicial "neutrality" regarding economic affairs. Section four will then discuss the continued dominance of these themes in the Court's modern dormant commerce clause jurisprudence.

III.
THE ECLIPSE OF THE NEO-CLASSICAL MODEL IN ACTIVE COMMERCE CLAUSE LITIGATION

One of John Maynard Keynes's major contributions to economic theory was to shift the focus of economic analysis from the particular to the general, from the behavior of individual economic actors to the dynamics of the complex system in which those actors operated. This refocus is analogous to one of Chief Justice Marshall's major contributions to constitutional theory: his rejection of the notion that commerce was limited to "traffic, to buying or selling, or the interchange of commodities,"[80] in favor of a broader definition encompassing all economic activity and its logical consequences. The connection between these two theories is the concept of the national market, coupled with the acceptance of political control over economic activity. As noted previously,[81] although Marshall's theory was probably intended to forestall rather than abet egalitarian reform, his expansive definition of commerce provided the theoretical starting point to legitimize large-scale Keynesian intervention in the American economy during the late thirties. Marshall's concept of commerce will also be a necessary ingredient of any economic theory that attempts to introduce more explicitly redistributive or socialist principles into the quasi-socialistic structure imposed on the modern economy in the fifty years since the *General Theory* was published.

At the risk of mining a vein that has long since been exhausted, this section briefly reviews the Supreme Court's active commerce clause decisions during the four decades preceding the advent of the New Deal. This is not intended to provide yet another cautionary tale against the Court's intervention into economic affairs. In a sense the purpose is just the opposite: this Article argues that the Court cannot avoid adopting at least the broad perspectives of a particular economic theory in the course of deciding cases that raise commerce clause issues. Moreover, the perspectives offered by the latter-day successors to neo-classical economics and the competing macroeconomic theories of a Keynesian or socialistic bent are to a large extent mutually exclusive. It is important, therefore, for the Court both to recognize the unstated economic premises of its commerce clause decisions, and to adopt an economic theory that at least roughly comports with modern economic reality.

80. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).
81. *See supra* notes 11-30 and accompanying text.

This section will focus on the extent to which the Court's constitutional decisions regarding economic affairs were once — i.e., during the period from 1895 to 1936[82] — heavily influenced by the precepts of neo-classical economics. This section will therefore set the stage for the next two sections, in which the role of these same neo-classical economic ideas in the Court's dormant commerce clause jurisprudence will be discussed. The goal is to point out the extent to which the Court's commerce clause decisions have contributed to the definition of economic thought in ways that make the political regulation of the economy more difficult, thus arguably entrenching certain dominant economic interests.

Dissenting in *Lochner v. New York*, Justice Holmes objected that "[t]his case is decided upon an economic theory which a large part of the country does not entertain."[83] Contemporary historians have also suggested that during the late nineteenth century the Court simply incorporated the personal economic theories of the conservative justices into constitutional law.[84] Although it is true that the substantive due process and commerce clause opinions of the Supreme Court during this period consistently pursued the holy grail of laissez-faire, economic doctrine was not incorporated into the constitutional vernacular in any systematic way, and it is probable that justices endorsing various components of neo-classical economic thought did not fully understand the conceptual basis in economic theory for what they did. Laissez-faire was more a philosophical concept than an economic one for many of the conservatives of this era.[85] Nevertheless, the themes of the constitutional jurisprudence of 1895 to 1936 coincide with the themes of neo-classical economic theory, which came to the fore during the same period. Whether knowingly or inadvertently, the Court during this period placed the imprimatur of the Constitution on neo-classical economics.

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82. The date of the decision in United States v. E. C. Knight Co., 156 U.S. 1 (1895), marks the beginning of the neo-classical era of active commerce clause jurisprudence because it was the first major decision applying neo-classical principles to the then-new federal role in the economy. However, as will be discussed in Section four below, many of the neo-classical elements applied in *Knight* were present in prior decisions involving state regulations challenged under the dormant commerce clause.

83. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

84. *See, e.g.*, A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960).

85. This is clearer in the substantive due process and contract clause decisions of the period than in the commerce clause decisions. The due process clause in particular offered justices the opportunity to discuss their views in the quasi-religious terms of natural justice, liberty, and individualism, rather than the more earthly nomenclature of economic analysis. *See* Santa Clara County v. Southern Pac. R.R. Co., 116 U.S. 394 (1886) (declaring corporations to be "persons" for purposes of due process analysis); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (setting forth the concept of liberty of contract as an aspect of due process); Lochner v. New York, 198 U.S. 45, 57 (1905) (striking down maximum hour laws as a violation of the "right of the individual to liberty of person and freedom of contract"); Adair v. United States, 208 U.S. 161, 175 (1908) (striking down federal legislation prohibiting employers from discriminating against union members on the ground that the legislation interfered with "the right of the employer, for whatever reason, to dispense with the services of [the] employee," the interference with which "no government can legally justify in a free land.").

The confluence of neo-classical economic theory and constitutional law can be detected by concentrating on certain predominant features of neo-classical economics. Four characteristics are particularly important: (1) the emphasis placed on microeconomic thinking, and the discouragement of macroeconomic analysis; (2) the assumption that economic factors such as price levels and the aggregate level of economic activity gravitate toward a natural equilibrium, and the complementary notion that the market contains an internal self-correcting mechanism that enables capitalist economies to avoid pervasive or long-term economic dislocations; (3) the presumption that the perfect competition paradigm correctly describes the prevailing tendency of a market economy, and that economic monopolies and oligopolies are inherently anomalous, unstable, and temporary; and (4) the rejection of political intervention in the economy in any form. In the active commerce clause area, the incorporation of these theoretical premises into the constitutional provisions regarding government action on economic matters led to specific legal consequences. During the heyday of the neo-classical commerce clause, virtually all major instances of government intervention in the economy were rejected by the Court on the ground that the government action violated constitutional law. Also, as a matter of broad constitutional policy, these economic principles required the abandonment of Chief Justice Marshall's early observations concerning the nature of commerce and the scope of federal power to regulate the operation of the national market.[86]

The Court pursued the implications of its theory enthusiastically during the period of constitutional conservatism. Large-scale federal intervention in the economy began in 1887, when the Interstate Commerce Act was adopted.[87] The federal role expanded when the Sherman Antitrust Act became law in 1890.[88] The Court responded to these preliminary interventionist efforts in 1895, with a neo-classical emendation of the commerce clause. The Court simultaneously excised John Marshall's concept of the regulated na-

86. The Court's gradual abandonment of Marshall's concept began almost immediately after his death. *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). See also *supra* note 34 for further discussion of *Miln*. Indeed, it has been argued that Marshall himself was responsible for the short life of the original strong version of the commerce clause because of his failure in *Gibbons* to put to rest the theory of concurrent power over commerce, and for his "hesitant" treatment of state power in Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 244 (1829). *See* White, *The Marshall Court and Cultural Change, 1815-35*, in 3 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 567-85 (1988). The drift away from Marshall's theory gained momentum in the dormant commerce clause context with Justice Curtis's distinction between economic subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation," and those that are primarily local in nature. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851). But it was not until the Court adopted, sometimes explicitly and sometimes implicitly, the theoretical framework of neo-classical economics that the abandonment of Marshall's concept of commerce gained a third dimension, capable of providing an organizing theme for all forms of economic regulation under both the active and the dormant commerce clause.

87. Ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. § 1 *et seq.* (1982)).

88. Ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 *et seq.* (1982)).

tional market, and replaced it with the basic articles of the neo-classical faith outlined above.

The transformed commerce clause was first fully explicated and applied to federal regulatory action in *United States v. E.C. Knight Co.*.[89] The case involved the application of the new Sherman Act to the American Sugar Refining Company, which had been purchasing the stock of its competitors in order to monopolize the sugar industry within the United States.[90] *Knight* did not break new conceptual ground, however. The principles applied in *Knight* had been articulated seven years earlier in *Kidd v. Pearson*,[91] a case involving state regulation of liquor production intended for shipment out of state. *Kidd* upheld the state regulation in that case, holding that it did not infringe upon the federal government's power to regulate commerce. The *Kidd* decision is a virtual compendium of neo-classical principles, several pages of which are incorporated verbatim in Chief Justice Fuller's majority opinion in *Knight*.[92] Both decisions are cast primarily in political, rather than economic terms. In both cases the Court focuses on the need to protect the state regulatory prerogatives embedded in the tenth amendment and the notion of dual sovereignty. Although the Court employs the political vernacular, the theoretical basis of dual federalism is economic. The Court assumed that the economic universe is ordered in the manner described by neo-classical economics, and that primary economic activity can be rigidly segmented and divorced from its broader consequences.

This point can be illustrated by an analysis of the extensive portion of the *Kidd* opinion quoted in *Knight*. The quote begins by establishing the formal distinction between manufacturing and commerce:

> No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different.[93]

This effort to compartmentalize different stages of economic activity is a defining characteristic of neo-classical economics. According to the neo-classical theorists, economic decision-making is firm- and task-oriented. Treating manufacture as only one component of an interlocked network of economic relationships is foreign to the neo-classical doctrine.

The Court then gently segues from the formal distinction it has just established to the undesirable political-economic consequences of a contrary decision.

> If it be held that the term includes the regulation of all such manu-

89. 156 U.S. 1 (1895).
90. *Id.* at 3.
91. 128 U.S. 1 (1888).
92. *See Kidd*, 128 U.S. at 20-22, *quoted in Knight*, 156 U.S. at 14-15.
93. *Kidd*, 128 U.S. at 20, *quoted in Knight*, 156 U.S. at 14.

> factures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. . . . Does not the wheat grower of the northwest, and the cotton planter of the south, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?[94]

In a sense, this passage proves too much, and hints at the reasons for the eventual downfall of both neo-classical economics and its active commerce clause variant. The last two sentences in the passage quoted above refer to the growing complexity of the American economy in the last years of the nineteenth century. The growing size of private economic entities alone undercuts the neo-classical fixation on microeconomics. Not only were producers increasingly susceptible to the decisions of out-of-state financiers and distributors, but the fate of all three groups was tied to the economic growth of the nation as a whole. As the economy grew and became more sophisticated and specialized, local markets became adjuncts to national markets, which in turn were becoming internationalized.

Yet the normative underpinning of the Court's position would not permit it to recognize the new reality. Recognition of the need to coordinate the interrelationships within an increasingly specialized economy, the Court implicitly concluded, inevitably would lead to the dismantling of all barriers to effective political regulation of economic affairs. During this period the Court frequently explained away the new economic reality with self-serving descriptions of relevant facts. After quoting the principles of commerce clause analysis stated in *Kidd*, for example, the *Knight* decision proceeded to apply those principles to the antitrust law and the sugar industry. Prior to the purchases of stock contested in *Knight*, the American Sugar Refining Company had obtained control of virtually all other sugar refining plants in the United States.[95] The company was attempting to gain control of the five remaining refineries, four of which were located in Pennsylvania. "[I]t does not follow," the Court held, "that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt . . . to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily involved."[96] The Court's neo-classical view of a fragmented commercial world permitted it to avoid acknowledging the constitutional significance of economic consequences that were both inevitable and pervasive. The Court fragmented the world so completely that every link in one company's chain of

94. *Kidd*, 128 U.S. at 21, *quoted in Knight*, 156 U.S. at 14-15.
95. *Knight*, 156 U.S. at 18 (Harlan, J., dissenting).
96. *Knight*, 156 U.S. at 17.

production and distribution was considered unrelated to every prior and subsequent link.

The *Knight* Court's emphasis on microeconomic fragmentation and its antipathy toward political control of capital contributed to a decision that implicitly endorsed the other two main principles of neo-classical economics as well: the notion of natural economic equilibrium, and the belief that monopolistic behavior would correct itself.[97] As a later Supreme Court would note, "[t]he *Knight* decision made the [antitrust] statute a dead letter . . . ."[98] *Knight* left regulation of economic concentrations largely to the market, where neo-classical economics said it should remain. Moreover, the case implicated not only the regulation of trusts, but also "the power of Congress to create evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products."[99] But of course this was the whole point of *Knight*: the decision rejected the very premise that any such "national industrial system" existed.

The neo-classical concepts that provided the underlying rationale for decisions such as *Knight* were occasionally abandoned, even by the Court's most conservative members, in the period leading up to the constitutional revolution. For example, in *Swift & Co. v. United States*,[100] another case involving antitrust regulation, each of the justices who had joined the *Knight* majority accepted Justice Holmes's expansion of the narrow *Kidd/Knight* view of commerce. Holmes's tactic in *Swift* was to approve the application of the Sherman Act to products within the "current of commerce." The result in *Swift* was to permit federal regulation of price-fixing agreements at stockyards, based on the premise that the cattle were in the stockyards temporarily, en route from the range to the slaughterhouse.[101] On the related theory that railroads were actively engaged in interstate transportation, the Court in other cases approved federal regulation of railroad rates, safety equipment, and anticompetitive joint control agreements.[102] However, neither of these lines of cases provided a satisfactory theoretical alternative to the Court's narrow view of the economy. In fact, in some ways these cases merely confirmed the supremacy of the neo-classical view, because in each instance the Court re-

97. Compare the Court's more skeptical attitude only a few years earlier in Munn v. Illinois, 94 U.S. 113 (1877) (upholding regulation of rates in grain warehouses on ground that the owners exercised a "virtual monopoly" in an area "affected with a public interest").

98. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 230 (1948).

99. *Id.*

100. 196 U.S. 375 (1905).

101. *See also* Stafford v. Wallace, 258 U.S. 495 (1922) (activities such as livestock trading among merchants, packers, shippers, dealers, and farmers which are essential to the movement of interstate commerce, though not of such a character when viewed apart, constitute subordinate activities within the "streams of commerce" among the states and are therefore subject to national protection and regulation).

102. *See* Houston, East & West Texas Ry. v. United States, 234 U.S. 342 (1914) (rates); Southern Ry. v. United States, 222 U.S. 20 (1911) (safety equipment); Northern Securities Co. v. United States, 193 U.S. 197 (1904) (joint control agreement).

fused to recognize an activity as "commerce" unless there was (or at least the Court could pretend that there was) a direct link to the actual transportation of goods across state lines.[103] Once again the economy was being viewed as a compilation of discrete transactions, rather than as an organic whole. The microeconomic treatment of commerce was so pronounced during the Court's conservative period that even nonadherents to the neo-classical creed, such as Holmes, occasionally chided his fellow justices for insufficient vigilance in requiring the government to prove that the conduct it sought to regulate involved substantial and particular interstate transactions.[104]

The Court's other deviations from neo-classical analysis during this period also posed no theoretical threat to the dominance of the neo-classical world view. Many of the cases during this period that permitted federal regulation of interstate commerce involved the regulation of morality, rather than of purely mercantile activities. Thus, the Court upheld the regulation of interstate commerce in lottery tickets,[105] prostitutes,[106] and obscene materials.[107] The Court also permitted the federal government to regulate interstate transportation of pestilence in its physical, as well as its moral form.[108] The Court treated the subject matter in these cases as being outside the scope of legitimate economic activity. Therefore, the Court was willing to forego economic analysis in favor of moral paternalism. In any event, each of the cases in which the regulation was upheld involved the actual transportation of offending material across state lines, thus the transactional character of the regulation was preserved and the basic thrust of the Court's neo-classical outlook was not threatened.[109]

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103. The Court's precedents also imposed an immediacy requirement that further limited the usefulness of the "current of commerce" theory. *See* Coe v. Errol, 116 U.S. 517 (1886). *Coe* was a pre-*Knight* state tax case in which the Court held that logs placed on a riverbank to await transportation to another state had not yet entered interstate commerce. In *Coe* the Court described the point at which a product entered interstate commerce as "that moment . . . in which [the products] commence their *final* movement from the State of their origin to that of their destination. *Id.* at 525 (emphasis added). Interpreted in light of *Coe*, Holmes's "current of commerce" theory became a metaphorical straightjacket that reinforced the transactional orientation of the neo-classical commerce clause. Regulation was justified, in other words, only when the "current" was flowing; any break in the current's flow would eliminate the constitutional justification for federal regulation.

104. *See Northern Securities*, 193 U.S. at 402-03 (Holmes, J., dissenting) ("If the act before us is to be carried out according to what seems to me the logic of the argument for the Government . . . I can see no part of the conduct of life with which on similar principles Congress might not interfere.").

105. Champion v. Ames, 188 U.S. 321 (1903).

106. Hoke v. United States, 227 U.S. 308 (1913).

107. *See Hoke*, 227 U.S. at 321 (citing favorably United States v. Popper, 98 F. 423 (N.D. Cal. 1899)).

108. *See, e.g.*, Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (upholding federal prohibition on the transportation of impure food and drugs). *But see* Illinois Central Ry. v. McKendree, 203 U.S. 514 (1906) (striking down federally-required quarantine of diseased animals).

109. Even this limited transactional analysis was not applied to articles not susceptible to the moral pestilence analysis. In Hammer v. Dagenhart, 247 U.S. 251 (1918), the Court refused

The few opinions in which the Court did seem to challenge the neo-classical microeconomic perspective can be explained as examples of the Court's anti-labor animus. These cases approved the application of a much broader interpretation of the Sherman Act to limit labor union activity than the Court had been willing to accept in *Knight* when the Act was applied to restrain corporate activities.[110] Although these cases described the implications of economic behavior in a broad sense that is inconsistent with the prevailing neo-classical view of the economic universe, the lapse is one that also appears in the neo-classical economic literature itself, in which the identification with corporate interests also occasionally superseded the quest for theoretical consistency.[111] In any event, the significance of these cases is minimal, because their holdings were never extended beyond the trade union context.

Despite the Court's occasional lapses in cases involving "moral pestilence" or upstart labor unions, the four neo-classical principles outlined at the beginning of this section provided the organizing principle for the overwhelming majority of active commerce clause decisions issued by the Court in the period from 1895 to 1936. Of the four principles, one in particular stands out in the Court's treatment of commerce clause issues: the emphasis on microeconomic analysis. The other three are also present in most of the cases, but it is the microeconomic focus that provides a leitmotif for all the cases.

