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Mark C. Christie
Judge, Virginia State Corporation Commission

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ECONOMIC REGULATION IN THE UNITED STATES: THE CONSTITUTIONAL FRAMEWORK

Mark C. Christie *

The United States of America is well-known (and occasionally well-liked or loathed) as the world's largest free-market capitalist nation. Indeed, many assume that since the United States for more than two centuries has had an economic system based on liberal principles, Adam Smith's "invisible hand" of capitalism must have been embedded in the United States Constitution from the beginning of the American republic.[1] Yet government at all levels in the United States has historically exercised significant regulation of economic and commercial activity—regulation inconsistent with *laissez-faire* capitalism.

The purpose of this article is to consider several questions: (1) what are the constitutional sources of governmental authority in the United States to regulate economic activity?; (2) what are the differences in regulatory powers between the federal and state levels of government?; and (3) what are the limits on the regulatory powers of government in the United States? I should emphasize that in this article I do not intend to advocate for or against government regulation as the proper policy in any specific area; instead, I intend to explore the circumstances under which regulatory policies chosen by policymakers are consistent with the Constitution.

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* Judge, Virginia State Corporation Commission; Visiting Professor, Center for Public Policy, Virginia Commonwealth University. J.D., 1981, Georgetown University Law Center; B.A., 1975, Wake Forest University. The views expressed herein are solely those of the author.

1. Adam Smith's *The Wealth of Nations* was published in 1776, the same year the Second Continental Congress approved the Declaration of Independence of the United States of America. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Methuen & Co. 1930) (1776).

I. THE UNITED STATES CONSTITUTION AS AN ECONOMIC DOCUMENT

Does the Constitution enshrine free-market capitalism—what Europeans would call economic liberalism—as the economic order of the United States?

This question has been a source of debate throughout much of American history. In his 1913 seminal work, *An Economic Interpretation of the Constitution of the United States*,[2] Charles A. Beard was among the first historians to allege that the Framers of the Constitution were concerned about protecting their own economic interests. One does not have to accept entirely Beard's then-radical thesis to acknowledge that the Framers had obvious economic purposes when they drafted the Constitution in 1787. The protection of what was considered the natural right of individuals to own property was a key philosophical component of the American Revolution, and, as prominent economic historians Douglass North and Robert Thomas have noted, where capitalism succeeded it was "in the main due to the type of property rights created."[3] Men of property, shocked at episodes such as Shay's Rebellion in Massachusetts in 1786, which was largely a revolt of debtors against creditors, wrote the Constitution. The Takings Clause of the Fifth Amendment to the Constitution, added shortly after ratification, explicitly protects private property from government confiscation without adequate compensation.[4] The Constitutional Convention of 1787 included another essential component of a capitalist economy in the Constitution: the protection of the legal enforceability of contracts between private parties from governmental interference.[5]

The French and Russian Revolutions were primarily about equality—social and political equality in the French case and the Marxist utopia of absolute economic equality in the Russian case.

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2. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (The Free Press 1963).

3. FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 46 (2003), *citing* DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973).

4. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V; *see infra* Parts IV.B.–C.

5. The Contracts Clause states: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl.1.

Whether the American Revolution was more about liberty than the equality that Thomas Jefferson hailed in the Declaration of Independence has long been a popular topic among historians.[6] Certainly for Jefferson and some radical revolutionaries, such as Thomas Paine, the American Revolution was about democracy and egalitarian ideals. There is no question, however, that the Framers of the Constitution, at their convention in Philadelphia eleven years after the signing of the Declaration of Independence, were deeply concerned with protecting individual liberty—including the liberty to own property—from governmental encroachment. Appalled by the actions of state legislatures during the Articles of Confederation period, the convention delegates had no intention of establishing a federal government with the power to impose economic equality through the violation of individual property rights.

On the contrary, James Madison, the brilliant "Father of the Constitution," wrote in *The Federalist No. 10* that in a free society, "factions"—what we would call interest groups—would naturally occur.

> Liberty is to faction, what air is to fire. . . . But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.[7]

Madison believed that liberty creates the conditions for an unequal distribution of property:

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.[8]

Madison believed that liberty would produce economic inequality because of the "nature of man" and that "the most common and durable source of factions has been the various and unequal

6. *See, e.g.*, GORDON S. WOOD, THE AMERICAN REVOLUTION 99–106 (2002).
7. THE FEDERALIST NO. 10, at 63 (James Madison) (Tudar Publishing Co. 1937).
8. *Id.* at 64.

distribution of property," yet the protection of liberty was the first order of government.[9] Madison and the other Framers were not utopians but realists who recognized the inherent conflict between liberty and economic equality—and they chose liberty. Their belief in equality was limited to a sociopolitical equality in which all citizens would stand equal in the eyes of the law, and the aristocratic privileges of birth that characterized Europe's monarchies would be abolished. There would still be an aristocracy, but it would be a natural aristocracy based on individual talent and work ethic, not birth, and characterized by an equality of opportunity, not outcomes.

While the liberty the Framers intended to protect certainly included the liberty to own private property and to conduct private commercial affairs, did the Constitution enshrine *laissez-faire* capitalism as America's constitutionally required economic system? There has long been a strain in American constitutional history whether certain natural rights to economic freedom cannot be impaired by the powers of government, regardless of whether those rights are found in the text of the Constitution itself. That natural-law belief, however, has never attained a permanent consensus on the Supreme Court.[10] The history of America has seen a steady increase in the regulation of commercial and economic activities by government, regulation that the courts have occasionally limited or restructured but have rarely—and never permanently—forbidden as inconsistent with a purported constitutional requirement of *laissez-faire* capitalism. In his famous dissent in *Lochner v. New York*,[11] Justice Holmes challenged the natural-law advocates directly, writing, "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[12]

It is accurate to say that the Constitution protects a free-market capitalist economic system to a significant degree, most importantly by protecting private property and contractual rights. These rights are essential to the functioning of a market economy, but the Supreme Court has never interpreted the Con-

9. *Id.*

10. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 484–88 (12th ed. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-1 to 8-7 (3d ed. 2000).

11. 198 U.S. 45 (1905).

12. *Id.* at 75 (Holmes, J., dissenting).

stitution to require a completely unregulated, *laissez-faire* market economy. The Constitution was not written by Ayn Rand, but instead by James Madison and other practical politicians—politicians who believed deeply in protecting individual liberty and property from government tyranny, but who were also heirs to the European Enlightenment belief that some degree of government regulation of human affairs was absolutely necessary to lift humans from their natural state of anarchy.

II. WHAT IS THE FOUNDATION OF GOVERNMENT'S REGULATORY POWER?

To understand the sources of government's power to regulate economic activities in America, we must first understand from whence government itself came, at least as America's founders understood it.

The United States Constitution—indeed, the United States of America itself—is the product of the European Enlightenment and its philosophy of government and the proper relationship between the governed, i.e., the people, and their government. The American republic and its Constitution can accurately be described as two crown jewels of the Enlightenment because they embody Enlightenment principles applied to a new form of government which has not only survived, but thrived, for more than two centuries.

Two of the most important Enlightenment philosophers in terms of influence on America's founders were Thomas Hobbes and John Locke.[13] Hobbes, in his classic work *Leviathan*,[14] wrote that mankind's natural state of existence was that of a "war of every one against every one."[15] For their own self-preservation, humans voluntarily contracted to form a government and give it sovereign power to restrain men from harming each other.[16] Thus one of the fundamental purposes of government, as America's founders saw it, was to protect men from each other. This purpose of government—to protect the public safety and good order—

13. Some historians consider Hobbes to be pre-Enlightenment, though he was nevertheless firmly in the Age of Reason.

14. THOMAS HOBBES, LEVIATHAN (The Liberal Arts Press, Inc. 1958) (1651).

15. *Id.* at 110.

16. *See id.* at 139–43.

provided the basis for what we call today in constitutional law the general police power that is inherent in the sovereign, i.e., government.

John Locke, who more than any other individual was the intellectual fountainhead of the republican experiment in America, took a somewhat more positive view of the human condition than Hobbes. Locke believed that human beings were born with natural rights to life, liberty, and property, and that human beings would consent to live under a government that would protect their natural rights.[17] Locke's view of a society based on ordered liberty was not one of *laissez-faire*, but one in which government had a proper role to play in exercising its police power for the protection of the citizenry's natural rights, especially the citizenry's right to property.[18]

Throughout American constitutional history, the police power of government has not been narrowly limited to law enforcement authorities fighting crime. Instead, the police power has been generally construed to include the power of government to regulate economic activity as well. The Supreme Court, in its 1877 opinion *Munn v. Illinois*,[19] described broadly the government's inherent police power in a challenge to rate regulation of grain elevators by the Illinois legislature:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government. . . . From this source comes the police powers, which, as was said by Mr. Chief Justice Taney . . . "are nothing more or less than the powers of government inherent in every sovereignty. . . ." Under these

17. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 167, 176 (The Classics of Liberty Library 1992) (1698).

18. *See id.* at 261 ("The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting them[s]elves under Government, *is the Pre[s]ervation of their Property.*") (emphasis added).

19. 94 U.S. 113 (1877).

> powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and *we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.*[20]

This is one of the clearest statements in Supreme Court jurisprudence that the Founding Fathers, while passionate about the protection of liberty and private property rights, did not intend to enshrine *laissez-faire* capitalism in the Constitution. To do so would have required them to eliminate Anglo-American government's traditional police power, which, as the *Munn* Court pointed out, had included forms of economic regulation for centuries.

More specifically, the *Munn* Court stated that underlying the historical basis for the use of the government's police power to regulate economic activity was the concept of private property that is affected with a public interest, which includes the common carrier or natural monopoly. As described by the Supreme Court in *Munn*:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . .[21]

The *Munn* Court cited examples from English law of private property put to public use—for example, a river ferry.[22] While the ferry was privately owned, if it was offered for the use of the public, it was properly regulated by government as to rates and other conditions of operation for the protection of the people. The ferry was a common carrier, but the rationale for regulating common carriers also extended to natural monopolies:

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20. *Id.* at 124–25 (citations omitted) (emphasis added).
21. *Id.* at 126.
22. *See id.* at 125.

> There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.[23]

Common carriers and natural monopolies were private properties affected with a public interest and thus subject to government regulation using its inherent police powers to protect the public. The American legal and constitutional system inherited this principle from English law, and it formed the basis for the regulation of railroads and, later, trucking companies, buses, streetcars, airlines, and public service corporations (e.g., electric, gas, water and telephone utilities) in the nineteenth and twentieth centuries.[24]

III. UNDERSTANDING THE FEDERAL SYSTEM IN AMERICA

To understand economic regulation in the United States, one must also understand the American federal system. In terms of the sources of regulatory authority, the federal and state governments in America are starkly different. The state governments came into existence well before the federal government, and it was the state governments that inherited the general police power which was inherent in the sovereign under English law. Again, the *Munn* Court described the history:

> When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their *State* constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective *States*, unless in express terms or by implication reserved to themselves.[25]

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23. *Id.* at 127–28 (quoting Aldnutt v. Inglis, (1810) 104 Eng. Rep. 206, 210–11 (K.B.) (Lord Ellenborough, C.J.)).