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to rely on the moral pestilence cases in order to uphold a federal regulation of articles produced with child labor. Instead, the Court returned to the mechanistic view it had espoused in *Kidd* and *Knight*. "The goods shipped are of themselves harmless," Justice Day wrote for the majority. *Id.* at 272. "When offered for shipment, and before transportation begins, the labor of their production is over . . . ." *Id.* The Court refused to recognize that this analysis could be applied as well to cardboard lottery tickets, which while in actual interstate transport could do little more than produce paper cuts. The point is that the Court simply did not view the moral pestilence cases as primarily economic in nature, and therefore the analysis used in those cases did not diminish the strength of the theory developed in *Kidd* and *Knight*.

110. *See* Bedford Cut Stone Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); United States v. Brims, 272 U.S. 549 (1926); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908).

111. Note, for example, the American neo-classical economist John Bates Clark's application of marginal utility analysis to wage theory. Clark believed that a worker's wages must equal the marginal product of the worker's labor, the value of which is set by the market. *See* J. CLARK, THE DISTRIBUTION OF WEALTH 46 (1899). The businessman merely passes on to the worker the true value of the worker's input into the product. Wage levels are in a sense beyond the businessman's control. Therefore, intentional exploitation of the worker is impossible. This "universal" law of production provided a facially neutral justification for what the workers themselves probably considered intentionally execrable treatment by their employers. Stanley Jevons produced a similar theory linking production and wages, "from which followed the futility of trade unions and an essential harmony between capital and labor." M. DOBB, THEORIES OF VALUE AND DISTRIBUTION SINCE ADAM SMITH: IDEOLOGY AND ECONOMIC THEORY 176 (1973); *see also* Steedman, *Jevons' Theory of Capital and Interest*, 40 THE MANCHESTER SCHOOL 31, 48-49 (1972). Yet these theories are subtly inconsistent with other tenets of neo-classical economics insofar as they deny that wage levels are the product of contractual negotiations between free economic actors. By recognizing the pervasive influence of the macroeconomy on individual economic decisions, these theories unwittingly contradicted the basic premise of economic freedom on which neo-classical economics was built in order to achieve a result that comported with the interests of the business sector.

The role played by this aspect of neo-classical economics is most evident in two famous decisions striking down New Deal legislation: *Schechter Poultry Corp. v. United States*[112] and *Carter v. Carter Coal Co.*[113] The cases involved two different statutes,[114] and provided the Court the opportunity to apply its neo-classical analysis in factual contexts ranging from the New York poultry trade to the national coal industry. Although the two statutes that were challenged in these cases addressed very different subject matter, the statutes were linked by their common reliance on a fundamental rejection of the basic precepts of neo-classical economics. The statutes were each broad attempts to raise incomes in entire industries as a means of artificially bolstering aggregate demand and salvaging a faltering economy. Although the statutes were each directed at particular industries, they were intended to be part of a non-specific, systemic approach to economic regulation.[115] In a retrospective analysis of these decisions, one of the attorneys who litigated the cases on behalf of the government wrote that there was no way to establish particular transactional linkages between the wage scales in each particular industry and the national economy.[116] A "sounder argument," he wrote, "treats the whole national economy as inseparable into interstate and intrastate segments, insofar as the fluctuations of the business cycle are concerned. The inescapable effect of the argument was that the Federal Government under the Commerce Clause could regulate all business activity, no matter how local some operations might appear when viewed in isolation."[117] These two sentences encapsulate the distinction between neo-classical economics and the doctrine that succeeded it.

The government lawyers expected this argument to fail, and it did. In rejecting the government's arguments, the Court strongly reiterated the broader economic theory that had then governed commerce clause jurisprudence for over forty years. In *Schechter*, a unanimous Court noted that the government's cumulative economic impact theory "proves too much." If the government were to prevail, then "[a]ll the processes of production and distribution that enter into cost could likewise be controlled."[118] While the Court refused "to consider the economic advantages or disadvantages of such a cen-

112. 295 U.S. 495 (1935).

113. 298 U.S. 238 (1936).

114. *Schechter* struck down the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195. *Carter Coal* struck down the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991.

115. Another good example of this approach, and the Court's unsympathetic response, is United States v. Butler, 297 U.S. 1 (1936), in which the Court struck down the Agricultural Adjustment Act of 1933, 48 Stat. 31 (1933). In this Act, the national government had attempted to use its taxing and spending powers to influence directly the levels of agricultural production and farm income. The Court ruled that the statute was unconstitutional because the subject of agricultural production was a matter of purely local concern.

116. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 660 (1946).

117. *Id.* at 660-61.

118. 295 U.S. at 549.

tralized system," it ruled against the government anyway because "the Constitution does not provide for [such a system]."[119] Whatever pertained in economic theory, the Court continued, the distinction between the local economy and the national economy was fixed by the commerce clause itself.[120] The principles of a failed economic doctrine had become incorporated so successfully into the Court's political and legal vernacular that even Justices Cardozo and Stone joined the chorus.[121]

Carter Coal simply added rigidity to the doctrine that the entire Court had endorsed in *Schechter*. *Carter Coal* applied the theory of *Schechter*, *Kidd*, and *Knight* to regulation of the coal industry. If there was a single linchpin to the industrial economy in 1936, it was the coal industry. At the time Congress passed the Bituminous Coal Conservation Act, disruptions in the coal industry threatened to stymie the entire national economy.[122] More importantly, from the perspective of Keynesian economics it was not necessary to cite specific problems potentially posed by industrial disruption in order to justify the legislation. This legislation was simply part of the overall New Deal scheme to impose a structure upon the uncoordinated activities of individual economic actors. In this context the Bituminous Coal Conservation Act served the twin Keynesian goals of raising price levels for industry to stimulate general economic demand and permit the servicing of accumulated debt, and increasing the purchasing power of the workers.

Yet the Court refused even to consider the broader economic purposes of the legislation. The case was settled for Justice Sutherland and the other justices who joined his majority opinion by simple reference to the fact that mining, along with manufacturing and crop growing, were entirely local affairs.[123] Sutherland added that the level of wages, working conditions, collective bargaining, and labor relations in general also were local matters.[124] The legislation failed to survive the majority's scrutiny because there were no particular transactions that involved interstate transportation. "Everything which moves in interstate commerce has had a local origin," Sutherland wrote. "Without local production somewhere, interstate commerce . . . would practically disappear."[125] Justice Cardozo dissented in *Carter Coal*, but he had concurred with the Court's conservative majority in *Schechter* because "[t]o find [interstate commerce] here would be to find it almost everywhere."[126] *Carter Coal* proved that Cardozo was on the wrong track. Given the neo-classical transactional measure of commerce, *Carter Coal* was a logical result; and if the

119. *Id.*
120. *Id.* at 549-50.
121. "To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system." *Id.* at 554 (Cardozo, J., concurring).
122. *See Carter Coal*, 298 U.S. at 330-31 (Cardozo, J., dissenting).
123. *Carter Coal*, 298 U.S. at 304.
124. *Id.*
125. *Id.*
126. 295 U.S. at 554 (Cardozo, J., concurring).

Court could not find commerce in *Carter Coal*, it would not find it anywhere.[127]

The majority in each of these cases used an identical rhetorical tactic. In the waning years of the neo-classical active commerce clause, the system of unfettered laissez-faire was protected by denying the existence of the larger economic context. Localism was the tactic employed to preserve an entire system of economic ideas that ultimately did not have to be defended on the basis of their economic merit. Neo-classical economics became the rule because the doctrine became subsumed into what the Court considered an unassailable linguistic truth; as the Court said in *Schechter*, the distinction between the local and national economy was established by the phraseology of the commerce clause itself.

After the constitutional revolution occurred in 1937, the Court jettisoned this subterfuge. The Court asserted that the neo-classical truths of the prior era were being replaced with economic ecumenism.[128] The Court would take no position, it said, on future economic debates. These debates, the Court asserted, were properly to be held in the political branches of government, and the Court would henceforth refrain from second-guessing whatever decisions were made by Congress and the President.[129] But in reality this "neutrality" was not neutral at all. By certifying in advance any and all congressional determinations that a particular aspect of the economy required national treatment, the Court had accepted a position that was fundamentally inconsistent with the world view of neo-classical economics. The very fact that economic factors were subject to political control was itself contrary to everything taught by neo-classical doctrine. Despite the post-1937 Court's protestations to the contrary, the same body that had embraced neo-classical economics for the prior forty years had now embraced Keynesian economics, or some more radical form of macroeconomic theory, with equal, albeit more muted, fervor.[130]

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127. Cardozo did not abandon the transactional measure of commerce even in *Carter Coal*. "Mining and agriculture and manufacture are not interstate commerce considered by themselves," he conceded, "yet their relation to that commerce may be such that for the production of the one there is need to regulate the other." 298 U.S. at 327 (Cardozo, J., dissenting). But by refusing to go all the way and argue that the national economy is an indivisible economic organism, Cardozo was left with no theoretical means with which to challenge contrary judgments regarding the extent of the relationship between production and commerce in each particular industry. The remainder of Cardozo's opinion in *Carter Coal* is effective support for the proposition that lines cannot be drawn between local and interstate commerce in a modern industrial economy, notwithstanding Cardozo's denial of this fact in *Schechter*.

128. *See* Osborn v. Ozlin, 310 U.S. 53, 62 (1940).

129. Members of the Court occasionally caution that a statute must regulate an activity that has a "*substantial effect* upon [interstate] commerce" in order to be justified under the commerce clause. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 312 (1981) (Rehnquist, J., concurring) (emphasis in original); *see also* Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968). But this cautionary note is effectively contradicted by the Court's consistent refusal since 1937 to limit congressional authority under the commerce clause to regulate private economic activity.

130. This is evident in the 1937 Court's rejection of the transactional metaphors that had

The key to the evolution of the Court's active commerce clause jurisprudence is that battles over economic theory were fought under the guise of the traditional political dichotomy of nationalism, which served as a surrogate for macroeconomics and Keynesianism, versus localism, which served as a surrogate for microeconomics and neo-classical economics. The Court's primary emphasis on localism and microeconomics during the period from 1895 to 1936 is significant because these features of neo-classical economics have been carried over nearly unchanged into modern dormant commerce clause analysis. The modern Court has either abandoned, modified, or simply declined to address the other three factors of neo-classical economics — equilibrium theory, the perfect competition paradigm, and the rejection of political intervention in economic affairs. But by addressing issues such as the political control of capital in a context defined by the Court's microeconomic orientation, the Court continues to exhibit a conservative disposition on dormant commerce clause issues, in contrast to the strong nationalist position it has taken on active commerce clause issues. The next section addresses the persistence of neo-classical themes in modern dormant commerce clause cases.

IV.
NEO-CLASSICAL THEMES IN DORMANT COMMERCE CLAUSE JURISPRUDENCE

A. Neo-classical Themes in the Taney Court's Dormant Commerce Clause Decisions

Prior to 1895, most of the Supreme Court's commerce clause decisions involved what Chief Justice Marshall called "the power to regulate commerce in its dormant state."[131] However, there were not many commerce clause cases of either the active or the dormant sort during this period,[132] and the

served as judicial shorthand for the principles of neo-classical economics. "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937). The new majority retained the outline of a transactional analysis in *Jones & Laughlin Steel* by emphasizing that the plaintiff was one of several industries that "organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities," *id.* at 41, thereby subjecting themselves to national regulation. But the Court would soon abandon even this remnant of the transactional focus upon the particular actions of individual economic entities. Five years after the *Jones & Laughlin Steel* decision the Court approved the imposition of penalties on a farmer who had grown wheat in excess of a federal allotment established by the Agricultural Adjustment Act of 1938. Wickard v. Filburn, 317 U.S. 111 (1942). Not only was there no interstate transaction in this case, there was no economic transaction of any sort. The farmer had used the excess wheat for his own consumption. Nevertheless, the Court upheld the application of the Act in this circumstance upon the wholly Keynesian theory that the farmer's own consumption of wheat, together with similar consumption by other farmers, affected aggregate demand for the commodity, which was itself an article of interstate commerce subject to regulation by congress. The Court's adoption of the Keynesian world view was complete.

131. Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

132. The Court ruled on only five such cases during its first fifty years, and only thirty prior to 1870. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 142 (1928).

cases that did arise often involved fairly specialized issues, such as the interstate character of local waterways[133] and the problems of immigration control.[134] For these reasons the early decisions failed to articulate a comprehensive theory to support the application of the dormant commerce clause to the modern forms of systematic economic regulation that the Court would begin to confront in the late nineteenth century. Nevertheless, the early cases contain several themes that form the skeleton upon which the full panoply of neo-classical ideas would later be hung.

For example, the Taney Court firmly rejected the exclusivity interpretation Chief Justice Marshall tentatively proffered in dicta in *Gibbons*.[135] Almost immediately after Marshall's death, the Court's majority decided to read broadly another reference in *Gibbons* — Marshall's reference to the states' "police powers"[136] — to invigorate the role of the states as regulators of economic activity.[137] Chief Justice Taney elaborated on this principle, and translated it into the political vernacular of independent sovereignty that would later provide the Court's conservatives with a constitutional means for prohibiting effective national economic regulation of virtually every sort.

> [The states' police powers] are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.[138]

Felix Frankfurter wrote that Taney's analysis in *The License Cases* "destroys" Marshall's simplistic distinction between state police power and federal power over interstate commerce.[139] But Frankfurter's praise for Taney ignored both the policy preferences behind Marshall's original distinction and the larger implications of Taney's doctrine. Marshall's distinction between the states' police powers and the federal government's commerce power was not intended to be a simplistic template with which to determine the legitimacy of particular state regulations. Rather, the distinction must be viewed through

133. *See, e.g.*, The Daniel Ball, 77 U.S. (12 Black) 557 (1871); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). The two most important commerce clause decisions of the Court's first hundred years concerned similar issues, although those decisions are drafted in much more general terms that seem intended to anticipate broader commerce clause concerns. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

134. *See, e.g.*, Henderson v. New York, 92 U.S. 259 (1876); The Passenger Cases, 48 U.S. (7 How.) 283 (1849); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1836).

135. *See Gibbons*, 22 U.S. (9 Wheat.) at 209.

136. *See id.* at 203.

137. *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

138. The License Cases, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J., concurring).

139. F. FRANKFURTER, *supra* note 17, at 52-53.

the prism of Marshall's own strong pro-nationalist bent. The police/commerce power dichotomy was a rhetorical device to assure the anti-federalist opposition that the states would retain significant authority over non-economic aspects of local affairs even if the federal government were granted exclusive control over matters of interstate commerce.[140] This consolation to the states aside, the dichotomy nevertheless represented a policy choice in favor of federal regulation of commerce that was abandoned by Taney and the Court he led. The Taney Court's rejection of this policy choice represented the larger implication of its contrary approach to the commerce clause. In rejecting the exclusivity interpretation, the Court began to view the states' power of economic regulation as both natural and benign. This favorable view of state authority was greatly enhanced during the Court's neo-classical period, and although limited by restrictions on discriminatory regulations, continues to be the majority view today.

Another theme of the early cases that continues to influence dormant commerce clause jurisprudence was the notion that the states properly may dictate the legal structure of corporate law within which the capitalist economy would grow. This notion was the logical antecedent to the proposition that states possess considerable authority to regulate the actual workings of the economy. It was also the formal cornerstone to the general neo-classical belief in a fragmented national market. The Taney Court addressed this issue early in its tenure, in *Bank of Augusta v. Earle*.[141] The case involved two banks and a railroad incorporated in Georgia, Pennsylvania, and Louisiana, each of which had been prohibited under Alabama law from doing business within that state. The Supreme Court ruled on the basis of its "general understanding" of the "law of comity," that corporations of one state are permitted in normal circumstances to operate in other states, although the Court acknowledged that states may regulate corporate behavior "repugnant to [their] policy."[142] State governance of the corporate form has been an accepted fact in constitutional law ever since *Bank of Augusta*, and the basic presumptions of state power in this early opinion still exert enormous influence over dormant commerce clause jurisprudence.[143]

As he did with regard to Taney's opinion in the *The License Cases*, Frankfurter also attempted to characterize Taney's opinion in *Bank of Au-*

140. Another interpretation is that Marshall simply suffered a failure of nerve in pursuing his nationalist agenda, and thus produced in *Gibbons* a "highly ambiguous and perhaps an ambivalent decision." White, *supra* note 86, at 580.

141. 38 U.S. (13 Pet.) 519 (1839).

142. *Id.* at 592. Alabama's interest in this case was asserted by an individual as a defense to breach of contract claims brought against him by the out-of-state corporations. Although the majority opinion in *Bank of Augusta* rejected the debtor's state sovereignty claim on the ground that he had inaccurately construed Alabama law, the Court's reading of Alabama law was influenced by its view of the broader constitutional questions of state sovereignty in economic matters. *See id.* at 586-93.

143. *See* CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987). See discussion *infra* notes 224-26 and accompanying text.

gusta as politically progressive.[144] Frankfurter applauded Taney's opinion in *Bank of Augusta* because the Chief Justice refused to take the next logical step and establish the corporation as a citizen for the purposes of the privileges and immunities clause.[145] Although its textual and doctrinal hook was different, the Court would effectively take this next step approximately fifty years later, when it ruled that a corporation was a "person" for fourteenth amendment purposes.[146] But this was not such a major leap as Frankfurter believed. Taney had removed corporate governance to the state level; having been freed from concern about federal regulation, the later Court merely had to adapt the doctrine to insure that the only remaining laws regulating the corporate form — i.e., state laws — would be benign.[147]

The damage inflicted by the Taney Court to the cause of progressive economic regulation, exemplified by *Bank of Augusta*, was both more subtle and far more substantial than Frankfurter was willing to recognize. In effect, decisions such as *Bank of Augusta* established the pattern of treating economic activities on a transactional basis, a pattern that would reappear as part of the descriptive framework for commerce clause decisions endorsing neo-classical economic concepts. Opinions such as Taney's concurrence in *The License Cases* added another dimension to this perspective by fragmenting the nation's regulatory apparatus and scattering the parts among various local power centers. This concept of concurrent sovereignty would later lend political legitimacy to a set of economic ideas fundamentally opposed to any effective national control of economic decision-making.