24. *See, e.g.*, RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES 9–10 (4th ed. 1999).

25. *Munn*, 94 U.S. at 124 (emphasis added).

An example of the American states' inheritance of English law upon independence can be found in the current version of the Virginia Code.[26] Two provisions state that both the English common law and the Acts of the British Parliament shall remain in effect in Virginia "insofar as [they] are consistent with the Bill of Rights and Constitution of this Commonwealth and the Acts of Assembly."[27]

It was the state governments in America that inherited the general police power to protect the public, *not* the federal government. The Framers of the Constitution intended the federal government, which came into existence decades after the state governments and their colonial predecessors, to have no general police power and only have the specific powers listed in the Constitution. Thus the state governments have frequently been described as governments of *plenary* powers and the federal government only of *enumerated* powers.[28] The difference is crucial to understanding and respecting the American federal system; yet it is sad how many Americans do not understand this important distinction, especially Americans who become federal officeholders.

IV. WHAT ARE THE LIMITS ON STATE GOVERNMENTS' REGULATORY POWERS?

While state governments are governments of plenary powers with broad authority under their police powers to protect the public through regulation, those powers are not unlimited. In addition to any limits found in state constitutions, there are three primary limits on state regulatory power found in the United States Constitution: the Due Process Clause, the Takings Clause, and the so-called "dormant Commerce Clause."[29]

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26. *See* VA. CODE ANN. §§ 1-200 to -201 (Repl. Vol. 2005).

27. *Id.* § 1-201; *see id.* § 1-200.

28. *See* JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 138 (7th ed. 2004).

29. I have not listed the Contracts Clause as currently an important restriction on state regulatory powers. While it has flared up occasionally as a separate constitutional limitation on state action, *see, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), in the modern era the Contracts Clause has largely been subsumed into Due Process Clause jurisprudence.

A. *The Due Process Clause*

The Fourteenth Amendment's Due Process Clause[30] stands as a limit on state regulatory powers over economic activities, but whether it still represents a significant limit is questionable. It was not always so, however, as the Due Process Clause was frequently used in the past to limit state regulatory powers substantially.

As discussed above, the Court in *Munn v. Illinois* justified the regulatory powers of state governments on the historic English legal principle of the sovereign's power to regulate common carriers and natural monopolies.[31] For the next several decades, the Supreme Court often applied *Munn* by using the Due Process Clause to strike down state regulation of private business on the grounds that the type of business at issue was neither a common carrier nor a natural monopoly and thus not a business affected with a public interest.[32] This "*Munn* doctrine" came to an end in *Nebbia v. New York*,[33] when the Court ruled that state regulatory powers were not limited only to those businesses deemed to be affected with a public interest.[34]

A broader use of the Due Process Clause to invalidate state economic regulation took place between the late nineteenth century and the 1930s. Using a so-called "economic due process" doctrine, the Supreme Court frequently struck down state laws on the grounds that the *end* the state sought to achieve with its economic regulation was itself illegitimate, regardless of the means or process chosen to achieve that end. The emblematic case of this era was, of course, *Lochner v. New York*,[35] in which the Supreme Court struck down a state law regulating the working hours of bakers on the rationale that it violated a substantive guarantee of contractual freedom between employer and employee which the

30. "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

31. *See supra* notes 19–23 and accompanying text.

32. *See, e.g.*, Charles Wolff Packing Co. v. Court of Indus. Rels., 262 U.S. 522 (1923).

33. 291 U.S. 502 (1934).

34. *See id.* at 531–33.

35. 198 U.S. 45 (1905).

Court found implicit in the Due Process Clause.[36] The Court's opinion brought forth the famous Holmes dissent noted above.[37]

Like other judicially imposed restrictions on state (and federal) economic regulatory powers, the *Lochner* doctrine of economic due process came to an end during the New Deal era. In *West Coast Hotel v. Parrish*[38] and *United States v. Carolene Products*,[39] the Court dispensed entirely with the *Lochner* doctrine and replaced it with an extremely deferential standard of judicial review of economic regulation by government, whether state or federal. The new "rational basis" standard, which continues in effect, was stated in *Carolene Products*: "where the legislative judgment is drawn in question, [the Court's inquiry] must be restricted to the issue whether *any* state of facts either known or *which could reasonably be assumed* affords support of [the legislation]."[40]

Today, only when the state has acted in a transparently arbitrary or capricious fashion to regulate private economic activity will the Supreme Court use the Due Process Clause to invalidate the state action. The question whether this standard represents any real limit on state regulatory power may perhaps be answered by observing that the Supreme Court has not struck down a state law regulating economic activity on due process grounds since the 1930s.[41]

B. *The Takings Clause*

The Takings Clause of the Fifth Amendment, which has been made applicable to the states by the Fourteenth Amendment,[42] provides that private property shall not "be taken for public use, without just compensation."[43]

The Takings Clause does not prohibit the government from taking private property. It allows the government to exercise the

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36. *See id.* at 53, 64.
37. *See id.* at 74–76 (Holmes, J., dissenting); *supra* note 12 and accompanying text.
38. 300 U.S. 379 (1937).
39. 304 U.S. 144 (1938).
40. *Id.* at 154 (emphasis added).
41. *See* PIERCE & GELLHORN, *supra* note 24, at 89–90.
42. *See* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).
43. U.S. CONST. amend. V.

power of "eminent domain" if two requirements are met: (1) the taking must be for a public use, and (2) the property owner must be paid fairly for his or her property.

The paradigmatic use of the Takings Clause is when a state government uses eminent domain to seize privately owned land to construct a highway or bridge open to all motorists. There is no question as to meeting the public use requirement, and the only real issue in such a proceeding is the adequacy of compensation the government offers to the property owner.

The Takings Clause does not require that private property only be transferred to governmental ownership. Throughout American history eminent domain has frequently been used to transfer private property to privately owned common carriers or regulated monopolies. These private companies are affected with the type of public interest discussed in *Munn v. Illinois*, and they function as proxies for government itself because they provide a service that the government deems in the public interest to provide.[44] Common examples of public service corporations include electricity, gas, water, and telephone utilities. The classic example of a common carrier is a railroad. All have been heavily regulated as to rates and terms of service at various times throughout American history.

Since the late 1970s, there has been a strong deregulatory trend put in place by policymakers that has seen railroads, along with airlines and trucking companies, become largely deregulated as to rates and terms of service. Within the past decade, several states have attempted to restructure the electric power industry to replace a regulated monopoly with a competitive market. A major question in terms of the Takings Clause is whether the rationale for allowing a public utility to exercise the state's power of eminent domain will still pertain when there is no longer a state-designated monopoly provider but instead numerous competing companies that are under no obligation to serve all customers within a given service territory—as regulated monopolies historically have been required to do.

When eminent domain has been used for a public highway or by a state-regulated public service corporation, there has been little constitutional controversy. Major controversy occurs, however,

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44. *See supra* text accompanying notes 19–20.

when the public use requirement is in question. In June 2005, the Supreme Court issued a landmark opinion on that issue in *Kelo v. City of New London*.[45]

In *Kelo*, the economically depressed city of New London, Connecticut wanted to revitalize itself through a multi-use development anchored by a new research and development center for the pharmaceutical company Pfizer Inc.[46] New London's economic-development plan also envisioned a new state park, a Coast Guard museum, a waterfront conference center and hotel, restaurants, retail stores, new homes, and marinas.[47]

The problem for the city was that several property owners refused to sell their homes to make way for the new development.[48] The city then sought to use the power of eminent domain to seize the properties and transfer them to the city-designated private developer.[49]

Previous uses of eminent domain for promoting economic development approved by the Supreme Court usually involved property that was either blighted itself (and thus a nuisance under historic English common law principles adopted in the United States) or part of a blighted neighborhood,[50] or where the government alleged a distinct economic harm caused by an intensely concentrated pattern of property ownership that eminent domain was intended to cure.[51] In *Kelo*, however, there was no allegation that the property at issue was either blighted or part of a blighted neighborhood. The city argued that the term "public use" in the Takings Clause really meant "public purpose," and that economic development—producing new jobs and higher tax revenues—was a public purpose that met the constitutional requirement.[52]

By a narrow five-to-four margin, the Supreme Court agreed. Writing for the majority, Justice Stevens explained that the term "public use" had expanded over time:

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45. 125 S. Ct. 2655 (2005).

46. *See id.* at 2658–59.

47. *See id.* at 2659.

48. *See id.* at 2660.

49. *See id.*

50. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32–33 (1954).

51. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984) (involving the situation in which a large amount of land owned by a small number of landlords was forcibly sold to tenants through use of eminent domain).

52. *See Kelo*, 125 S. Ct. at 2658–63.

> Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer . . . but it proved to be impractical given the diverse and always evolving needs of society. . . .
> The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined this concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.[53]

Justice Kennedy, in his concurring opinion, stressed that he was confident that New London was not attempting to benefit one private party at the expense of another because:

> This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression. . . . The identity of most of the private beneficiaries were unknown at the time the city formulated its plans. . . . In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse . . . that courts should presume an impermissible private purpose, no such circumstances are present in this case.[54]

In a scathing dissent by Justice O'Connor—one of her last major opinions before retiring—she began by quoting from one of the earliest Supreme Court decisions, a 1798 case in which the Court opined, "[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."[55] O'Connor continued,

> Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.[56]

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53. *Id.* at 2662–63.

54. *Id.* at 2670–71 (Kennedy, J., concurring).

55. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798), *quoted in Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

56. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

Concluding, O'Connor remarked:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*."[57]

The *Kelo* decision brought a storm of criticism from politicians and legal commentators.[58] What is ironic is that *Kelo* simply stated the obvious, that state and local governments have been using the power of eminent domain under a broad definition of "public use" for many decades, as Justice Stevens in his majority opinion pointed out, citing numerous prior cases.[59] The important question, however, is not whether state and local governments have long been using—and occasionally abusing—the Takings Clause under the banner of economic development; the important question is whether the Supreme Court has allowed the power of eminent domain to be expanded far beyond the constitutional Framers' intent, as Justice O'Connor alleged. In the *Kelo* case, the Court had an excellent opportunity to define the "public use" requirement of the Takings Clause in a balanced way, allowing its proper use to benefit the public while protecting private property owners from abusive and indiscriminate use by state and local governments in ways that inure more to private benefit than public good. The *Kelo* Court, however, failed to take this opportunity. Instead it set forth a standard of review that is so broad as to be essentially meaningless. It is hard to see how future courts at any level are supposed to prevent the abuse of eminent domain when a government claims its exercise is essential to economic development and presents it as part of an apparently comprehensive plan, such as comforted Justice Kennedy in his concurring opinion.[60]

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57. *Id.* at 2677 (alteration in original).
58. *See, e.g.*, Richard A. Epstein, *Supreme Folly*, WALL ST. J., June 27, 2005, at A14.
59. *See Kelo*, 125 S. Ct. at 2662–65.
60. *See id.* at 2669–71 (Kennedy, J., concurring).