Frankfurter was correct to point out that Taney's motivations in these cases were noble. "Taney was keenly alive to the concentration of economic power which the corporate form promoted, and greatly concerned over its threat to those more or less egalitarian hopes for American society which he shared with Jefferson and Jackson."[148] But what seems at first glance a virtue is in actuality the crux of the problem: Taney's "egalitarian hopes" were cast in the form of Jeffersonian agrarian democracy. These same ideas — which

144. *See* F. FRANKFURTER, *supra* note 17, at 63-64.

145. *Id.* at 64-65.

146. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

147. The Court did this in more ways than one. In addition to the substantive due process protections offered by the fourteenth amendment, the commerce clause was dusted off occasionally during the Court's neo-classical period to protect against any overly rigorous use by the states of their power to regulate out-of-state corporate activity. *See* International Textbook Co. v. Pigg, 217 U.S. 91 (1910); Bucks Stove Co. v. Vickers, 226 U.S. 205 (1912); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Shafer v. Farmers' Grain Co., 268 U.S. 189 (1925). See also two slightly earlier examples of the same phenomenon: Wabash Ry. v. Illinois, 118 U.S. 587 (1886); Western Union Telegraph Co. v. Pendleton, 122 U.S. 347 (1887). Because of the malleability built into the Taney Court's *Cooley* doctrine, *see infra* notes 152-57 and accompanying text, it was virtually inevitable that a Court primarily concerned with protecting the interests of the business sector would constantly redraw the line between state and federal authority to regulate economic affairs. The carte blanche provided to Congress by the constitutional revolution at least eliminated the potential for duplicitous judicial manipulation that existed prior to 1937.

148. F. FRANKFURTER, *supra* note 17, at 63.

emphasized local political control and small government — were inadequate when confronted with economic combinations that had no such desire to limit their own power.

This changing economic context altered the very meaning of the concept of liberty. Whereas to early democratic theorists such as Jefferson the term liberty referred to personal emancipation from governmental interference, to Jefferson's legitimate successors the term refers to social emancipation through government regulation.[149] This transformation occurred because economic development changed the nature of the threat to liberty. The primary threat to liberty in an industrialized society based on a market economy is the threat posed by the accumulation of private power over economic resources. If the Jeffersonian ideal of egalitarian human emancipation is to be preserved, accumulated private power must be opposed by an equally great public power — i.e., the centralized apparatus of the federal government. As Frankfurter acknowledged, basic Jeffersonian principles infused Taney's commerce clause decisions "by reason of his economic and political outlook."[150] These principles did indeed prevent Taney from providing corporations constitutional protection equivalent to that provided to individuals. But more importantly, Taney's commerce clause decisions contributed to the rise of conservative commerce clause jurisprudence by confusing ends and means. The decisions enshrined as an end-in-itself the traditional means of protecting liberty in its Jeffersonian formulation — the fragmentation of political power and the weakening of the central government. Ironically, these same methods provided the tools with which later generations of conservatives would for many years thwart efforts to achieve the egalitarian goals of Jefferson's successors.[151]

The themes of the Court's early dormant commerce clause decisions are summarized effectively in *Cooley v. Board of Wardens*.[152] On its face the *Cooley* decision is a grand compromise between the nationalists and the advocates of local control over economic affairs. Frankfurter emphasized the different attitudes regarding these issues among the justices who decided *Cooley*.[153] But these differences are much less important than the justices' common perception about the piecemeal nature of the economy. *Cooley* promulgated a mechanism that could be used to isolate certain portions of the economy from

149. Gey, *A Constitutional Morphology: Text, Context, and Pretext in Constitutional Interpretation*, 19 ARIZ. ST. L.J. 587, 624-32 (1987); *see also* Laski, *Liberty*, 5 Encyclopaedia of the Social Sciences 442-47 (1937).

150. F. FRANKFURTER, *supra* note 17, at 65.

151. Indeed, in at least one area Chief Justice Taney's narrow view of the commerce clause threatened even the traditional Jeffersonian/individualistic version of liberty, by excluding the purchase and sale of slaves from the category of commerce subject to national regulation. *See* Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 508 (1841) (Taney, C.J., concurring).

152. 53 U.S. (12 How.) 299 (1851).

153. *See, e.g.*, F. FRANKFURTER, *supra* note 17, at 56-57; *see also* Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 573-77 (1936) (emphasizing discord among the justices on dormant commerce clause issues throughout the Taney era, culminating in a "compromise" decision in *Cooley*).

national control. If on the surface the doctrine introduced in *Cooley* was a grand compromise, in its operation the doctrine served the interests of the advocates of localism, by institutionalizing the transactional analysis of commerce that continues to dominate constitutional analysis of economic regulation under the dormant commerce clause.[154]

The *Cooley* doctrine contained three central elements. First, the decision established that the commerce power was concurrent, thereby sealing the fate of Marshall's assertion of federal exclusivity.[155] Second, the decision in *Cooley* stated that the lines between federal and state power over commerce should be determined with reference to the particular subjects of commerce. "[T]he power to regulate commerce," the Court declared, "embraces a vast field, containing not only many, but exceedingly various subjects. . . ."[156] As in the other Taney Court decisions, *Cooley* focused on particular economic transactions. The Court gave no serious consideration to the theme of an integrated national market defined by an ongoing process of economic activity. Finally, the decision established a simple test for distinguishing between the different subjects of commerce, and thus for distributing regulatory power among the states and the federal government: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."[157] *Cooley* established the basic tenet of the neo-classical com-

154. The possibility that the *Cooley* doctrine could be used effectively to sustain most forms of state economic regulation, which was Taney's consistent goal, may account for Taney joining the *Cooley* majority decision instead of writing a separate, more extreme concurrence advocating a complete break with Marshall's commerce clause principles. Even Frankfurter acknowledged that political considerations rather than principle may have been Taney's primary motivation in *Cooley*. *See* F. FRANKFURTER, *supra* note 17, at 57.

155. Frankfurter noted that even the suggestion in Justice Curtis's *Cooley* opinion that the commerce clause may contain an implicit limitation on some state activity was inconsistent with Chief Justice Taney's belief that Marshall's concept should be overturned *in toto*. F. FRANKFURTER, *supra* note 17, at 55-57. Frankfurter explained Taney's concurrence in the opinion as a political compromise with a Court whose majority was not yet willing to make such an unequivocal statement of economic decentralization. *Id.* Assuming Frankfurter's reading is correct, Taney need not have been concerned. As the remainder of this section attempts to demonstrate, a wholesale rejection of Marshall's commerce clause theory was unnecessary. The *Cooley* decision was quite effective in retaining for the states substantial authority over economic affairs.

156. 53 U.S. (12 How.) at 319.

157. *Id.* In *Cooley* itself the Court ruled that the regulation of pilotage in the port of Philadelphia was a matter of local concern, and therefore upheld a state statute requiring all ships coming into the port to engage a local pilot. In its opinion, the Court referred to a 1789 federal statute stating that such matters should "continue to be regulated in conformity with the existing laws of the States. . . ." 53 U.S. at 315 (citing 1 Stat. 54 (1789)). Several commentators have pointed out the Court's ambiguous treatment of this statute. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 407 n.3 (2d ed. 1988); F. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 76 (1937); Sholley, *supra* note 153, at 577. Specifically, it is unclear whether the Court considered the federal statute dispositive regarding whether pilotage was a subject matter of local concern, or conversely whether the Court merely considered the congressional view of the issue in the course of making an independent determination. Whether the Court ultimately deferred to the conclusions of Congress is less important than the policy that the

merce clause: the notion that the economy could be subdivided into discrete components, some of which were not really part of the national economy at all. Without this fundamental concept, *Knight*, *Schechter*, *Carter Coal*, and the other famous examples of constitutional conservatism would not have made theoretical sense.

The Court never abandoned the transactional focus that was adopted by the Court during the Taney period. After Taney's death in 1864, the Court continued to decide cases not by reference to the broad economic implications of state regulation, but rather on mechanistic determinations regarding how much of a regulated activity took place within a particular state. Complicated economic transactions were often considered as if the only economically relevant factor was the final handshake. In *Paul v. Virginia*, one of the more extreme examples of the Court's transactional formalism, the Court upheld a Virginia regulation of out-of-state insurance companies on the ground that the companies' product — the insurance policy — "is not a transaction of commerce."[158] The Virginia statute upheld in *Paul* required out-of-state insurance companies to file bonds not required of insurance companies incorporated under Virginia law.[159] The Court justified its ruling that this statute did not interfere with the federal government's authority to regulate commerce by focusing on the final stage of the process of obtaining insurance. Insurance policies, the Court ruled, are "simple contracts of indemnity against loss."[160] Although it recognized that the out-of-state insurance company, rather than the company's local agent, was the true party to such contracts, the Court found that policies "do not take effect — are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law."[161] Having discounted the quintessentially national character of large financial enterprises such as the insurance industry, the Court would have no problem extending its narrow focus to traditional manufacturing operations in cases such as *Kidd v. Pearson*.[162]

Not all of these decisions immediately benefited the dominant economic interests. *Munn v. Illinois*,[163] for example, upheld one version of the Granger laws. Granger laws were enacted by several states during the second half of the nineteenth century. The laws were the product of a revolt by midwestern

statute was used to support. The Court read the statute as premised on the proposition that this particular aspect of the economy "is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits." 53 U.S. (12 How.) at 319. The Court used the statute as one example of the national consensus concerning the "superior fitness and propriety, not to say the absolute necessity, of different systems of regulation. . . ." *Id.* at 320. What was true of pilotage in *Cooley* would be extrapolated by later Courts to apply to virtually every aspect of the economy.

158. 75 U.S. (8 Wall.) 168, 183 (1868).

159. *Id.* at 169.

160. *Id.* at 183.

161. *Id.*

162. 128 U.S. 1 (1888); *see supra* notes 91-94 and accompanying text.

163. 94 U.S. 113 (1876).

farmers and small businessmen, who sought to "bring under control the farmers' symbiotic enemies — railroads, warehouses, and grain elevators."[164] The laws typically established commissions to set and enforce maximum rates that could be charged to haul or store freight. The Supreme Court rejected commerce clause objections to the Illinois Granger law on the ground that the agricultural interests being protected by the Granger laws were "a thing of domestic concern. . . ."[165] But the story of the Granger laws does not have a happy ending. The Supreme Court had simply given David legal authority to go after Goliath. Having lost in the Supreme Court, the railroads turned to political action within the states. This tactic proved highly successful. For example, in Wisconsin the railroads used local political action so effectively that the radical Wisconsin law was overturned in only two years.[166] The saga of the Granger movement revealed a larger truth about economic regulation in the modern age:

> The state commissioners were . . . bound to fail in a federal system. Their power extended only to the borders of their state. Particularly after the Civil War, railroad entrepreneurs sewed together small railroads to make big interstate nets. How much control could [a state] ever hope to exert over railroads that passed through its territory?[167]

The Court could give the states legal authority to regulate interstate enterprises, but it could not grant them the exemption from economic reality that would be required to make such economic regulation effective.

The *Cooley* doctrine dominated dormant commerce clause analysis through the end of the Court's neo-classical active commerce clause period. Although the form of the Court's dormant commerce clause formalism was sometimes modified,[168] the Court consistently applied the basic themes devel-

164. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 391 (1973).

165. 94 U.S. at 135.

166. L. FRIEDMAN, *supra* note 164, at 392.

167. *Id.* at 394.

168. The most typical modification involved a "burden analysis," by which the Court denied states the ability to regulate local activities if the regulation imposed a "direct" burden on interstate commerce. This analysis was often employed in railroad rate and safety cases, but these cases were notoriously unpredictable. See, for example, the cases cited in Justice Brandeis's dissent in DiSanto v. Pennsylvania, 273 U.S. 34, 39-40 (1927), for instances where the Court refused to find a direct burden on commerce. For examples of decisions striking down state legislation on the basis of the burden analysis, see Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 926 n.152 (1985). Commentators have had some difficulty integrating the burden analysis into the framework of the *Cooley* doctrine. Professor Sedler, for example, believes that the burden analysis was a departure from the *Cooley* doctrine, but was applied only to a limited group of railroad cases. *Id.* Professor Tribe, on the other hand, views the burden analysis as part of a relatively smooth process in which the Court "focused increasingly on the precise method and context of challenged regulation, attempting in this way to ascertain the extent to which state action impedes interstate commerce, and the justifications with which it does so." L. TRIBE, *supra* note 157, at 408. From Tribe's point of view, the burden analysis seems to be an imperfect transition phase from the rigid *Cooley* doctrine to the present balancing test. My own view is that the burden analysis was simply another manifesta-

oped in the early years of the Taney Court. The true nature of the Court's early dormant commerce clause decisions is demonstrated by the Court's use of the themes developed in these cases to generate its conservative active commerce clause jurisprudence in the neo-classical period from 1895 to 1936. During this period there were no significant developments in dormant commerce clause theory. Dormant commerce clause theory became an adjunct to active commerce clause theory, which also had become oriented primarily toward preserving the reservoirs of state authority over economic affairs. As discussed in the previous section, the doctrinal emphasis on microeconomic analysis and the fragmentation of the national market bared ideological fangs when applied to active commerce clause issues. The active commerce clause cases revealed the conservative political and economic underpinnings of a doctrine that had been developed with entirely different intentions under the aegis of a good Jacksonian populist Chief Justice. The question is, how much of this inherently conservative doctrine survived the constitutional revolution of 1937?

B. Neo-Classical Themes in Post-1937 Dormant Commerce Clause Decisions

The Supreme Court did not issue a definitive restatement of the dormant commerce clause until eight years after it refashioned the standard for the active commerce clause.[169] However, the modern treatment of dormant commerce clause issues was presaged by two earlier documents: Justice Stone's 1927 dissent in *Di Santo v. Pennsylvania*,[170] and a 1940 law review article by

tion of the malleability that had been built into the *Cooley* doctrine from the outset. The key is that after approximately 1895, the principles and perspective provided by neo-classical economic theory was the motivational force behind the application of both the *Cooley* doctrine and the burden analysis. To the extent that the burden analysis seems designed to thwart state efforts to regulate economic affairs, the burden analysis may seem inconsistent with the microeconomic emphasis attributed in this Article to neo-classical economics. The inconsistency is indeed present, but it is a reflection of an irreconcilable inconsistency within two central tenets of neo-classical economics: the emphasis on microeconomic behavior, on the one hand, and the rejection of all political intervention in the economy on the other. The emphasis on microeconomic analysis led the Court to give substantial economic regulatory power to the states. This is evident in cases discussed previously, such as *Paul v. Virginia*, *Kidd v. Pearson*, and *United States v. E.C. Knight Co.* But when the states used the power given to them by the Court in a manner that sought to force private economic actors to conform their behavior to politically determined ends, the Court would occasionally abandon its microeconomic principles in favor of giving power to the federal authorities who had either demonstrated no desire to regulate at all, *see* Wabash Ry. v. Illinois, 118 U.S. 557 (1886), or had established a regulatory apparatus with the encouragement of those subject to regulation. *See generally* G. KOLKO, RAILROADS AND REGULATION, 1877-1916 (1965) (describing railroads' generally favorable relations with the early Interstate Commerce Commission). The burden analysis was thus helpful in protecting the laissez-faire ideals espoused by neo-classical economics. The point is that despite these lapses the Court retained its primary microeconomic focus on local markets and state control of most economic processes. The fragmentary neo-classical perspective of economic activity was not rejected in the burden analysis cases, it was simply temporarily ignored.

169. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

170. 273 U.S. 34, 43 (1927) (Stone, J., dissenting).

Noel Dowling.[171] Everyone seems to agree that the changes made by Stone and Dowling are an improvement over what went before, although there is some conflict over the exact nature of the new standard. In the most basic terms, the conflict over the modern standard concerns whether the new standard imposes a true balancing test, or is concerned primarily with eliminating protectionism.[172] My own idiosyncratic view is that this dispute is almost entirely beside the point, because it accepts without question the central premise that the new standard carried over from the old: i.e., that in a modern industrial economy the states should have a substantial role in regulating economic activity. The remainder of this Article will investigate the continuing strength of that premise, and will argue that this premise constitutes a major, but unstated, economic policy choice that gives the dormant commerce clause jurisprudence an unavoidably conservative tint. Specifically, this premise encourages decentralized political control of an increasingly centralized and powerful group of private economic actors.

It was evident from Justice Stone's first statement of what would become the modern dormant commerce clause standard that the reconstituted standard would not abandon the fundamental principle favoring substantial local control over economic behavior. In his *Di Santo* dissent, Stone urged the Court to remember that "the purpose of the commerce clause was *not* to preclude *all* state regulation of commerce crossing state lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce. . . ."[173] Stone did not question the Court's ability to subdivide the country's economy into spheres of local and national control. Stone's primary criticism of the standard as of 1927 was that it led the Court to draw the lines between local and national control inconsistently. Stone proposed replacing the formalistic labels favored by the Court's majority in favor of "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce."[174] Finally, Stone asserted that the goal of such an analysis was to protect "the national interest in maintaining the freedom of commerce

171. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

172. *See, e.g.*, Regan, *supra* note 5 (emphasizing the movement-of-goods cases, and arguing first, that the primary target of the modern standard should be intentional state protectionism, and second, that the Court has never really engaged in an open-ended balancing analysis under the modern standard anyway); Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395 (1986) (also arguing that intentional protectionism should be the focus of the standard); Malz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981) (supporting a more general anti-protectionism principle); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (supporting anti-protectionism theme, but focused on the adequacy of the state decision-making process); Blasi, *Constitutional Limitations on the Power of States to Regulate the Movement of Goods in Interstate Commerce*, in 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 174 (T. Sandalow & E. Stein eds. 1982) (advocating balancing analysis); Dowling, *supra* note 171 (advocating balancing analysis).