C. *Regulatory Takings*

Another important issue arising under the Takings Clause is that of the "regulatory taking." Until the 1920s, the Takings Clause was considered to be applicable only in the paradigmatic case of direct government expropriation of private property. In the landmark case of *Pennsylvania Coal Co. v. Mahon*[61] in 1922, however, the Court established the concept of a regulatory taking. In a regulatory taking, title to the private property is not transferred to the government or another private party. The original property owner still holds fee title to the property. The government, however, through regulation so impacts the owner's right to use his or her property, or so diminishes its fair market value, that the regulation is held to be a *de facto* taking and a constitutional violation.[62]

Since *Pennsylvania Coal*, the Court has found regulatory takings in several contexts: first, where government regulation forces a property owner to accept a permanent physical invasion of his or her property. A recent example is the case of *Dolan v. City of Tigard*,[63] in which the city of Tigard, Oregon, acting pursuant to a state land-use plan, adopted an ordinance requiring private property owners to set aside portions of their property for public-access pathways for bikers and pedestrians and greenways to minimize flooding problems.[64] When Mrs. Dolan applied for a building permit to expand her hardware store, the town conditioned the permit on her setting aside a portion of her property for a public-access biking and walking pathway.[65] She objected, and argued that conditioning her building permit in such a manner amounted to a regulatory taking.[66] Writing for the majority, Chief Justice Rehnquist held that the ability to control access to one's own property is a key feature of private property ownership, and forcing her to give up her right to exclude others from her property amounted to an uncompensated taking under the Fifth Amendment.[67] Rehnquist noted that if the city had used eminent

61. 260 U.S. 393 (1922).
62. *See id.* at 414–16.
63. 512 U.S. 374 (1994).
64. *See id.* at 377–80.
65. *See id.* at 380.
66. *See id.* at 382.
67. *See id.* at 384, 396.

domain in the classic manner to seize her property for such a purpose, the city would obviously have owed her just compensation.[68] Under the Constitution, the city could not obtain the same result by letting her keep fee title to her property, but forcing her to grant access to the public.[69]

A second category of regulatory takings has been recognized when government regulation takes away from the owner *all* economically valuable uses of the property. In the case of *Lucas v. South Carolina Coastal Council*,[70] a property owner of beachfront property suffered the loss of all economic use of his property when a state coastal management agency issued a regulation prohibiting any development in the zone in which the property was situated.[71] The Court found that this was a regulatory taking on its face and sent the case back to the South Carolina courts to determine whether it could be justified by the state's own common law of nuisance.[72]

Apart from the two categories of direct physical invasion and total diminution of economic value, the allegation of a regulatory taking is complex and difficult to prove. Most cases fall into a category in which the case of *Penn Central Transportation Co. v. New York City*[73] offers controlling principles. In *Penn Central*, New York City enacted an historic preservation ordinance affecting several hundred distinctive buildings throughout Manhattan.[74] Penn Central, which owned Grand Central Station, wanted to build a fifty-five-story office tower above Grand Central Station.[75] The city's zoning agency refused to allow Penn Central to build the office tower on the grounds that such a tower would be inconsistent with the original architecture of Grand Central Station and thus a violation of the city's historic preservation ordinance.[76] Penn Central offered evidence that it had suffered several million dollars in lost revenue because the office tower was

68. *See id.* at 384.
69. *See id.* at 396.
70. 505 U.S. 1003 (1992).
71. *See id.* at 1006–07.
72. *See id.* at 1031–32.
73. 438 U.S. 104 (1978).
74. *See id.* at 108–11.
75. *See id.* at 116–17.
76. *See id.* at 117.

not allowed to be built and alleged a regulatory taking.[77] The Supreme Court, however, refused to find a taking in the city's zoning ordinance or its application to Grand Central Station.[78] The Court reasoned that while Penn Central had clearly lost *potential* revenue from being denied the right to develop the office tower, there was still significant value remaining in the property in its existing state and thus a taking had not occurred.[79]

Penn Central established several criteria that are still used by courts to weigh whether a regulatory taking has resulted from a government policy. In *Lingle v. Chevron U.S.A. Inc.*,[80] issued in May 2005, Justice O'Connor, for the Court, described the criteria:

> Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action"—for instance, whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" *Ibid.* [citing *Penn Central*]. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.[81]

In *Lingle*, the Court made it more difficult to prove a regulatory taking. The State of Hawaii enacted a law regulating the rents charged to oil products retailers who rent their service stations from oil companies.[82] Chevron challenged the law as a regulatory taking of its potential rental income stream.[83] The lower courts held that the law violated the Takings Clause, relying on an earlier Supreme Court case, *Agins v. City of Tiburon*,[84] in which the Court announced a rule that a regulatory taking would be found if the state regulation does not substantially advance legitimate state interests,[85] which seemed more like a due-process

77. *See id.* at 116, 119.
78. *Id.* at 138.
79. *See id.* at 116, 119.
80. 125 S. Ct. 2074 (2005).
81. *Id.* at 2081–83 (alteration in original) (citations omitted).
82. *See id.* at 2078.
83. *See id.* at 2078–79.
84. 447 U.S. 255 (1980).
85. *Id.* at 260, *quoted in Lingle*, 125 S. Ct. at 2077.

analysis than a takings test. Indeed, in *Lingle*, the Court reversed itself and held that the *Agins* test was not appropriate under the Takings Clause.[86] The appropriate test was to evaluate the burden on the property owner by determining whether a direct taking, a total diminution in value, or a violation of the *Penn Central* criteria had taken place, and not to attempt to evaluate whether the state regulatory policy was an effective means to a legitimate policy goal.[87]

The Takings Clause and Due Process Clause have been conflated before in Supreme Court jurisprudence, particularly in cases involving state regulation of the rates and terms of service of common carriers and regulated utilities.