173. 273 U.S. at 43-44 (emphasis added).

174. *Id.* at 44.

across state lines."[175]

Both Stone's description of the test and his definition of the goals to be achieved are consistent with the transactional focus on the actual mechanics of each particular purchase, sale, or transport of goods. Professor Dowling's effort to bolster the preliminary statement of the proposed new standard in Stone's *Di Santo* dissent actually provides a helpful key to the numerous flaws in the new standard, in the form of several pointed questions.[176] Dowling's analysis of these weaknesses missed the central point, however. The real problem with the Stone analysis is that it frames the question "Is it commerce?" in precisely the same terms that the Court rejected in every active commerce clause decision since *Jones & Laughlin Steel*.[177] In cases such as *Wickard v. Filburn*,[178] the Court explicitly abandoned the premise that an economic enterprise's size, location, participation in the actual transport of goods, or quantifiable effect on identifiable national economic measures could in any way be used to determine whether that enterprise participated in commerce. Yet Stone proposed that the Court analyze these same factors in order to apply the dormant commerce clause to state economic regulation. The fundamental economic premise underlying the post-1937 active commerce clause decisions is that *all* economic activity is commerce, and therefore properly the concern of the national government. Stone's dormant commerce clause standard hedged on this recognition of the new economic reality, and got the Court back into the business of parsing the economy into local and national sectors.

Dowling had some sense of the general criticism to which the Stone standard was susceptible, but he viewed this criticism as primarily one of judicial activism generally, rather than of the particular economic policy the Court was endorsing. In other words, in Dowling's view the problem with having the Court review the size, nature, etc., of economic activities in applying the dormant commerce clause was not that the Court was misjudging the nature of the economy, but rather that the standard permitted judges to make economic judgments of any sort.[179] Thus, he restated the Stone standard in terms

175. *Id.*

176. "Did the reference to the 'nature of the regulation' and 'its function' indicate that the Court first applied a sort of due process test of reasonableness to the objectives and methods of enforcement of state action touching commerce? In examining the 'character of the business involved' was the Court concerned with whether the business regulated was nationwide or local; whether it was large or small; whether its local control was essential to the well-being of the citizens of the state or not? Did the suggestion about the 'actual effect on the flow of the commerce' mean that it was the Court's function to make a factual study of the effects of a particular state measure upon commerce, *i.e.*, the extent to which it actually stopped or diminished the movement of traffic? Was the Court also to take into account the potentialities of future interference with commerce, or content itself with the present? Even the standard of validity implicit in the opinion, whether or not 'the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines,' is not without its own difficulties. Local concern and infringement of national interest are not mutually exclusive categories." Dowling, *supra* note 171, at 7-8.

177. *See supra* note 130.

178. 317 U.S. 111, 127-28 (1942).

179. Dowling's article was in large part a response to newly-appointed members of the

that included overt deference to the elective political branches, with Congress given ultimate power to impose its will on the states in matters of economics.[180] This addressed Dowling's central concern — the need to limit judicial discretion to overturn decisions of electoral bodies generally, both at the state and the federal level, yet simultaneously protect unmistakably national prerogatives. But by transforming the dormant commerce clause question into a matter of judicial restraint, Dowling diminished the significance of the message the Court was sending by its refusal to reverse the localist preference that had permeated the Court's pre-1937 constitutional decisions allocating authority over economic decision-making. In other words, judicial restraint exercised in dormant commerce clause cases, which decentralized political power over economic affairs, contradicted the theme of judicial restraint exercised after 1937 in active commerce clause cases, which centralized political power over economic affairs.

Dowling's modified version of the Stone standard was written into law by then-Chief Justice Stone in *Southern Pacific Co. v. Arizona*.[181] Stone's *Southern Pacific* opinion illustrates that the Stone/Dowling effort would fail to accomplish its goals in two major respects. First, although the new standard was intended to cure the defects of the *Cooley* doctrine it replaced, there is a remarkable consistency between the new standard and the old. For example, Stone merely rephrases the *Cooley* division of the economy into local and national aspects. States are prohibited by the Stone standard from regulating "those phases of the national commerce which, because of the need for na-

Court — Justices Black, Douglas, and Frankfurter — who believed the Court's ability to overturn state regulatory legislation should be curtailed in all but the most egregious cases of overt discrimination by one state against another. *See* Dowling, *supra* note 171, at 16. This extreme view of judicial restraint in dormant commerce clause cases was most forcefully presented by Frankfurter in the lectures he gave on the commerce clause shortly before his appointment to the Court. *See* F. FRANKFURTER, *supra* note 17. Frankfurter's belief in judicial restraint accounts for his strong endorsement of Justice Taney's opinions in support of state power over economic affairs. Frankfurter spoke admiringly of Taney's "tendency . . . to restrict the area of judicial discretion in constitutional decision. He stuck close to the language of the text, avoiding implications derived from large notions of policy, because he did not believe that judges were especially qualified to shape political and economic policy." *Id.* at 71. However, Frankfurter ignored the extent to which judicial inaction in effect constitutes an endorsement of the status quo, in this case an endorsement of substantial local control of economic affairs. For present purposes, the point is that the liberals' reaction to the Court's economic decisions leading up to 1937 took the unfortunate form of a reaction against virtually all judicial guidance of economic decision-making, and Dowling and Stone were forced to incorporate much of this general judicial restraint philosophy into their own more moderate standard. The ironic result, as argued below, is that the liberals inadvertently salvaged the central tenet of the prior Court's conservative economic philosophy by refusing to have the Court determine that the national market concept would prevail in both active and dormant commerce clause areas.

180. Dowling's restatement of the new standard is as follows: "[I]n the absence of affirmative consent a Congressional negative will be presumed in the courts against state action which in its effect upon interstate commerce constitutes an unreasonable interference with national interests, the presumption being rebuttable at the pleasure of Congress. . . . State action falling short of such interference would prevail unless and until superseded or otherwise nullified by congressional action." Dowling, *supra* note 171, at 20.

181. 325 U.S. 761 (1945).

tional uniformity, demand that their regulation, if any, be prescribed by a single authority."[182] The changes in the manner by which courts would distinguish between permissible and impermissible state regulations certainly required courts to make their judgments more explicit. But the articulation of relevant factors did nothing to change the substantive nature of the ultimate determination courts would have to make.[183] In the end, after all the enumerated factors had been addressed, the Stone standard left the judiciary with the task of subdividing the economy. The economic policy basis of this judgment was not altered.

Second, Stone's standard also failed to restrain the judiciary from engaging in the sort of extensive oversight of regulatory efforts that characterized the prior period. Stone's standard succeeds as judicial restraint only in the sense that it is likely to uphold state economic legislation that does not directly interfere with nationalist prerogatives. However, that much could have been said of the Court's prior actions under the *Cooley* doctrine and its ancillaries. Stone's test does not inherently restrain the judiciary from making substantive determinations concerning the nation's economic structure to a greater extent than the *Cooley* standard.

Arguably, Stone sought only a more limited form of restraint — a restraint of judicial process, rather than constitutional substance. He obviously intended his standard to provide clearer guidance to states that wanted to enact regulatory legislation. But Stone's test failed even in this most basic sense of judicial restraint. As Justice Black pointed out in his dissent to *Southern Pacific*, the subjective judgments that Stone's test encouraged created the need for massive litigation in every case,[184] because the state must always provide evidence of the substantial local need for each particular piece of legislation, and each new statute must be justified in its own highly individualized regulatory environment.[185] Under Stone's standard, the courts are actually *more* involved in some ways than they were under the *Cooley* doctrine. The predictability factor also does not clearly militate in favor of the new standard. The Stone standard simply suffers from a different kind of unpredictability than that which characterized the Court's prior efforts. The prior standard was unpredictable because it was too metaphysical; no one was capable of knowing

182. *Id.* at 767. *Compare Cooley*, 53 U.S. (12 How.) at 319.

183. *Southern Pacific* involved a state statute limiting the length of freight trains to 70 cars. The Court described the relevant factors to be considered in determining whether this statute should be invalidated under the dormant commerce clause as follows: "[T]he matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference." 325 U.S. at 770-71.

184. The trial in *Southern Pacific* lasted for five and a half months, and the record amounted to 3000 pages. 325 U.S. at 787 (Black, J., dissenting).

185. For a recent reiteration of Black's criticism, see Kassel v. Consolidated Freightways, 450 U.S. 662, 698-706 (1981) (Rehnquist, J., dissenting).

in advance where the abstract boundary of the national economy ended and the boundary for state affairs began. The Stone standard is uncertain because every new statute must be judged on subjective grounds based on a court's assessment of such amorphous factors as the "need for uniformity."[186] The Stone standard thus fails to satisfy even the basic requirement of judicial restraint.

It should be noted at this point that the Stone/Dowling restatement was unquestionably an improvement in one respect on the standard prior to 1937. In their quest for judicial restraint, Stone and Dowling both defer to the ultimate judgment of Congress on all economic affairs. Their deference is an inevitable consequence of the Court's active commerce clause rulings since 1937 giving Congress essentially unfettered power to define "national" commerce free of judicial oversight. This effectively gives Congress the ability to overrule the Court's excessively parochial rulings by preempting the area through congressional legislation. Those seeking to regulate private economic activity at the national level therefore have the ability to appeal to a higher "court" (i.e., Congress) whenever the Supreme Court issues an opinion in favor of economic decentralization. This provides a safety valve that did not exist previously for relieving the pressure created by overly restrictive dormant commerce clause rulings.[187]

186. The vagueness and unpredictability of the new standard is illustrated by Stone's ruling in *Southern Pacific* itself. In striking down the state statute at issue in that case, Stone had to distinguish an opinion he had written in another dormant commerce clause case decided seven years earlier. In the earlier case the Court upheld a South Carolina statute prohibiting trucks over 90 inches wide or weighing over 20,000 pounds from operating within the state — standards that were substantially stricter than those in most other states. South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938). Although there is a narrow rationale for upholding *Barnwell, see infra* note 297, Stone distinguished the case in his *Southern Pacific* opinion by referring to the highly debatable notion that there is an inherent difference between roadways and railways, and the equally debatable assertion that safety regulation of highways was more susceptible to an internal political check than railways. *Southern Pacific*, 325 U.S. at 783. Stone's first assumption was based largely on the fact that railways tend to be privately owned, while the highways are public property. *Id.* But if the state's interest in protecting the safety of transportation within its borders is legitimate, this difference is irrelevant. The second argument also makes little sense, for three reasons: first, because the railways have substantial political resources with which to induce local surrogates to fight local legislation; second, because the railways have a powerful natural local constituency in the form of local shippers, who would tend to oppose any legislation increasing the costs of transporting their goods; and third, because in *Barnwell* local interests would include South Carolina truckers, who could logically support this legislation as a means of insulating themselves from out-of-state competition for the trucking business within South Carolina thus negating — or at least severely diminishing — the internal political opposition to the legislation. In other words, equally convincing arguments could be constructed under Stone's standard both to support and oppose the result he reached in *Barnwell*. Stone's new standard may have eliminated the formalistic dormant commerce clause pigeonholes, but it did very little to clarify the analysis.

187. It also provides a political mechanism for returning regulatory authority to the states when necessary to achieve national goals. Since 1891, the *Cooley* doctrine contained a corollary permitting Congress to override the Court's judgment that a particular state regulation infringed upon an aspect of national commerce. *See* Leisy v. Hardin, 135 U.S. 100 (1890) (in the absence of federal legislation, interstate liquor shipments were an aspect of national commerce, and therefore could not be regulated by state law); *In re* Rahrer, 140 U.S. 545 (1891) (upholding

Even so, the Stone/Dowling theory did not remove the Court from the process of defining the scope and nature of the national economy. The nature of the Court's involvement in this process was simply redefined. What was once done by irreversible dictate is now done by subtle judicial articulation of economic ideas that are given political reality by the interested parties. The Court has assumed a pedagogical and ideological function. It articulates economic values regarding such factors as the preferability of local control and unfettered markets, and simultaneously lends credibility to the powerful constituencies for local control. The Court now provides these constituencies with the mantle of democratic localism, under which they can lobby against the nationalization of a particular area of economic affairs. Although the Court is no longer the court of last resort in allocating regulatory authority, it is still the court of first resort on questions involving the legitimacy of local economic regulations. In this role, the Court can set the terms of economic debate in the political vernacular of federalism and local policy experimentation, which subtly favor economic decentralization over the use of national political power.

The beneficiaries of the Court's willingness to foster local control over economic affairs can often be quite effective in using the influence they develop at the local level to thwart more comprehensive regulation at the national level. The insurance industry provides a good example. After the Court declared in 1868 that insurance is not an aspect of interstate commerce,[188] state regulation of the insurance industry became the rule. These efforts at regulation were occasionally corrupt[189] and occasionally effective.[190] But despite periodic disputes between individual state regulators and the regulated companies, over the years the state regulations built a nearly uniform constituency for local control that was capable of asserting itself at the national political level after the Court removed the constitutional restriction on federal control over the insurance industry.[191] This constituency was so strong that it

congressional legislation affirmatively subjecting interstate liquor shipments to control under state law). This "*Rahrer* corollary" to the *Cooley* doctrine was not employed frequently during the Court's neo-classical period, largely due to the fact that the Court itself effectively insured that most economic regulation would be delegated to the states. In the modern era, however, the *Rahrer* corollary provides necessary flexibility to those controlling the national regulatory apparatus, who periodically will choose to rely on limited regulatory decentralization to achieve national economic objectives. It is crucial, however, that the choice to decentralize a particular aspect of regulation be made by Congress rather than the Court. For a broad statement of the modern version of the *Rahrer* corollary, see Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652-53 (1981).

188. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); *see also supra* notes 158-62 and accompanying text.

189. *See, e.g.*, M. KELLER, THE LIFE INSURANCE ENTERPRISE, 1885-1910, at 203 (1963) ("The New York [Department of Insurance] remained the plaything of politics and sycophantic regulation past the turn of the century.").

190. *See id.* at 210-13.

191. *See* United States v. South-Eastern Underwriters, 322 U.S. 533 (1944) (overruling *Paul v. Virginia*, holding generally that insurance was a form of commerce subject to the commerce clause, and specifically that the Sherman Act could be applied to the insurance business).

not only convinced Congress to retain local regulation of policy terms and rates, but also to largely exempt the insurance industry from the terms of the Sherman Antitrust Act.[192] "[I]t was the common consensus that state regulation was too firmly entrenched to be seriously threatened. This was a major victory for the industry. . . . The substantiality of the post-1905 structure of insurance supervision had enabled the companies to escape the trend toward Federal regulation so central to the 1930's and 1940's."[193]

The example set by the insurance industry illustrates the operation of the localization dynamic fostered by the Court's lenient reading of the dormant commerce clause. The dynamic joins local economic and political interests, which seek to preserve their own power and attract economic resources to their locality, with national or multinational corporations, which can use their existing relationships with local regulators to forestall potentially more intrusive regulation by the national government. The result of this process in the insurance industry is not only the preservation of local political power to force the industry to account for local insurance needs, but also the exemption of a substantial part of the nation's financial sector from national antitrust regulation — a concern that few would consider local in nature.[194]

The modern standard for dormant commerce clause analysis has not changed significantly since it was originally formulated by Stone and Dowling.

192. *See* McCarran-Ferguson Act, ch. 20, § 259 Stat. 34 (1945) (codified as amended at 15 U.S.C. § 1012 (1976)); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

193. M. KELLER, *supra* note 189, at 289.

194. The insurance example also provides an example of the distortions that can enter the economy and constitutional law if states are allowed a free hand to regulate national industries. *Compare* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981) (retaliatory California tax on insurers from states that impose higher taxes on California companies did not violate commerce clause, given broad language of McCarran-Ferguson Act) *with* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (retaliatory tax against an out-of-state insurer violated equal protection clause). Only a short time after the Court introduced the equal protection clause into its analysis of economic regulation in *Metropolitan Life*, the Court denied relief to banks making a similar equal protection claim against state anti-takeover legislation. Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985). The reason for distinguishing between insurance companies and banks, according to the Court, was that "banking and related financial activities are of profound local concern." *Northeast*, 472 U.S. at 177 (quoting Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27, 38 (1980)). The notion that either banks or insurance companies can operate outside the national market in the modern age denies economic reality. The suggestion that banks can divorce themselves from the national market but insurance companies cannot defies common sense.

These cases reinforce two points made earlier. *See supra* notes 178-83 and accompanying text. First, the Court's modern standard is not significantly less metaphysical or unclear than the pre-1937 standard. Second, the reason the modern standard does not improve matters much is that the Court has carried forward many of the neo-classical presumptions made in the earlier dormant commerce clause cases. The Court continues to assume, for example, that the parochialism historically imposed on the economy by its dormant commerce clause theory is an objective aspect of economic reality. When the Court states in *Metropolitan Life* that its view concerning the local nature of the banking industry is "a recognition of the historical fact that our country traditionally has favored widely dispersed control of banking," 472 U.S. at 177, it fails to acknowledge that this "historical fact" has an ideological basis in conservative economic theory, which the Court is effectively endorsing anew.

Since the new standard was established in the late 1940s, no one on the Court has made a serious effort to question the theoretical basis of the standard. Furthermore, academic commentary hardly challenges accepted doctrine, except to debate whether the standard should be described as a balancing test or an anti-discrimination analysis. Most of the discussion in the modern cases involves an articulation of the factors that come into play under the Stone standard. The following four factors are especially prominent: discrimination against out-of-state buyers, sellers, or producers, especially if the discrimination is explicit and overt;[195] the extraterritorial effect of a state statute;[196] the absence of an internal political check on the state legislature that enacted the allegedly unconstitutional statute;[197] and the existence of a less restrictive means to pursue a legitimate state interest without affecting out-of-state entities.[198]

The debate over the details of the standard is less significant than what that standard has permitted the states to do. Under the present standard, the Court has upheld state regulations concerning the means by which national companies distribute their product to retail customers within the state,[199] the terms of tender offers for corporations incorporated within the state,[200] the minimum price of a state product or resource being shipped out-of-state,[201] the size of crews on trains,[202] and the composition of food containers.[203] In short, virtually no aspect of the economy is exempt from state regulation, so long as Congress has passed no preemptory legislation[204] and the state can characterize its regulation in the schematic, transactional form the Court favors.