In *Munn*, and in several later Supreme Court cases, privately owned corporations alleged that state regulatory authorities had violated the Due Process Clause by limiting their rates to amounts that did not allow them to recover their costs of providing the service plus a reasonable rate of return on their investors' capital.[88] In *Munn*, the Supreme Court refused to question the Illinois legislature's determination of reasonable compensation for operators of grain elevators[89] and said that while legislatures might well abuse the rate-setting authority, "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts."[90]

Subsequent Supreme Court decisions did, in fact, involve the judiciary in actively determining what constituted reasonable compensation when state regulatory authorities were challenged by regulated companies. In *Smyth v. Ames*,[91] just twenty-one years after *Munn*, a more conservative Court struck down a Nebraska law regulating railroad rates.[92] The Court said that the determination of what constituted reasonable compensation was not an issue the courts should simply leave to the legislature and found that Nebraska's railroad rates were so unreasonably low

86. *See Lingle*, 125 S. Ct. at 2087.
87. *See id.*
88. *See Munn*, 94 U.S. at 123.
89. *See id.* at 133–34.
90. *Id.* at 134.
91. 169 U.S. 466 (1898).
92. *See id.* at 547.

that they represented a constitutional violation.[93] As in *Munn*, the regulated company challenged the regulation as a violation of the Due Process Clause, not the Takings Clause.[94] The Court, however, used the language of the latter Clause in finding a constitutional violation: "The corporation may not be required to use its property for the benefit of the public without receiving *just compensation* for the services rendered by it."[95]

By the 1920s, the federal courts were deeply into the intricacies of ratemaking in determining what constituted a reasonable rate of return. In *Bluefield Waterworks Improvement Co. v. Public Service Commission*,[96] the Court set forth a detailed accounting standard for determining a reasonable rate of return. In that case, it concluded that six percent, the rate of return on capital allowed by the state regulatory agency, failed to constitute "just compensation" and was therefore unconstitutional.[97] The language of the Takings Clause again was used in finding a violation of the Due Process Clause.

The New Deal era produced a return to judicial deference to rate-making agencies. In *Federal Power Commission v. Hope Natural Gas*,[98] in an opinion written by Justice William O. Douglas, one of President Roosevelt's New Deal advisers prior to being appointed to the Supreme Court by FDR, the Court deferred to the regulatory agency's determination of a reasonable rate of return and said even a "meager return" could under certain circumstances be just and reasonable and not a constitutional violation.[99]

In a more recent electricity-rate case, *Duquesne Light Co. v. Barasch*,[100] the Supreme Court rejected an allegation of an uncompensated taking against a Pennsylvania law that "required that rates for electricity be fixed without consideration of a util-

93. *See id.* at 526, 547.
94. *See id.* at 543.
95. *Id.* at 546 (emphasis added).
96. 262 U.S. 679 (1923).
97. *See id.* at 695.
98. 320 U.S. 591 (1944).
99. *See id.* at 605. The Court found no difference between the application of the Fifth Amendment Due Process Clause to a federal regulatory agency and the application of the Fourteenth Amendment Due Process Clause to a state regulatory agency. *See id.* at 601 (citing Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 582 (1942)).
100. 488 U.S. 299 (1989).

ity's expenditures for electrical generating facilities which were planned but never built, even though the expenditures were prudent and reasonable when made."[101] In upholding the Pennsylvania law against a Takings Clause challenge, the Court discussed numerous prior cases that were not based on allegations of Fifth Amendment takings but on alleged violations of the Due Process Clause,[102] thus incorrectly treating analyses of the two provisions as virtually identical.[103] The Court reaffirmed the holding of *Federal Power Commission v. Hope Natural Gas Co.* that "'[i]f the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end.'"[104] The Court further explained that:

> whether a particular rate is "unjust" or "unreasonable" will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return. *At the margins, these questions have constitutional overtones.*[105]

Duquesne Light maintained the trend begun in the 1930s of judicial deference to legislative or executive agency determinations of the rates of regulated companies, whether the challenge is brought specifically under the Takings Clause or as a takings claim masquerading as a due process violation.

D. *The "Dormant Commerce Clause"*

The Commerce Clause of the Constitution, which gives Congress the power to regulate interstate commerce,[106] is an affirmative grant of power, which is discussed at length below. When Congress does not act to regulate a specific area of commerce,

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101. *Id.* at 301.

102. *See id.* at 307–10 (citing Covington & L. Tpk. Rd. Co. v. Sandford, 164 U.S. 578 (1896); *Smyth*, 169 U.S. at 546; *Hope Natural Gas Co.*, 320 U.S. at 605).

103. In *Lingle*, Justice O'Connor denied that an analysis under the Takings Clause was identical to an analysis under the Due Process Clause, although she acknowledged that "there had been some history of referring to deprivations of property without due process of law as 'takings,' and the Court had yet to clarify whether 'regulatory takings' claims were properly cognizable under the Takings Clause or the Due Process Clause." *Lingle*, 125 S. Ct. at 2083 (citations omitted).

104. *Duquesne Light*, 488 U.S. at 310 (alteration in original) (quoting *Hope Natural Gas Co.*, 320 U.S. at 602).

105. *Id.* (emphasis added).

106. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

however, federal courts have held that the Commerce Clause still acts as a limit on the regulatory powers of state and local governments.