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195. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 145-46 (1970); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 536-37 (1949).

196. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 642 (1982); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 377-78 (1964); Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959); Southern Pacific Co. v. Arizona, 325 U.S. 761, 774-75 (1945).

197. *See, e.g.*, Kassel v. Consolidated Freightways, 450 U.S. 662, 675-78 (1981); Southern Pacific Co. v. Arizona, 325 U.S. at 767 n.2.

198. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353-54 (1977); Dean Milk Co. v. Madison, 340 U.S. at 354.

199. Exxon Corp. v. Maryland, 437 U.S. 117 (1978); Breard v. Alexandria, 341 U.S. 622 (1951).

200. CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987).

201. *See* Cities Services Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) (natural gas); Parker v. Brown, 317 U.S. 341 (1943) (raisins); *see also* Milk Control Bd. v. Eisenberg, 306 U.S. 346 (1939) (milk; holding reaffirmed in *Cities Service*); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (state severance tax on coal upheld over commerce clause objections).

202. Brotherhood of Locomotive Firemen & Engineers v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968).

203. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

204. The Court tends to be very reluctant to preempt state law absent an explicit expression of intent by Congress. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983).

This partial list of state regulations permitted under the Court's present standard indicates the true continuity in dormant commerce clause jurisprudence since Chief Justice Marshall's death. The Court has never abandoned the principles that were incompletely articulated during Justice Taney's tenure, and given more precise theoretical dimension during the Court's neo-classical period. The neo-classical axioms that the nation's economy can be subdivided into local and national spheres, and the corresponding policy determination that the states should be given substantial responsibility for economic regulation, continue to provide organizing themes for an otherwise murky group of decisions. The next section sets forth the argument that these principles should be renounced, because they introduce a conservative bias into every debate over economic reform and regulation, and therefore erect obstacles to effective political control of private economic activity.

V.

THE CASE FOR ABANDONING THE NEO-CLASSICAL DORMANT COMMERCE CLAUSE

After Chief Justice Marshall's initial flirtation with the exclusivity interpretation of the commerce clause in *Gibbons v. Ogden*, the Supreme Court's dormant commerce clause decisions evidenced an incremental adoption of the contrary notion that the states properly may regulate many aspects of commerce. The aspects of commerce subject to state regulation have been described variously as the "local" aspects of commerce,[205] the aspects affecting interstate commerce only "indirectly, incidentally, and remotely,"[206] and, more recently, the aspects of commerce that do not "demand a uniform national rule."[207] Despite the changes in nomenclature, the Court's overall commitment to the preservation of state regulatory authority has remained constant.

As the Court drifted away from the exclusivity interpretation of the dormant commerce clause, it developed an intellectual stance identical to the one that defined the active commerce clause area during the period extending from approximately 1895 until 1936: i.e., it has focused intensively on the microeconomic aspects of economic regulation, to the exclusion of a more all-encompassing view of the economic universe. The cumulative macroeconomic consequences of uncoordinated state action are for the most part subsumed within the Court's narrow analysis of state policy objectives regarding each statute.

Chief Justice Stone's reformulated standard diverged very little from the analytical method and objectives established in the long line of dormant commerce clause cases stemming from *Cooley v. Board of Wardens*. Stone simply redefined the means necessary to implement the goals of localism and decen-

205. Cooley v. Board of Wardens, 53 U.S. (12 How.) at 319.
206. Smith v. Alabama, 124 U.S. 465, 482 (1888).
207. California v. Zook, 336 U.S. 725, 728 (1949).

tralization set forth in the earlier cases. He brought into the open the particular factors considered by the Court in each case, but he did not alter the underlying economic premises on which the Court's arrangement of particular factors would ultimately depend.

The Stone standard purports to avoid the deeper issues that lie beneath the surface of every dormant commerce clause case: i.e., how the economy is organized, and how political forces should be brought to bear in defining economic objectives. In the active commerce clause area, the modern Court has addressed these questions forthrightly. Its unvarying conclusion in active commerce clause cases is that no single economic decision can be made in isolation from every other economic decision, and furthermore that the nature of the country's political economy should be determined by the elected branches of the national government. In this respect the Court simply defers to the hard lessons of the Depression. It acknowledges that the new economic reality is characterized by corporate entities organized on an unprecedented financial scale, whose unchecked self-interest potentially threatens the entire political and economic system. In this context, extensive national political control of property and capital is inevitable.

The Court's drastic modification of its active commerce clause doctrine in the late 1930s should be viewed in conjunction with contemporaneous developments in theoretical economics, in which neo-classical theory lost its dominance of the discipline to macroeconomic theories such as Keynesianism. This change had occurred because the old theory had failed to recognize or grapple with the new economic reality. In the new Keynesian universe, every economic activity is related to interstate commerce, no matter how localized the activity seems when viewed in isolation. Steel cannot be made in Pennsylvania without affecting the welfare of coal miners in West Virginia,[203] wheat grown in a farmer's garden cannot be eaten by the farmer without affecting the economic well-being of all farmers,[209] and a stitch cannot be sewn in New Jersey without immediately sending ripples through the garment district on Seventh Avenue in Manhattan.[210] In short, the Court's modern active commerce clause decisions teach the ultimate macroeconomic lesson: every economic activity, down to the consumption of a mouthful of wheat, must be considered part of a single, indivisible economic whole.

The Supreme Court has failed, however, to extend its recognition of the new Keynesian reality to the sphere of political economy controlled by the dormant commerce clause. In the dormant commerce clause area, the Court has approved several examples of extensive state regulation,[211] as if these regulations could be considered in isolation from the decisions made by other states, the operation of the state regulation on the overall behavior of the af-

208. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
209. *See* Wickard v. Filburn, 317 U.S. 111 (1942).
210. *See* NLRB v. Fainblatt, 306 U.S. 601 (1939).
211. *See supra* notes 196-204 and accompanying text.

fected economic actors, or the effect the state regulation would have on the economy as a whole. Rather than consider these larger macroeconomic ramifications, the Court's determination of constitutionality turns on a series of narrow factors such as overt discrimination, direct extraterritorial effect, the existence of less restrictive means for accomplishing the same objective, and the existence of internal state political restraints. None of these factors are relevant, however, to the new view of the economy inaugurated by the Court in its active commerce clause cases.

The Court's dormant commerce clause cases contradict at every turn the fundamental observation underlying its active commerce clause cases. In the years following the adoption of the Stone standard, the Court permitted the states to regulate interstate commerce in a wide variety of ways. The Court justified such regulation by finding local interests far beyond the narrow range of police powers set forth in *Gibbons*.[212] These cases, asserting the continued importance of local control over economic affairs, reflect the Court's refusal to reject the fundamental tenets of neo-classical economics in the dormant commerce clause field, in sharp contrast to the Court's stated attitude in its active commerce clause decisions.

The persistence of neo-classical themes in the dormant commerce clause area infuses the Court's commerce clause jurisprudence with a politically conservative bias in three respects. First, the neo-classical themes announce the Court's preference for market-oriented economic analysis. Political intervention in the economy, especially of the socialistic or radically redistributive variety, is discouraged, even though intervention is no longer prohibited absolutely, as it often was in the period before 1937. Second, the Court's authorization and encouragement of state regulatory power ignores the rise of the mesoeconomy — i.e., the sector of the economy controlled by multinational enterprises significantly larger than the small firms that are the traditional focal points of microeconomic analysis.[213] The Court's willingness to countenance substantial decentralization of economic regulation loads the system in favor of mesoeconomic enterprises, which can use their great economic power and mobility to play the states against each other as a means of hindering local efforts to achieve any but the most modest economic reforms. Third, the neo-classical dormant commerce clause serves as a stalking horse for the restrictive concept of dual sovereignty, which otherwise no longer commands a majority on the Court. These three forms of conservative bias indicate that the Court has not yet truly abandoned its role in defining the context in which economic regulation will occur; nor is the Court as deferential toward political control of economic policy as its active commerce clause cases imply. The only way to eliminate this bias is to take the theory of the modern active commerce clause cases to its logical end, and reject on constitutional grounds

212. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

213. *See generally* S. HOLLAND, THE MARKET ECONOMY: FROM MICRO TO MESOECONOMICS (1987).

all forms of purely economic regulation at the state level.[214]

A. The Ideology of the Market

Cases such as *Exxon Corp. v. Maryland*[215] demonstrate that a state's unadorned desire to regulate a given activity will often be sufficient to justify state regulation of economic affairs under the Court's modern standard. The state's regulation of economic activity need not be justified by the claim that regulation at the national level is inadequate to accommodate some state idiosyncrasy. The "legitimate local purpose" required by the Court[216] can be satisfied by a policy preference no different in kind from the policies usually set on the national level.

In *Exxon*, the state's asserted purpose was to prevent national oil companies from favoring their captive retail establishments with supplies of scarce gasoline. Maryland was not the only state concerned with this problem; the vertical integration of the oil industry created precisely the same problem throughout the country. But by permitting Maryland to address this problem on its own, at the state level, the Court created obstacles to a more pervasive attack on the concentration of power in the oil industry. First, the Court approved a solution to the problem that only shifted the benefits of concentration to a smaller, in-state elite. Nothing in the regulation guaranteed lower prices or a more certain supply of gasoline to the consumer. The direct beneficiaries of the statute were the Maryland retail gasoline dealers.[217] The ironic effect of the Maryland statute was that it created a new class of beneficiaries who now had a stake in maintaining the basic organization of the oil industry intact. This group could be expected to lobby fiercely against any more pervasive reorganization or regulation of the oil industry on a national scale.[218]

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214. This is not to say that the states will be precluded from passing all legislation affecting economic entities. Essentially, the court should return the standard to the position required by a strict reading of Justice Marshall's opinion in *Gibbons*. *See infra* notes 296-99 and accompanying text.

215. 437 U.S. 117 (1978).

216. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

217. This fact accounted for the one dissent in the case, by Justice Blackmun. Blackmun pointed out that 98 percent of the gas stations targeted by the legislation were owned by out-of-state firms, while 99 percent of the beneficiary dealers were locally owned. *See id.* at 138 (Blackmun, J., dissenting).

218. It is possible to criticize this theory on the ground that the oil companies themselves were the parties objecting to the state regulation here, which arguably indicates that it is wrong to contend that the Maryland statute was in the companies' interest. If it is in the companies' best interest to develop local allies in the ongoing fight against national controls, critics would ask, then why are the oil companies fighting so hard to overturn the state statute? One response to this criticism is simply that the companies have made a bad judgment about their own self-interest. Another, more satisfactory response, is that the companies are simply using the malleability of the modern commerce clause standard in an attempt to have their cake and eat it too. The best possible result for the companies would be to have no regulation of any sort on any governmental level. It would therefore be a logical short-term strategy for the companies to use the dormant commerce clause to fend off state legislation such as the Maryland statute, while relying on political pressure to ensure defeat of national legislation. If confronted with the long-term prospects of extensive federal regulation, however, the companies would undoubtedly re-

Aside from the immediate political implications of the Maryland statute, the statute, and the Supreme Court's opinion upholding the statute, contains a more subtle message concerning economic regulation generally. In cases such as *Exxon* the Court treats economic regulation as if it were solely a matter of assuring fair exchanges of goods between a finite set of active market participants. The Court states that the dormant commerce clause is intended to protect "the natural functioning of the interstate market [from prohibitive or] burdensome regulations."[219] The Court is not using the term "interstate market" in the limited Keynesian sense of an interrelated bundle of economic factors, nor is it using the term "interstate market" in the more radical sense to indicate the geographic boundaries within which the products of society's economic activity are to be democratically allocated. Rather, the Court is referring to the narrower, microeconomic definition of the market. The Court's use of the term indicates that it does not believe that its task is to effectuate the political allocation of economic resources; rather, it considers its role to be the protection of mechanisms for the private exchange of goods over state lines.

In *Exxon*, the Court viewed oil simply as one interstate commodity among many. The Maryland regulation was therefore permissible because the volume of oil travelling interstate was not reduced.[220] However, by approving the local regulation of a quintessentially national resource such as the supply of oil, the Court conveyed *sub rosa* a preference for private, market-oriented solutions to economic problems over more interventionist policies that can only be undertaken at the national level.

B. State Regulation of the National Economy

No state can adequately address the basic distortions created by the concentration of power in the few vertically integrated oil companies that dominate the industry. Moreover, it would be economically as well as politically impossible for a state to opt for socialization of the oil industry. Each state can deal only with the tentacles of the oil industry that extend into the state's territory. Socialization would constitute an attack on the main body of the oil industry; since the industry's body is a global phenomenon, it is therefore invulnerable to such an attack by a single state acting alone.[221] The universe of

sort to using their concordat with the states as a means of demonstrating that national legislation is unnecessary.

219. 437 U.S. at 127 (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976)).

220. *Id.* at 125, 126 n.16.

221. The general economic concentration and massive industrial scale to which this Article refers long ago transcended national boundaries. Two hundred multinational companies are now responsible for approximately one-third of the world's Gross Domestic Product. *See* Clairmonte & Cavanagh, *Transnational Corporations and Services: the Final Frontier*, 5 TRADE AND DEVELOPMENT: AN UNCTAD REVIEW 215, 232 (1984). The multinational character of manufacturing and service enterprises complicates the regulatory picture in two major ways. First, the companies' dominance gives them a large degree of price-making power within the many markets dominated by imperfect competition. Second, large industrial companies are

regulatory options available to a state is therefore limited to regulations affecting the industry's use of its in-state tentacles. The state can alter the operation of the marketplace, but it cannot reject the marketplace in favor of another method of producing and marketing oil. The basic ideological issue in *Exxon* was decided by virtue of the Court's allocation of regulatory power to the state of Maryland. The Court's treatment of that case as a microeconomic matter of inadequate retail distribution only cloaked the true problem posed by the fact that the large oil companies retain ultimate control over the supply of one of society's major economic resources.

Although the Court has abandoned the neo-classical economists' absolute aversion to any form of political intervention in the economy, the Court's microeconomic treatment of economic problems in cases such as *Exxon* channels such intervention in a way that does not seriously threaten the dominant market actors. As noted previously, in an age of increasing economic concentration the decentralist political rhetoric of pre-industrial liberalism tends to favor economically powerful private interests.[222] A predominantly localized system of economic regulation would not be altogether bad if society were still characterized by Jeffersonian conditions of small-scale manufacturing within a largely agrarian society. If states could hold their own in a battle with the large corporations they seek to regulate, then the decision to allocate regulatory authority to the political entity that is closest to the people could be considered politically neutral. Unfortunately, the present economic system inhibits viable regulation by the states. This is one of the basic lessons of the active commerce clause cases decided at the beginning of this century. As the Solicitor General unsuccessfully argued in *Hammer v. Dagenhart*, regulatory balkanization is far more likely to result in a "race to the bottom" than in a series of innovative economic experiments.[223]

A recent example of this phenomenon in the dormant commerce clause context is provided by the Supreme Court's decision in *CTS Corp. v. Dynamics Corp.*,[224] and the fallout from that case. The case involved an Indiana law regulating takeovers of corporations incorporated in Indiana. The statute prohibited a raider from taking over an Indiana corporation unless the takeover was approved by the preexisting, "disinterested" stockholders in that corporation (i.e., those who had not already tendered their stock).[225] The Court upheld this statute against claims that it violated the commerce clause by blocking interstate transfers of stock. Justice Powell's majority opinion was

increasingly organizing even single-product production on a multinational scale, enabling them to play national as well as state governments against each other in order to obtain the hospitable investment conditions they desire. *See, e.g.*, S. HOLLAND, *supra* note 70, at 79. These factors indicate the growing difficulty of regulating large economic enterprises even on a national level, and presents another forceful argument against further diluting centralized political power by parceling out such power to the individual states.

222. *See supra* notes 149-51 and accompanying text.

223. *See* Hammer v. Dagenhart, 247 U.S. 251, 256-57 (1918).

224. 481 U.S. 69 (1987).

225. *Id.* at 73 n.2.

one of the more formalistic recent applications of the transactional approach to the dormant commerce clause. The Court asserted that a corporation is simply a "commodity," which "owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done."[226] The Court treats this case just as if it involved the interstate sale of cantaloupes or apples; the Court held that so long as the relevant transaction — the final purchase of the share in the "commodity" — is not unduly hampered, the state policy will be upheld.

The other states responded quickly to the freedom granted them by *CTS* and the pressure imposed on them by corporate boards that had followed the case closely. Less than a year after the Supreme Court upheld the Indiana law in *CTS*, the state of Delaware passed an even stronger anti-takeover statute.[227] This statute was necessary to preserve Delaware's role as the premier incorporation jurisdiction in the country.[228] In the battle over Delaware's anti-takeover legislation, the most active opponents were market players themselves — takeover specialists, institutional investors, and the investment banks and law firms that feed the mergers and acquisitions business.[229] The ancillary effects of corporate takeovers evidently were not a major factor in the debate. Rather, the debate focused on the effect the law would have on the buyers and sellers of the corporate "commodities."[230]

The Court's narrow market-oriented perspective in *CTS* only encouraged this attitude at the state legislative level. This aspect of the *CTS* decision also illustrates how the neo-classical economic ideology that has seeped into dormant commerce clause analysis distorts the Court's analysis of macroeconomic policy. In *Edgar v. MITE*,[231] decided only four years before *CTS*, the Court held that a similar Illinois law limiting takeovers was an unconstitutional violation of the commerce clause. In *CTS*, the Court distinguished its holding from *MITE* on the ground that, unlike Indiana, Illinois had attempted to regulate both Illinois corporations and out-of-state corporations. But a close reading of the statute held unconstitutional in *MITE* reveals that Illinois did not simply attempt to reach out and regulate any and all cor-

226. *Id.* at 94.

227. DEL. CODE ANN. tit. 8, § 203 (1988).

228. According to one report, Delaware's first version of its anti-takeover law had to be strengthened in several respects after Boeing and at least five other major corporations threatened to incorporate in another state. As the author of this account notes, "[s]uch threats are not taken lightly in a state that gets 16 percent of its income from corporate franchise taxes." Sontag, *A Takeover Law Grows in Delaware*, Nat'l L.J., Apr. 11, 1988, at 19-20.

229. *See id.* at 20. Federal agencies such as the Federal Trade Commission and the Securities Exchange Commission testified against the legislation, but the main opposition was orchestrated by corporate raider T. Boone Pickens and those associated with him. *Id.*

230. Delaware's experience is not unique. Due to the historical decentralization of corporate governance, the states have for many years engaged in a "race to the bottom" in seeking to attract national companies to incorporate within their jurisdiction. For early examples, see Liggett Co. v. Lee, 288 U.S. 517, 557-64 (1933) (Brandeis, J., dissenting).

231. 457 U.S. 624 (1982).

porations in the world, which is the impression given by the Court in *CTS*.[232] The Illinois statute in *MITE* attempted to regulate takeovers of corporations that were either incorporated in the state, or which had substantial capital in the state. Thus, any corporation regulated by Illinois was required to have some substantial connection to the state — whether that connection was based on incorporation or a substantial economic presence within the jurisdiction.

The Court's treatment of the Illinois statute is significant because it demonstrates how transactional analysis warps the Court's perception of the economic policies embodied in regulatory statutes. In the Court's view, its role in the takeover cases was to protect the market, which it defined as the mechanism for exchanging commodities across state lines. But a broader view of the market could support the argument that the Illinois statute invalidated in *MITE* presented a stronger case for regulation than the Indiana statute upheld in *CTS*. This argument is based on the observation that a state's interest in regulating corporate takeovers is much stronger with regard to corporations that have substantial capital within the state than the state's interest regarding corporations that are simply incorporated within the state, but do most of their business elsewhere. The reason is that corporate takeovers are usually highly leveraged transactions, often financed by junk bonds, which encumber the corporation with great debt, and often cause the target corporation to shut down or sell off some of its operations after the takeover is accomplished. This often leads to forced concessions by the company's workers in order to keep their jobs. The state's interest in protecting the economic security of local employment conditions seems a much stronger state interest than the interest in *CTS*, which is to protect the stockholders of a locally incorporated corporation. These stockholders 1) frequently are not even residents of the regulating state, 2) are much more capable of protecting themselves from the effects of a takeover than a group of semi-skilled workers in the local factory, and 3) are probably going to profit handsomely anyway from the premium paid for their stock as a result of the takeover.

Because the Court focused on the corporation as a "commodity," and interpreted the market to be simply a giant emporium in which to transfer these commodities, the Court failed to notice the broader policy implications of economic conduct. *MITE* and *CTS* therefore demonstrate yet another shade to the conservative coloration of the Court's modern dormant commerce clause jurisprudence. In addition to limiting effective national regulatory power by dispersing regulatory authority among the states, and creating local constituencies likely to oppose more comprehensive national regulatory efforts, the Court's neo-classical approach to the dormant commerce clause also limits the boundaries of potential regulation even at the state level by

232. 481 U.S. at 93 (the Illinois law "applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations.* But [the Indiana law] applies only to corporations incorporated in Indiana." (emphasis in original)).

regarding all economic activity in microeconomic terms as discrete economic transactions. So long as the state regulation tends to foster this market-oriented approach to economics, the Court will often uphold the regulation; but if the state pursues non-market-oriented objectives, the Court is likely to be more skeptical, especially if the legislation's economic goals conflict with the market values the Court has decided to foster.[233]

C. *The Neo-Classical Dormant Commerce Clause and the Revival of Dual Sovereignty*

In order to justify its approval of a wide range of state economic regulation, the Court must translate the neo-classical economic themes of economic decentralization and localism into the constitutional vernacular. This necessarily entails, in substance if not in form, at least a partial revival of the dual sovereignty concept that was a prominent feature of both active and dormant commerce clause decisions before 1937.[234] The modern Court has been understandably reluctant to revive dual sovereignty explicitly because the concept carries connotations linking it with the discredited doctrine of economic due process. Moreover, because of the complete abandonment of neo-classical themes in modern active commerce clause decisions, the remnant of dual sovereignty could never possess the power of its former self; in every instance in which the modern Court grants the states power to regulate some aspect of economic life, Congress may "overrule" the Court by asserting its superior sovereign power over economic affairs.[235] Nevertheless, although the tenth

233. There are some exceptions to this rule. For example, the Court has approved what I facetiously label the "suburban solitude exception" to this rule. In Breard v. Alexandria, 341 U.S. 622 (1951), the Court held that it would not use the dormant commerce clause to strike down local legislation designed to protect "the social, as distinguished from the economic, welfare of a community." *Id.* at 640. On this basis the Court upheld a local ordinance preventing door-to-door solicitation. However, this social legislation exception to the market-protecting tendency of the Court has limited significance. First, it can be argued that this was a statute similar to that involved in *Exxon*, in which local participants in the market (in *Breard*, local retail merchants) sought legislative protection from out-of-state participants (in *Breard*, sales crews from out-of-state magazine publishers). The market mechanism was not being challenged by the local statute; as in *Exxon*, the statute simply replaced one set of market beneficiaries with another. Second, *Breard* seems to be based on two other values that will seldom arise in this area: bourgeois etiquette ("As a matter of business fairness, it may be thought not really sporting to corner the quarry in his home and through his open door put pressure on the prospect to purchase"), *id.* at 627, and sexist paternalism ("hospitable housewives dislike to leave a visitor on a windy doorstep while he explains his errand, yet once he is inside the house robbery or worse may happen"), *id.* at 639 n.27 (quoting Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 406 (1941)).

234. *See* Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

235. The use of state sovereignty to limit the national government's power is the lynchpin of what Corwin calls "dual federalism." The fact that Congress can now overrule the Court's allocation of power to the states is sufficient proof for Corwin that the evils of dual federalism have been overcome. *Id.* In contrast, dual sovereignty retains both theoretical and practical significance. It is theoretically significant because it symbolizes the Court's ambivalence over constitutional issues relating to economic regulation. The Court is willing to defer completely to Congress in active commerce clause decisions, but where Congress has not acted explicitly the Court continues to assert that state sovereignty extends to economic affairs. The Court has

amendment, which was the textual source of dual sovereignty during its heyday, remains a "truism,"[236] the Court continues to give substance to the concept of dual sovereignty indirectly through its dormant commerce clause decisions.

The concept of dual sovereignty is problematic for several reasons. First, it is problematic because it is inconsistent with the Court's recognition in the active commerce clause cases of a uniform national economy, which dictates that a single sovereign be responsible for economic regulation. Second, the concept is problematic because it contributes to a surreptitious infusion of conservative economic values, as discussed in the previous subsection. Third, the theory of dual sovereignty lends credence to economic decentralization by associating state power to regulate economic affairs with other examples of constitutional decentralization undertaken in the name of federalism. By defining state authority to regulate economic affairs as an example of the general political principle of federalism, the Court places the issue of state regulatory power within a context that has been defined recently by sharp restrictions on federal authority. Numerous recent decisions have applied the federalism principle to limit federal judicial authority to regulate matters relating to state sovereign interests.[237] The principle of these cases is expansive. As the Court once stated it, in the course of discussing the contemporary influence of the tenth amendment: "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[238] Unless the Court revives *National League of Cities*,[239] this does not mean that the theory of dual sovereignty will be used to overturn congressional legislation preempting state economic regulation. But it does provide the states potent theoretical ammunition to support the argument that they should be strong, if not equal partners in the regulation of economic affairs. The Court has created this dilemma by applying a general political theory of local control to economic circumstances in which effective local control is a practical impossibility.

Not surprisingly, the principle of dual sovereignty has been urged most forcefully in the dormant commerce clause cases by the Court's conservative

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not renounced the concept of dual sovereignty, it has simply reallocated the powers of the two sovereigns. The concept of dual sovereignty retains practical significance because it gives the states the sovereign power to dictate economic policy in any area not clearly preempted by congressional action. As is argued throughout this section, the remnant of state sovereignty over economic affairs effectively prevents consideration of fundamental changes in the prevailing economic structure.

236. *See* United States v. Darby, 312 U.S. 100, 123-24 (1941). The Court has attempted to revive the tenth amendment only once since 1937, and that attempt was ultimately unsuccessful. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).

237. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987); Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); Edelman v. Jordan, 415 U.S. 651 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971).

238. Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

239. *See supra* note 236.

members. For example, in a recent case involving state taxation Justice Scalia wrote a dissenting opinion, which was joined by Chief Justice Rehnquist, attacking the Court's "doctrine of the negative Commerce Clause."[240] In the opinion Scalia employs several textualist and originalist arguments to support his conclusion that the Court "for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well."[241] Although Scalia acknowledges that Marshall's opinion in *Gibbons* can be read as an endorsement of the exclusivity interpretation of the commerce clause, he considers that interpretation to have been consistently rejected by the Court, beginning with the opinions of Marshall's successor, Chief Justice Taney.[242] Scalia contends that since the Court has definitively rejected the exclusivity interpretation, it should take the next logical step and end its oversight of state regulatory behavior absent evidence of "rank discrimination against citizens of other States."[243]

Justice Scalia musters historical and textual evidence to endorse explicitly the concept of dual sovereignty, while advocating implicitly the debatable economic values of neo-classical decentralization. "The exclusivity rationale is infinitely less attractive today than it was in 1847," according to Scalia. "Now that we know interstate commerce embraces such activities as growing wheat for home consumption, *Wickard v. Filburn*, and local loan sharking, *Perez v. United States*, it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded."[244]

Scalia's argument begs the central question: he assumes without arguing the point that the states *should* have a role in regulating economic affairs. This assumption, which is put forth in the traditional manner of conservative constitutional discourse as if it follows automatically from the textual and historical sources,[245] avoids the highly ideological economic debate by translating the issue into one of dual sovereignty, in the guise of non-ideological federalism. Contrary to Justice Scalia's assumption, the structure of the contemporary industrial economy makes the exclusivity interpretation more, not less attractive — unless one is guided by the ideological goal of reducing political control over the allocation and deployment of economic resources. These ideological questions should be decided on the basis of the economic data and an open consideration of the social values at stake in permitting the present system to continue. These major economic issues should not be decided on the

240. Tyler Pipe Indus. Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., dissenting).

241. *Id.* at 265.

242. *See id.* at 261 (citing License Cases, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J. concurring)).

243. *Id.* at 265. This is also the premise of Scalia's concurring opinion in CTS Corp. v. Dynamics Corp., 481 U.S. 69, 94 (Scalia, J., concurring).

244. *Tyler Pipe*, 483 U.S. at 261 (citations omitted).

245. For a discussion of the role such arguments play in politically conservative constitutional jurisprudence, see Gey, *supra* note 147.

basis of the Court's political judgment regarding the nature of sovereignty.[246]

The final problem posed by the concept of dual sovereignty is that the Court has been unable to limit its application in economic regulation cases. This problem is highlighted by the state-as-market-participant cases. In these cases the Court combines the conceptual structure of dual sovereignty with its transactional definition of economic markets.[247] The result is a series of opinions that not only exacerbate the influence of states over the structure of the national economy, but also provide a simple means for undisguised discrimination against other states.

The principle of the market-participant cases was expressed in *Hughes v. Alexandria Scrap Corp.*,[248] the first such case: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[249] The *Alexandria Scrap* decision was issued on the same day as *National League of Cities*, and the strong federalism orientation of that case also infused *Alexandria Scrap*. But *Alexandria Scrap* actually went beyond *National League of Cities* by bolstering the concept of state sovereignty with the Court's neo-classical emphasis on market economics. *Alexandria Scrap* involved a commerce clause challenge to a Maryland program under which the state bought scrap cars. The state bought cars from both in-state and out-of-state sellers, but the out-of-state sellers were required to provide more extensive title documentation. The Court held that this discrimination against out-of-state sellers did not amount to a violation of the dormant commerce clause because the commerce clause does not impose any restriction *at all* on a state's acting as a participant in, as opposed to the regulator of, the market.[250]

The Court's formalistic transactional perspective forces it to ignore the basic nature of the Maryland program. It is true that the form of Maryland's action was akin to a traditional purchaser of goods or services. By focusing

246. The Court's conservatives are not alone in using the concept of dual sovereignty to bolster state power over economic affairs, although they are the concept's most vociferous proponents. At some level, every dormant commerce clause decision that permits state regulatory action endorses the notion of dual sovereignty. Thus, at one point or another, every present member of the Court has joined in an opinion endorsing the concept. Only Justice Blackmun dissented in both Exxon Corp. v. Maryland, 473 U.S. 117 (1978), and CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987), two of the broader recent endorsements of state sovereignty over economic affairs. Yet Justice Blackmun wrote the majority opinion in Reeves, Inc. v. Stake, 447 U.S. 429 (1980), a state market-participant case, in which he explicitly endorsed the dual sovereignty concept. *See id.* at 438 n.10. However, this part of Blackmun's opinion in *Reeves* drew heavily on the notions of sovereignty articulated in National League of Cities v. Usery, 426 U.S. 833 (1976). Because Blackmun subsequently renounced *National League of Cities*, *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), it is probably safe to assume that his belief in dual sovereignty has diminished accordingly.

247. *See supra* notes 218-19 and accompanying text.

248. 426 U.S. 794 (1976).

249. *Id.* at 810 (citations omitted).

250. *Id.* at 796-810.

solely on the actual exchange of money for scrap, the Court could find that the Maryland program involved only a series of simple economic transactions, and it was therefore irrelevant that one party to those transactions happened to be the state. But no one involved in the case believed that Maryland had entered the auto hulk market because there was money to be made in iron oxide. Rather, Maryland's objective was purely regulatory. Although the Court itself at one point acknowledged the state's regulatory purpose,[251] the Court's holding turns on the determination that the state had pursued its objective in the manner of a traditional buyer of goods. So long as the state patterned its behavior on the transactional model of the marketplace, the Court signaled that it would ignore any regulatory purpose or extraterritorial economic effect.

The overt discrimination evident in this case should have offended even the most deferential interpretation of the commerce clause.[252] Yet the justices joining the *Alexandria Scrap* majority were willing to explain away the discrimination as part of Maryland's innovative attempt to create a form of commerce that otherwise would not have existed. Having "created" this form of commerce, the state could not be forced to expend its limited funds to deal with sellers from other jurisdictions. As Justice Stevens put it, "[Maryland's] failure to create that commerce would have been unobjectionable because the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business. Nor, in my judgment, does that Clause inhibit a State's power to experiment with different methods of encouraging local industry."[253] But if the Court intends to encourage experimentation, and if regulation — not economic remuneration — was the object of this particular state's experiment, then the same principle should justify discrimination in state statutes explicitly denominated as regulations. Obviously no one could challenge a state's complete failure to regulate a particular activity. But once the state does impose regulations, then the dormant commerce clause forbids that state from using regulatory methods that discriminate against out-of-state interests. So if one type of state action discriminating against outsiders is forbidden, why is another equally discriminatory type of state action permitted? The answer seems to be that the Maryland action was permitted solely because the regulatory purpose was cast in a form that fit within the Court's narrow perspective of the marketplace.

The Court viewed the state as simply another buyer of goods. The fact that the state's action had a regulatory and discriminatory purpose was irrele-

251. "Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment." *Id.* at 809.

252. Even Justice Scalia, who is probably the sitting justice most hostile to the Court's enforcement of dormant commerce clause limits on state regulatory activity, recognizes that the Court should prohibit discrimination against out-of-state interests. *See* Tyler Pipe Indus. Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 254 (1987) (Scalia, J., dissenting); CTS Corp. v. Dynamics Corp., 481 U.S. 69, 94 (1987) (Scalia, J., concurring).

253. 426 U.S. at 815-16 (Stevens, J., concurring).

vant, just as it would be for any other market participant. The analogy drawn between states and other market participants was made explicit in the next major case, *Reeves, Inc. v. Stake*.[254] "There is no indication," Justice Blackmun wrote for the majority in *Reeves*, "of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[255] Blackmun then specifically linked the goal of protecting the "free market" with the concept of state sovereignty.

> Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee of its people," and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[256]

Blackmun saw no fundamental difference between the state and any other "trader or manufacturer."

Actually, the very facts of *Reeves* undercut Justice Blackmun's equation of state market participants with private market participants. In *Alexandria Scrap*, Maryland arguably pursued the neutral purpose of cleaning the local environment; the problem with Maryland's statute was the discriminatory means to achieve this goal. In *Reeves*, both the end and the means were discriminatory. *Reeves* involved a cement plant owned by the state of South Dakota. Historically, the plant had sold cement to both in-state and out-of-state construction companies. The plaintiff in the case was a Wyoming contractor which had obtained ninety-five percent of its cement from the South Dakota factory for the prior twenty years.[257] Because of a construction boom, the area encountered a cement shortage. South Dakota summarily stopped selling its plant's cement to out-of-state purchasers, including the plaintiff. According to Justice Stevens in *Alexandria Scrap*, Maryland's purpose in buying auto scrap was to create a market where none had existed previously. No such neutral motive could be devised for South Dakota's action in *Reeves*. South Dakota intended simply to use the existing cement shortage to benefit the local construction industry, to the detriment of out-of-state firms such as the plaintiff. The state's purpose was to tilt the regional economy in its favor, regardless of the ultimate consequences for the rest of the region, or the nation as a whole.

The state action in *Reeves* illustrates the allure presented by every opportunity for state economic regulation. The primary function of state political

254. 447 U.S. 429 (1980).

255. *Id.* at 437.