One of the most-cited "dormant Commerce Clause" cases is *City of Philadelphia v. New Jersey*.[107] Congress had chosen not to use its Commerce Clause power to regulate the interstate flow of garbage.[108] In the absence of any congressional regulation, many state and local governments had enacted their own laws regulating the interstate waste trade.[109] The State of New Jersey enacted a law forbidding the importation of garbage generated out of state.[110] Philadelphia, which had contracted with private waste haulers to deposit much of its municipal garbage in New Jersey landfills, challenged the New Jersey law as a violation of the Commerce Clause.[111]

Even though Congress had not legislated on the interstate garbage issue at all—its power was "dormant"—the Court struck down New Jersey's law as a violation of the Commerce Clause.[112] The Court wrote:

> In the absence of federal legislation, these subjects [in which Congress has not acted] are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. *The bounds of these restraints appear nowhere in the words of the Commerce Clause*, but have emerged gradually in the decisions of this Court . . . .
>
> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach. . . .[113]

107. 437 U.S. 617 (1978).
108. *See id.* at 620.
109. *See id.* at 623.
110. *See id.* at 618–19.
111. *See id.*
112. *See id.* at 629.
113. *Id.* at 623–24 (citations omitted) (emphasis added).

In a "dormant Commerce Clause" case, the Court will look behind the state's use of its police power to determine if the state is simply engaging in economic protectionism rather than acting in good faith to protect the health or safety of its citizens.[114] Thus, state laws banning the importation of diseased livestock or toxic medical waste may be upheld as legitimate uses of the state's police power.[115] In *City of Philadelphia v. New Jersey*, however, the Court saw nothing more than economic protectionism by New Jersey and struck the law down.[116]

The principle that a "dormant Commerce Clause" acts as a limit on state authority in the absence of congressional action has been criticized. In a 1997 case, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[117] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, maintained that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[118] These justices would allow states the maximum authority to exercise their police powers, regardless of the impact on interstate commerce, if Congress has chosen not to use its own affirmative Commerce Clause power to regulate an area of trade. These justices expressed a belief that there is no such thing as a "dormant" or "negative" Commerce Clause and Supreme Court jurisprudence applying a "dormant" Commerce Clause is an improper attempt to create a federal common law when the Constitution explicitly makes the federal government one of enumerated powers only.[119] This position, while not frivolous given the text of the Constitution, has not commanded a majority of the Supreme Court for the past several decades.

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114. *See id.*

115. *See id.* at 628–29 (explaining that these types of quarantine laws do not discriminate against interstate commerce because they are intended to prevent the flow of harmful or dangerous items).

116. *See id.* at 629.

117. 520 U.S. 564 (1997).

118. *Id.* at 610 (Thomas, J., dissenting).

119. *See id.* at 609–10 (Thomas, J., dissenting).

V. WHAT ARE THE LIMITS ON THE FEDERAL GOVERNMENT'S REGULATORY POWER?

Since the federal government is not a government of plenary powers and there is no textual federal police power, the federal government can regulate only through a direct grant of power enumerated in the Constitution. At least that was the principle that James Madison and the other Framers thought they were embedding in the Constitution. Whether that principle still applies after recent Supreme Court decisions is questionable.

Certainly the Takings Clause acts as a limit on federal regulatory power over privately owned property, in the same way that it limits state regulatory power. The federal government is also prevented from acting in a transparently arbitrary or capricious manner by the due process requirement of the Fifth Amendment,[120] although as noted above, since *Carolene Products* in 1938, the Supreme Court has followed an extremely deferential standard of judicial review of economic regulation.[121]

The most important enumerated grant of regulatory power to the federal government is the Commerce Clause. It may accurately be said that the United States Constitution itself came into existence because of the commercial anarchy and blatant state-versus-state protectionism that was impoverishing the thirteen original states during the period immediately following independence, and the Commerce Clause was intended to solve this problem. The scope of the commerce power has long been a major source of constitutional controversy. Clearly it was intended to give Congress the power to regulate commercial trade that crossed states lines. Yet how far does the commerce power of Congress go?

The earliest important case describing the scope of the commerce power was *Gibbons v. Ogden*,[122] in which Chief Justice John Marshall wrote that ferryboat traffic between New York and New Jersey constituted interstate commerce and thus was subject to federal regulation.[123] Yet Marshall also noted that trade which

120. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

121. *See supra* notes 40–41 and accompanying text.

122. 22 U.S. (9 Wheat.) 1 (1824).

123. *See id.* at 1.

was purely within a state would not be subject to federal Commerce Clause power.[124]

By the latter decades of the nineteenth century, rapid industrialization and the criss-crossing of the continent by railroads had produced an American economy that was truly national in scope. This rapid industrialization also produced the Progressive Era, when Congress responded to the problems associated with industrialization with a raft of legislation regulating everything from railroad rates to child labor to industrial cartels. While Congress sought to expand dramatically federal regulatory power during this era, the Supreme Court repeatedly limited it through a narrow definition of interstate commerce. In *United States v. E.C. Knight Co.*,[125] the Court blocked the federal government from using the recently enacted Sherman Act[126] to prevent the purchase of several sugar refineries in Pennsylvania by the American Sugar Refining Company.[127] The purchases would have cartelized the national sugar refining industry, but the Court ruled that the purchases of the refineries did not constitute interstate commerce, since the purchase contracts were to be executed in Pennsylvania and thus were subject only to the police power of that state.[128]

In the early twentieth century, in the case of *Hammer v. Dagenhart*,[129] the Court continued to define interstate commerce narrowly as it struck down a federal law regulating child labor.[130] The federal law banned the shipment of goods *across state lines* that had been manufactured in plants that did not comply with the federal child labor law.[131] The Court said that while the goods may cross state lines, what Congress was attempting to regulate (working hours of children) was local in nature and did not constitute interstate commerce.[132]

During the Great Depression the Supreme Court's narrow interpretation of interstate commerce clashed with President

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124. *See id.* at 90.
125. 156 U.S. 1 (1895).
126. 15 U.S.C. §§ 1–7 (2000).
127. *See E.C. Knight Co.*, 156 U.S. at 18.
128. *See id.* at 116–18.
129. 247 U.S. 251 (1918).
130. *See id.* at 276–77.
131. *See id.* at 268–69.
132. *See id.* at 276.