256. *Id.* at 438-39 (footnotes and citations omitted). In a footnote omitted from the quotation, Blackmun elaborated on the dual sovereignty aspect of the case: "Even where 'integral operations' are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." 447 U.S. at 438 n.10. Note, however, that since Blackmun's recantation of his vote in *National League of Cities*, this may not represent his current views. *See supra* note 246.

257. *See Reeves*, 447 U.S. at 452-53 n.4 (Powell, J., dissenting).

officials is to serve the interests of their constituency — the local citizens. The state officials do not serve this function by protecting citizens of other states or considering the national ramifications of their actions. This simple political fact will often lead to beggar-thy-neighbor actions such as the South Dakota policy challenged in *Reeves*. Broader regulatory objectives will inevitably be subsumed within a short-range goal of cultivating local advantage over competing states.[258] In a pre-industrial age this was not as critical, since there was little a state could do in advancing its own interest that would seriously affect the economies of its neighbors.[259] Today, however, the complex interrelationships that characterize our advanced industrial society make it virtually impossible for a state to regulate economic activity without immediately affecting the economic affairs of its neighbors. The Court's modern dormant commerce clause decisions partially recognize this fact of economic reality by prohibiting states from overtly discriminating against out-of-state entities, but even in these decisions the Court clings to the neo-classical belief that some aspects of economic activity can be viewed as isolated and localized. The market-participant cases are distinctive only because the Court has chosen to ignore entirely the macroeconomic effect of a state action whenever the state arranges its regulatory behavior in a form that fits within the market-as-emporium model favored by the Court.

Even in the market-participant area, however, the Court has recently been forced to confront the deleterious consequences of unrestrained state regulatory action. In 1983, Justice Rehnquist authored the majority opinion in *White v. Massachusetts Council of Construction Employers*, in which he reaffirmed "the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."[260] The decision upheld a Boston law requiring private contractors hired by the city to employ Boston residents for at least fifty percent of the work force used on city projects. The Court's "reaffirmation" of its market-participant rule in this context lost the vote of Justice Blackmun, the author of the majority opinion in *Reeves*. According to Blackmun, the prior cases "were

258. At one point in his *Reeves* opinion, Justice Blackmun notes that the initiation of the South Dakota cement factory project in 1919 was a "product of the State's then prevailing Progressive political movement." *Id.* at 430. This fact is used to bolster the image of the states as laboratories in which innovative, radical new economic theories can be put to the test. *See id.* at 431 n.1. But if anything the case demonstrates just the opposite; the case actually demonstrates how easily projects undertaken at the state level can be coopted by the local economic elite. Despite the state's best progressive intentions in undertaking the project in 1919, by 1980 the project had become indistinguishable in effect from other, more mundane state efforts to concentrate commerce within its boundaries at the expense of its neighbors. Insofar as the cement factory was still owned by a state government, the project could still be described in 1980 as an experiment in socialism. But this is a form of socialism only the South Dakota construction industry could love.

259. However, concerns over the cumulative effect of self-centered state economic behavior were present even in the pre-industrial era, as evidenced by the traditional explanation for the adoption of the commerce clause. *See supra* notes 17-30 and accompanying text.

260. 460 U.S. 204, 208 (1983).

relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, 'long recognized' as the right of traders in our free enterprise system."[261] Blackmun reemphasized that this proprietary prerogative "rests on core notions of state sovereignty."[262] In contrast, Blackmun protested, the Boston ordinance involved a direct attempt to govern private economic relationships: i.e., the relationships between private contractors and their employees.

Notwithstanding Blackmun's protests, the *White* decision seems perfectly in keeping with the framework developed by the Court in *Hughes* and *Reeves*. Blackmun's objection is that Boston is one step removed from a direct market participant. However, a simple rephrasing of the Boston statute would answer this objection. One could argue that the state did not seek to regulate the employment practices of the contractors it hired; it merely stated that it would not spend money with contractors who did not meet its criteria, i.e., at least half of its work force must be composed of Bostonians. This is no different, except in form, from the decision made by Maryland and South Dakota, acting as proprietors of goods and services, to deal only with buyers located within their borders.[263]

Although Blackmun's inconsistency in these cases is lamentable, in *White* he belatedly identified what should have been the Court's concern from the beginning. If the city of Boston can do this, then the states are essentially unrestrained in regulating economic activity so long as the regulations are characterized as contract terms set by the state posing as a "trader in our free enterprise system."[264] Under the flexible Rehnquist reading of the market-participant exception to the commerce clause, the states can set whatever standards they want, so long as they regulate by spending money rather than policing private parties directly. This leaves the way open for local content legislation, state monopoly purchase cooperatives, which would be under orders to purchase only local merchandise, and other forms of economic isolationism. This, in turn, reinforces the balkanization inherent in the Court's dormant commerce clause decisions.[265]

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261. *Id.* at 218 (Blackmun, J., dissenting).

262. *Id.*

263. Prior to *Hughes*, the Court approved summarily a decision permitting the state of Florida to purchase printing services exclusively from in-state shops. American Yearbook Co. v. Askew, 339 F.Supp. 719 (N.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972). Blackmun himself cited this case favorably in his majority opinion in *Reeves*. *See* 447 U.S. at 437 n.9. It seems inconsistent for Blackmun to argue in *Reeves* that a state may purchase printing services exclusively from in-state sources, and then argue in *White* that a city may not purchase half of its construction work force from in-city sources.

264. *See White*, 460 U.S. at 218.

265. Donald Regan has offered five reasons supporting the Court's general conclusion that discriminatory state spending programs, such as programs involving the state in a commercial capacity as a buyer or seller of goods, are less offensive to dormant commerce clause concerns than state regulatory programs. First, Regan asserts that state spending programs are less coercive than regulatory programs because no one is forced to take state inducement payments, or deal with the state-owned company. Regan, *supra* note 5, at 1194. But the same point can be

The Court's uneasiness with the implications of the market-participant cases led the majority to impose some restrictions on the doctrine a year after the *White* decision. In *South-Central Timber Development, Inc. v. Wunnicke*,[266] the Court struck down on dormant commerce clause grounds an Alaskan statute requiring purchasers of state-owned timber to undertake the "primary manufacture" (i.e., the basic trimming) of the logs before shipping them out-of-state. The Alaskan statute was a featherbedding measure functionally indistinguishable from numerous other state statutes that the Court had held unconstitutional because they required "business operations to be performed in the home State that could more efficiently be performed elsewhere."[267] As an application of these dormant commerce clause precedents, the Court's ruling was unsurprising. However, Alaska had carefully crafted its statute in the form of a proprietary measure; the statute applied not to all Alaskan loggers, only to those purchasing logs from the state. Judged in the light of the formalistic guidelines set forth in the Court's previous market-participant decisions, therefore, Rehnquist was correct to point out that the "contract term at issue here no more transforms Alaska's sale of timber into a 'regulation' of the processing industry than the resident-hiring preference imposed by the city of Boston in *White* constituted regulation of the construction industry."[268]

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made about state regulations. A state cannot force a company to locate within its jurisdiction and thus submit itself to the state regulation. A company is always free to avoid the state regulation by staying out of the state market. Second, Regan asserts that "it just seems obvious that when states distribute benefits they can prefer their own citizens . . . ." Therefore, according to Regan, spending programs are "less inconsistent with the concept of union. . . ." *Id.* This rationale makes the mistake of treating a state's commercial operations as if they are exactly analogous to the state's social welfare programs. It is certainly obvious that a state need not provide schools or welfare payments for residents of other states. But if the state spends its money with the intention of skewing the national market in its favor — as in the market-participant cases — by definition the expenditure is "inconsistent with the concept of union." Third, Regan contends that many state spending programs are beneficial to the nation as a whole, by creating commerce that would not otherwise exist. But the example Regan uses to illustrate this point is unconvincing. Regan asserts that the public construction program in *White* "probably would not have existed if the local preference aspect had been forbidden." *Id.* To the contrary, this program was undertaken when Boston was undergoing an economic resurgence that severely taxed its public facilities. It is doubtful that the dominant political and economic forces within Boston would choose to live with an inadequate and deteriorating public infrastructure, and thus discourage further economic growth, simply because Boston was forced to hire construction workers living outside the city limits. Regan's fourth and fifth points are that spending programs are expensive, therefore unlikely to proliferate and equally unlikely to incur retaliation. *Id.* at 1194-95. This is basically a de minimus argument: if spending measures damage the national economy at all, they damage it only a little bit. However, the Supreme Court itself has recognized in the active commerce clause area that even de minimus economic activities are part of an indivisible totality. *See supra* note 130. There is no reason why this principle should not apply when the offending actor is the state instead of a private party.

266. 467 U.S. 82 (1984).

267. Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970); *see also* Toomer v. Witsell, 334 U.S. 385 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

268. 467 U.S. at 103 (citations omitted) (Rehnquist, J., dissenting).

Prior to *Wunnicke*, the market-participant exception threatened to swallow the dormant commerce clause rule. Even after *Wunnicke* it is doubtful that a majority on the Court is willing to abandon the formalistic proprietor/regulator dichotomy that defines the market-participant doctrine. At most the Court seems willing to require that states acting as market participants interpret narrowly the markets they are attempting to enter.[269] Based on the various opinions in *Wunnicke*, a majority of the Court seems to believe that this would prevent the most egregious extraterritorial effects of state market participation, which would bring the market-participant cases back into line with the general goal of modern dormant commerce clause analysis. Of course, this does not answer Rehnquist's complaint that such distinctions cannot be drawn consistently,[270] but analytical consistency has never been a virtue of the dormant commerce clause cases.

In any case, the real problem with the market-participant cases is not that they depart from the basic thrust of the dormant commerce clause doctrine. Rather, the market-participant cases present the essence of the dormant commerce clause in a concentrated form. The market-participant cases combine the neo-classical theory of a fragmented national economy with that theory's particular emphasis on individual economic transactions within a laissez-faire market structure, and apply both aspects of the neo-classical perspective in the political vernacular of dual sovereignty over economic affairs. The Court's inconsistency in applying these theories is the country's good fortune. If the Court applied its localist economic theory more consistently, the unfettered state action allowed in the early market-participant cases could be the model for the entire dormant commerce clause, making coherent regulation of the national economy even more difficult.

D. The Proper Regulatory Role of the States in an Industrial Age

One of the odd things about the Court's modern interpretation of the dormant commerce clause is that it has received a largely favorable response from justices and academic commentators of nearly every political stripe. There is dissent over the details and application of the standard, of course,[271] but everyone seems to endorse the Court's general goal of devolving a share of regulatory authority to the states.[272] Some of this general acceptance logically

269. This seems to have been Brennan's objective in his plurality opinion in *Wunnicke*. *See* 467 U.S. at 97-98.

270. *See id.* at 102.

271. *See, e.g.*, *supra* note 172 and accompanying text.

272. In fact, almost all of the recent academic commentary proposes that the Court allocate *more* authority to the states than it presently does. *See* Farber, *supra* note 172; Malz, *supra* note 172; Redish & Nugent, *supra* note 5; Regan, *supra* note 5; Sedler, *supra* note 168; Tushnet, *supra* note 172. One of the few exceptions to this tendency is Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988). Professor Collins is correct to highlight the concept of economic union as the cornerstone of the dormant commerce clause, and I concur with his conclusion that the various opponents of a strong dormant commerce clause have failed to make the case in favor of greater decentralization. But Collins accepts too readily the

corresponds to the broader judicial philosophy of the proponents. For example, the conservatives[273] properly endorse the Court's approach because they accurately view it as advancing their own primary objectives of diminishing the power of the federal government and reducing the onus of government economic regulation generally. It is therefore understandable that Chief Justice Rehnquist has been the most avid advocate of the market-participant exception to ordinary dormant commerce clause analysis,[274] and that Justice Scalia has written two recent opinions arguing that the restrictions imposed on state conduct by the commerce clause should be weakened further.[275]

The endorsement of political moderates also seems logical. The Court's tendency under the modern standard to split the difference between claims of states' rights and claims of national prerogative conforms to the moderates' antipathy toward philosophical absolutes of any variety. The modern standard also creates a process for deciding dormant commerce clause cases that conforms to the nonideological bent of political moderates. Litigation concerning the constitutionality of a particular state regulation tends to be highly fact-oriented. The cases usually turn on particularized and ideologically neutered determinations such as the relative safety value of contour mudflaps versus straight mudflaps,[276] or 65-foot double trailers versus 55-foot single trailers.[277] The modern standard permits the justices to take a moderate, noncommittal position on the policy question whether the states or the national government should regulate the national economy. The Court's enforcement of the modern standard is also politically savvy: sometimes one side wins,

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Court's own localist efforts in cases such as *CTS*, *see id.* at 94-97, and the market-participant cases, *see id.* at 98-105, and is generally uncritical of the Court's overall approach to the dormant commerce clause. The basic problem with Collins's approach, however, is that he views the primary purpose of the dormant commerce clause to be the preservation of state autonomy, which the Court accomplishes by invalidating conflicting laws enacted by other states. The purpose of the modern dormant commerce clause should be to consolidate economic regulatory power in the national government. *See infra* notes 295-99 and accompanying text.

273. Labels such as "conservative" and "liberal" can mean a wide variety of different things. I shall use the terms in the very limited sense to denote attitudes toward economic regulation and the nature of government. "Conservative" therefore denotes a person who believes in less political regulation of capital and a less powerful government. "Liberal" denotes someone who believes in more regulation and a relatively powerful government. A "moderate" is someone who can swing either way depending on the circumstances. The inexact nature of the labels is less important than the argument they are used to illustrate. The point is that justices and academic commentators who have widely differing views concerning economic regulation all agree that the Court is doing basically the right thing in its dormant commerce clause decisions.

274. *See White*, 460 U.S. 204 (1983) (majority opinion written by Rehnquist); *Wunnicke*, 467 U.S. at 101 (Rehnquist, J., dissenting). Note also the incorporation into the market-participant cases of the themes discussed in Rehnquist's opinion for the Court in *National League of Cities*. 426 U.S. 833 (1976).

275. *See CTS*, 481 U.S. at 94 (Scalia, J., concurring); *Tyler Pipe*, 483 U.S. at 254-55 (Scalia, J., dissenting).

276. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

277. *See* Kassel v. Consolidated Freightways, 450 U.S. 662 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).

sometimes the other, but the determination is usually made on a narrow basis that does not implicate the fundamental policy preferences of either side. The losing side can usually walk away from a case with the understanding that it may prevail next time on better facts. Macroeconomic policy is hidden underneath the mass of microeconomic minutia.

The same Solomonesque tendency to split the difference in ideologically loaded disputes probably accounts for the support for the modern standard by moderates who lean toward the liberal end of the political spectrum. Chief Justice Stone, to whom the modern standard is commonly attributed, belongs in this category. More recently, commentators such as Laurence Tribe have offered support in the form of moderate/liberal arguments favoring judicial restraint and democratic local control of economic decisions. Like Stone, Tribe frames his support for the modern standard largely in terms of the need to protect the representative nature of the process by which local economic decisions are made, and avoids advocating any particular form of economic structure.[278]

As one moves farther left on the political spectrum, the widespread support for the modern dormant commerce clause standard becomes more puzzling. The Court's two most liberal current members, Justices Brennan and Marshall, have joined numerous majority opinions upholding state legislation, including *Exxon*[279] and *CTS*.[280] Liberal former members of the Court, such as Justice Douglas, were at one time even more in favor of decentralization than their moderate colleagues. Indeed, Douglas's early view of the dormant commerce clause is indistinguishable from Justice Scalia's current position.[281] Even Mark Tushnet, a prominent Critical Legal Studies scholar, has weighed in on the side of the Court's basic approach.[282]

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278. *See* L. TRIBE, *supra* note 157, at 408-13.

279. 437 U.S. 117 (1978).

280. 481 U.S. 69 (1987).

281. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting); McCarroll v. Dixie Lines, 309 U.S. 176, 183 (1940) (Black, Frankfurter, and Douglas, JJ., dissenting). Douglas later moderated his views somewhat. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959). For Justice Scalia's views, see *supra* note 275.

282. "[M]ost of the Court's results are correct. The few revisions that this article suggests result more from a desire for doctrinal neatness than from a sense that the cases were wrongly decided." Tushnet, *supra* note 172, at 130. Tushnet's article is also unusual in that it places a great deal of emphasis on the representative-reinforcing aspect of the Court's task in dormant commerce clause cases. *Id.* at 130-41. Donald Regan has suggested that this no longer represents Tushnet's views, given Tushnet's subsequent criticism of process-based constitutional theory. *See* Regan, *supra* note 5, at 1161 n.124; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). However, a close reading of the two articles and Tushnet's latest book reveals a core symmetry in Tushnet's approach. Tushnet's argument is not that every aspect of the representation-reinforcing analysis is flawed, but rather that the theory's proponents rely upon an inadequate view of representation. *See* M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 76-83 (1988). In any case, even if the theoretical basis for Tushnet's dormant commerce clause views have changed, his localist conclusions have not. *See id.*, and *infra* notes 286-91 and accompanying text.

The support on the left for the Court's approach probably derives largely from the populist, anti-nationalist strain that has always been prominent in American progressive thought.[283] The European left developed in a centralized political culture that is foreign to the traditional American perspective on republican government. The portion of the American political spectrum that is likely to support greater governmental restrictions on economic activity is also likely to view the states as a more conducive arena for imaginative and progressive legislation. Their optimistic view of local affairs was expressed over fifty years ago by Louis Brandeis, a liberal hero on a very conservative Court: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[284] Of course, this statement was made during a period in which the Court's conservative majority was striking down virtually all economic legislation, so it could be read as a purely tactical plea for the Court to permit some ideological variation — if not on the federal level, then at least in the states. However, this interpretation diminishes the extent to which Brandeis expressed the myths of small-scale democracy that permeates the thought of the American political and legal left.[285]

Mark Tushnet has expressed these concerns in terms of the civic republican tradition, which he would like to revive.[286] In Tushnet's view, this tradi-

283. Recall that most of the "progressives" at the time of the framing opposed the formation of a strong national government. *See supra* note 24. Another factor militating against support on the American left for strong central government is the absence of doctrinal consensus among the left's disparate elements. From its earliest days, the left in this country has been a mongrel movement, which has failed to develop a coherent view on national policy objectives. *See generally* M. CANTOR, THE DIVIDED LEFT: AMERICAN RADICALISM 1900-1975 (1978); J. WEINSTEIN, AMBIGUOUS LEGACY: THE LEFT IN AMERICAN POLITICS (1975). The lack of theoretical consensus, coupled with the absence of a national political apparatus along the lines of European Socialist and Green parties has led the American left to channel inordinate energy into local campaigns that have little chance of altering the fundamentals of the national economic landscape.

284. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

285. Note, for example, Justice Douglas's strong pro-states' rights dissents in cases leading up to *National League of Cities*. *See* Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting); New York v. United States, 326 U.S. 572, 590 (1946) (Douglas, J., dissenting). These views are a logical outgrowth of Douglas's own formative experiences. Douglas grew up in the Pacific Northwest during the early twentieth century. The area was a stronghold of radical unions such as the Wobblies, whose members Douglas befriended. *See* W. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 75-78 (1974). Douglas's strong progressive economic values were colored by an equally strong distrust of central authority and urban industrial culture generally. His philosophy, as he once put it, was "more the small town than the city." J. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 341 (1980) (quoting W. DOUGLAS, AN ALMANAC OF LIBERTY (1954)). Douglas's opinions in *New York v. United States* and *Wirtz* are therefore more partisan than Brandeis's catholic appeal for the Court to permit a wide variety of different approaches to regulation. Douglas is concerned more particularly with preserving the tradition of western progressivism. In these opinions one perceives Douglas's fear that these progressive currents would be swept aside by a conservative national government that would use its power to curtail "socialistic" state government activity.

286. For a brief overview of Tushnet's position, *see* M. TUSHNET, *supra* note 282, at 4-17.

tion supports decentralization of political power because "smaller groups are easier to organize than larger ones, and groups concentrated in one location are likely to develop ties of friendship and cooperation that further ease the burdens of organizing in opposition to outside efforts at control."[287] Tushnet also contends that decentralization would aid in developing "political participation as a method of civic education,"[288] which is central to the republican tradition. Tushnet himself recognizes that his program is somewhat utopian. For example, certain essential preconditions to the revival of civic republicanism do not exist — most importantly, substantial equality of wealth among the relevant political actors. Also, the republican values Tushnet advocates were formed in a political setting substantially different from the one existing today. In particular, economic evolution has altered the way individuals relate to their community. "Mobility among the citizenry, a virtue in the theory of federalism, has so increased that fewer and fewer of us have roots in any particular community. Even when we do the scale of local government has grown to the point where only the most avid followers of politics have contact with their local governments."[289]

Finally, Tushnet is careful to note the problem posed by existing concentrations of economic power. "Under current political circumstances a program favoring decentralization might end up with a system in which political authority is decentralized while economic power remains tightly controlled."[290] Nevertheless, with all these caveats in place, Tushnet remains a strong advocate for the revitalization of federalism. Although the boundaries of his civic republican community might not be coexistent with those of the present states,[291] it would certainly encompass substantially less territory than the present United States. Hence, decentralization is his ultimate goal.

Some of Tushnet's program is uncontroversial. Presumably everyone would prefer a community in which citizens are concerned with the welfare of their fellows, and are involved intensively in the process of making the society a better place. It would also be nice to devise a workable scheme by which community consensus could regularly be translated into coordinated political action, which is the central objective of the republican tradition. But it seems to me that Tushnet's Achilles heel, and that of much of the American left, is that he begs the central question: How does one gain public control over use of private economic assets that define the very structure of society? After all, each of the conditions that Tushnet cites as undermining the communitarian/republican goals was caused directly or indirectly by the economic concentration that resulted from industrial development — the growth of local communities, the concentration of political and economic power, greatly increased mobility of both labor and capital, and the inequality of wealth. It is not

287. *Id.* at 106-07.
288. *Id.*
289. *Id.* at 13-15.
290. *Id.* at 314.
291. *See id.* at 315.

enough to assert that these are bad things. The task for the American left is to determine how its goals of political participation and democratic control are to be achieved in the context of modern economic reality. Michael Sandel, another proponent of the civic republican tradition, has identified the primary problem:

> In its origins, federalism was designed to promote self-government by dispersing political power. But this arrangement presupposed the decentralized economy prevailing at the time. As national markets and large-scale enterprise grew, the political forms of the early republic became inadequate to self-government. Since the turn of the century, the concentration of political power has been a response to the concentration of economic power, an attempt to preserve democratic control.[292]

The advocates of the civic republican tradition must offer some means for dealing with this elemental economic fact. As both Sandel and Tushnet have openly acknowledged, they cannot advocate political decentralization without providing a plan for economic decentralization, for as Sandel puts it, "from the standpoint of self-government, half a federalism is worse than none."[293] It seems to me that the concentration of economic resources offers only two options. The first is to dispense with the goal of political decentralization altogether and concentrate on reorganizing the structure of national political power. Tushnet and the other civic republican theorists have made it clear they reject this option. The second option is to engage in a revolutionary super-antitrust campaign that will permanently break up concentrations of economic power into smaller components that can be regulated on a local level.

There are several problems with this second option. First, it implicitly acknowledges a point the civic republican tradition would rather avoid: that those seeking effective political control over the allocation of economic resources must resort, at least in the initial stages of the antitrust revolution, to a powerful national government. Second, it depends upon a number of questionable assumptions about the organization and operation of an advanced industrial economy. To a large extent, the concentration of economic resources is dictated by technological sophistication, industrial specialization, and the economics of scale. The fact that this society has permitted these concentrated resources to accumulate in private hands is a political, not an economic problem. In short, the size of modern economic operations is not the problem; lack of democratic control over those economic operations is the problem. Third, the second option seemingly favored by the civic republican proponents relies upon debatable assumptions about the nature of democratic

292. Sandel, *Democrats and Community*, New Republic, Feb. 22, 1988, at 20, 23. *See generally* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

293. Sandel, *Democrats and Community*, *supra* note 292, at 23.

control and the structure in which that control can best be realized. Breaking up the political landscape into smaller fragments is not necessarily the best way to provide citizens with control over their lives. It may be better to use centralized political power to force changes in decision-making within the economic structure — for example, through direct political input into investment decisions, or through national legislation mandating worker management/ worker ownership programs.

Finally, the second option provides no safeguard against the "race to the bottom" that has traditionally plagued localized economic regulation in this country. The attraction of decentralization is that it disperses political power. But concerted private interests have typically found it easy to counter dispersed political power. Even if the civic republicans were successful in eliminating existing economic concentrations of wealth, their new decentralized political structure remains vulnerable to challenge by new concentrations of wealth that develop within the more predatory small commonwealths, as well as to challenges by multinationals that have escaped the initial application of draconian anti-trust law.

The central problem with the civic republican proposals is that they employ the intellectual framework that traditionally has been used to thwart the democratization of the economy. Surely it must disturb those on the left who find themselves advocating the same political arrangements as their ideological opponents on the Court and in academia. These arrangements are not politically neutral. A misplaced nostalgia within the left for small-scale democracy and civic republicanism has led many of its members to endorse a set of constitutional concepts that, when applied to the dormant commerce clause, permit the continued infusion of neo-classical economic values into the Court's constitutional jurisprudence dealing with economic issues. These neo-classical motifs then are used to forestall the application of political power on a national level that is necessary to grapple with the accumulated economic might of the private sector.[294]

My proposal is not intended to eliminate the states as political entities. My proposal would return the states to the position Chief Justice Marshall envisioned in *Gibbons v. Ogden*. Marshall provided a rough guide to the kinds of activities that should remain within state control: "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the state, and those which respect turnpike roads, ferries, etc. . . ."[295] In some respects Marshall's list is outdated. For example, in the modern era the term "internal commerce" is an anachronism, and state

294. I do not contend that under the Court's modern interpretation of the active commerce clause the Court would prevent the federal government from taking such action. I do contend that the Court's dormant commerce clause decisions subtly inculcate neo-classical, laissez-faire principles. These principles make it politically much more difficult to obtain national legislation offending local constituencies, and cultivate a distrust of rigorously interventionist governmental actions that override the market-driven allocation of economic resources.

295. Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

regulation directed solely at commercial activity should be prohibited.[296] In the modern world, every commercial activity is part of interstate commerce.

However, Marshall's list does suggest the types of state legislative actions that the Court should continue to permit. The states may be permitted to enact inspection laws, quarantine laws, and health laws because they address primarily non-commercial problems that are peculiar to the state. Safety laws that are intended to address some physical idiosyncrasy of the state would also be permitted.[297] Obviously some laws of this nature will slightly impede or affect interstate commerce. Ancillary effects on commerce should not automatically lead a court to strike down a state statute, but *any* effect on commerce should place a burden on the state that enacted the legislation to prove that the statute was not intended to regulate commercial activities, does not have the primary effect of regulating commerce, and is directed at a problem arising from some peculiarity in the state's physical environment that cannot be addressed in any other manner. In other words, many of the factors that the Court considers relevant under the modern standard would still occasionally come into play, but the application of these factors would be guided by the overriding objective of concentrating economic regulation on a national level. Pure examples of state economic regulation, such as the statutes challenged in *Exxon Corporation v. Maryland* and *CTS Corporation v. Dynamics Corporation*, would certainly be unacceptable under this proposed analysis, as would most of the other statutes the Court has upheld since adopting Stone's reformulation of the dormant commerce clause standard.[298]

Before concluding, I should add a caveat to my theory. It is quite possible that the system I propose will result in an economic structure not very different than the present one. Concentrating political battles over control of economic decision-making at the national level will not guarantee that these battles will always be won by the proponents of increased control over capital. Moreover, the elective branches of the national government will continue to

296. Justice Black once made the contrary assertion that "some isolated and remote lunch room which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce." Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 275 (1964) (Black, J., concurring). This assertion is inconsistent with the emphasis modern macroeconomic theory places on the concept of aggregate demand, and with the Supreme Court's own approach in every active commerce clause decision since 1937. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

297. For example, the state regulation in South Carolina State Highway Dep't v. Barnwell Bros. 303 U.S. 177 (1938) could be justified under this rationale. The regulation in that case prohibited trucks over 90 inches wide from travelling on South Carolina roads. Most trucks in the interstate market were 96 inches wide. At the time, many of the state's roads were only sixteen feet wide. It was therefore physically impossible for two trucks complying with the industry norm to pass each other on many South Carolina roads. This statute could therefore be justified as a pure safety measure made necessary by an unusual feature of the local community. However, a court reviewing such a statute should limit the operation of the statute to trucks travelling on the unusually narrow roads. A state would not be permitted to use the safety rationale to cloak what is really an economic regulation.

298. For example, each of the state statutes upheld in the cases cited in notes 199-203, *supra*, would be struck down under my proposed standard.

have the power to pass legislation giving away power to the states.[299] But forcing this dispute to take place at the national level at least permits the political decisions to be made in a context in which labor and public-interest groups have some measure of input and power, not the case in many states, and in which the affected industries are robbed of the argument that they will simply move to another jurisdiction if they are not accommodated. Also, as noted previously, the national government has available to it economic alternatives such as socialization that are simply not feasible on a local level.[300]

The suggestion that the courts enforce the dormant commerce clause more rigorously is truly a modest proposal. I am not suggesting that the Court interpret the commerce clause to require the establishment of some form of socialism, or even that the Court enforce the more limited goals of mainstream Keynesianism. I am merely suggesting that these are political topics that should be decided in a political arena where all options are available for consideration. The standard proposed in this Article would finally accomplish the objective of judicial neutrality on economic matters, which Stone identified as his primary goal.[301] Although the nationalization of economic regulation is linked theoretically to the macroeconomic theories that arose out of the failure of neo-classical economics in the 1930s, in practical terms a rigorous enforcement of the dormant commerce clause would not preclude congressional authorization of state regulation far beyond what I believe would be advisable. The standard I have suggested merely requires that latter day versions of neo-classical economics be defended on their own merits, instead of smuggled into public policy under the skirts of the dormant commerce clause.

CONCLUSION

John Maynard Keynes wrote in the conclusion to his *General Theory* that "[p]ractical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."[302] The modern Supreme Court operates under the sway of the defunct neo-classical school of economists. In its modern dormant commerce clause jurisprudence, the Court has intertwined neo-classical economic doctrine with popular concepts of political federalism. The intermixture has been so successful that it has garnered support across the political spectrum, and the underlying ideological implications of the Court's localist rulings are not seriously challenged.

As discussed in Section II above, neo-classical economics was one application of what C.B. Macpherson labeled the theory of possessive individualism: the notion that society consists entirely of market relations between

299. *See supra* note 187.

300. *See supra* note 221 and accompanying text.

301. *See supra* notes 181-86 and accompanying text.

302. J. KEYNES, *supra* note 61, at 383.

independent economic actors.[303] Neo-classical economics took the philosophical assumptions of possessive individualism, combined them with a highly developed variation on the pre-industrial market economics of classical economists such as Adam Smith, and produced a set of theories that asserted a scientific explanation and justification for the unfettered economic marketplace. The intellectual approach of neo-classical economics is just as significant as the doctrine's specific conclusions about economic policy. Neo-classical economics shifted the focus of theoretical economics from the system as a whole to the individual components of the system. The interrelationships within a complex economy did not greatly concern the neo-classical economists because they took on faith that the natural self-correcting tendencies of a market economy would resolve any temporary economic dislocations.

The Court's adoption of these principles was presaged during Chief Justice Taney's term, when the Court began to chip away at the idea of the national market that Chief Justice Marshall had used as the linchpin of his commerce clause jurisprudence.[304] Then, during the period from approximately 1895 until the constitutional crisis of 1936, the Supreme Court structured both active and dormant commerce clause analysis around the intellectual framework and conclusions of neo-classical economics.[305] Like the neo-classical theorists who dominated economic thought during this period, the Court viewed economic affairs through a rigid microeconomic perspective. The Court's microeconomic perspective during this period caused the Court to segment the economy so severely that even the monopolization of the nation's sugar industry was defined as a matter of purely local interest, on the ground that "manufacturing" was not "commerce."[306] This rigid emphasis on the microeconomic fragmentation of the market led the Court also to embrace the ideological goal of the neo-classical economists: the rejection of virtually all forms of political intervention in the economy. This theory dominated the Court's commerce clause analysis until the constitutional crisis of the 1930s, which was brought on by the Court's refusal to accept the interventionist legislation of the New Deal.

Just as the constitutional crisis ended the dominance of neo-classical themes in active commerce clause jurisprudence, the economic crisis of the 1920s and 1930s ended the neo-classical dominance of economic theory. Keynesian economic theory, along with the various manifestations of post-Keynesian theory, rejected most of the intellectual models of neo-classical economics in favor of an all-encompassing macroeconomic view, under which no aspect of the economy can be isolated from the cumulative nature of all economic activity.[307] Political intervention in the economy was not only permit-

303. *See supra* notes 40-41 and accompanying text.

304. *See supra* notes 135-57 and accompanying text.

305. *See supra* notes 82-127 and accompanying text.

306. United States v. E.C. Knight Co., 156 U.S. 1 (1895); *see supra* notes 89-99 and accompanying text.

307. Even the latter-day neo-classical revivalists — such as the monetarists and the ra-

ted under this new view, but was a necessity if economic self-destruction was to be prevented. Just as the Court embraced the neo-classical economic model in its active commerce clause decisions leading up to 1937, after 1937 it embraced the new economic model. Under the post-1937 regime, economic activity was so interlocked that wheat grown for a farmer's own consumption became a legitimate matter for federal regulation.[308]

This recognition of the new economic reality never took root in the Court's modern dormant commerce clause decisions. Instead, the Court has continued to view dormant commerce clause cases through a neo-classical perspective.[309] Economic activity is viewed transactionally — as a series of purchases and sales — rather than as indivisible portions of the larger economic whole. Factors that had been removed from the definition of commerce in post-1937 active commerce clause cases[310] were reintroduced in the dormant commerce clause cases as indicators of "local" commerce that was subject to local government regulation and control. Under this analysis the Court has permitted state control over a wide variety of economic activity, ranging from retail sales within a state to the terms of tender offers for corporations.[311]

The final section of this Article argues that the Court's modern dormant commerce clause decisions play an important role in maintaining the ideological status quo. In particular, the Court's neo-classical dormant commerce clause decisions skew economic policy considerations in four ways: they structure debate over political economy in a way that favors a laissez-faire model of economic affairs; they make it more difficult to regulate the mesoeconomic enterprises[312] such as multinationals; they lend the political credibility of traditional federalism to economic decentralization; and by allocating power to local authorities they establish coalitions of local public officials and private economic actors, which act to thwart more rigorous national regulation of economic activity.

The Court should reconsider its dormant commerce clause jurisprudence and bring it in line with the modern economic realities already recognized by the Court's active commerce clause decisions. The adoption of the proposal that the Court enforce the dormant commerce clause much more forcefully will not in itself result in more effective regulation. But this proposal is the

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tional expectations school — are forced to frame their arguments in a significantly different way than their nineteenth century predecessors. These new schools are forced to make their arguments in favor of the unrestrained market in normative form, rather than relying on artificially exact scientific analysis. Also, latter-day neo-classical economists no longer contend that macroeconomic relationships do not exist, but rather that the macroeconomic relationships are so complicated that they are beyond human understanding and control. *See supra* notes 76-79 and accompanying text.

308. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

309. *See supra* notes 169-204 and accompanying text.

310. These factors include the enterprise's location and size, its participation in the actual transport of goods across state lines, and its quantifiable effect on the national economy. *See supra* notes 177-78 and accompanying text.

311. *See supra* notes 199-204 and accompanying text.

312. *See supra* note 213 and accompanying text.

only way to get the Court out of the business of making economic policy surreptitiously, and the first step toward dismantling what remains of the neoclassical commerce clause before yet another generation of economic conservatives breath new life into the "economic constitution."[313]

313. *See supra* note 79 and accompanying text.