Franklin Roosevelt's New Deal legislation. In *Schechter Poultry Corp. v. United States*,[133] decided early in FDR's presidency, the Court struck down a New Deal law establishing minimum wages and maximum working hours for workers in poultry plants.[134] The Court used the same reasoning as in *Hammer v. Dagenhart*, concluding that while some of the chickens processed in Schechter's plant were shipped across state lines, the wages and hours of his employees were a local matter and outside the scope of federal regulatory authority.[135]

Supreme Court decisions such as *Schechter Poultry* enraged President Roosevelt and led him early in his second term to propose what was called his "court-packing" plan, in which he proposed that for every justice on the Supreme Court over the age of seventy, the President could appoint a new member (at the time there were six members over seventy).[136] Yet even though Congress had an overwhelming majority of FDR's fellow Democrats in both houses, the plan was not accepted by Congress for fear of upsetting the basic separation of powers that was a key principle of the Constitution. The issue became moot, however, as a combination of retirements and changes in position resulted in a green light from the Court for virtually all of FDR's New Deal proposals by the end of Roosevelt's second term.[137]

One case from the early 1940s graphically illustrates the Court's complete reversal on the issue of the scope of the federal commerce power. In *Wickard v. Filburn*,[138] federal agricultural agents penalized a farmer who was growing wheat in excess of a federally imposed quota.[139] The farmer used the wheat to feed his own livestock and make flour for his own family's consumption.[140] The wheat was sold to no one, and not only did it not move across states lines, it literally did not leave his farm.[141] Yet the Court, in an opinion written by FDR's former Attorney General, Robert Jackson, found that federal regulatory power did extend to Farmer Filburn's wheat growing on the theory that when Farmer

133. 295 U.S. 495 (1935).

134. *Id.* at 550.

135. *See id.* at 542–43, 550.

136. *See* DAAN BRAVEMAN, WILLIAM C. BANKS & RODNEY A. SMOLLA, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 332–33 (4th ed. 2000).

137. *See id.* at 334.

138. 317 U.S. 111 (1942).

139. *See id.* at 113.

140. *See id.* at 114.

141. *See id.*

Filburn grew wheat for his own use, he impacted the national aggregate supply and demand for wheat.[142] Thus his wheat production, while trivial in quantity and not sold into commerce, was determined to impact interstate commerce sufficiently to justify federal regulation.[143]

Since *Wickard*, the Supreme Court has never struck down a federal law regulating economic activity on the grounds that the law in question exceeded Congress's Commerce Clause power—no matter how minimal or local in nature that economic activity may be. After *Wickard* and similar opinions, the federal regulatory apparatus and reach grew exponentially, leading to today's plethora of regulatory agencies.[144] All base their authority on the federal commerce power.

In the 1960s and 1970s, the federal commerce power was used to regulate essentially non-economic matters based on congressional findings of the impact of such activities on interstate commercial streams. The Supreme Court upheld the Civil Rights Act of 1964[145] as a proper exercise of federal commerce power in *Katzenbach v. McClung*,[146] and the Court also held federal environmental laws to be proper exercises of Commerce Clause power as well.[147]

By the mid-1990s, the Supreme Court had established three general categories in which federal regulation based on the Commerce Clause was authorized:

> First . . . the use of the channels of interstate commerce. Second . . . to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally . . . to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[148]

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142. *See id.* at 127–29.

143. *See id.* at 127–28.

144. For example, the Federal Energy Regulatory Commission (FERC), Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), and Federal Communications Commission (FCC), to name just a few.

145. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

146. 379 U.S. 294 (1964).

147. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 268 (1981).

148. United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

The first two categories are no longer controversial since they clearly fit within the text and history of the Commerce Clause. The third category, however, which has been used to justify federal regulatory power since the 1940s, is far more controversial when applied outside the context of economic regulation and to activities clearly local in nature. By the 1990s, it seemed that the third category represented the Supreme Court's abandonment of any effort to define limits on federal regulatory actions claiming a Commerce Clause basis.

Then, in *United States v. Lopez*, the Court struck down the criminal conviction of a youth who had violated a federal law prohibiting bringing guns onto school grounds.[149] Chief Justice Rehnquist, writing for a narrow majority, held that the federal law exceeded Congress's commerce power because the act of bringing a gun to school did not involve the channels, instrumentalities, persons, or things in interstate commerce, nor had Congress demonstrated that the act of bringing a gun to school would substantially affect interstate commerce.[150]

A few years later, the Supreme Court struck down provisions of the federal Violence Against Women Act of 1994[151] in the case of *United States v. Morrison*.[152] In *Morrison*, a female student at Virginia Tech alleged that she had been raped in a dorm room by a member of the Virginia Tech football team.[153] She initiated a civil action in federal court against Morrison as authorized by the new federal law.[154] The Supreme Court, following its reasoning in *Lopez*, ruled that the federal law exceeded congressional Commerce Clause power.[155] Neither the accused nor the accuser had used the channels or instrumentalities of interstate commerce, nor did the Court accept that sexual violence of the type alleged in *Morrison* had been shown to exert a substantial effect on inter-

149. *See id.* at 552.

150. *See id.* at 559, 561.

151. 42 U.S.C. § 13981 (2000), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

152. 529 U.S. 598 (2000).

153. *See id.* at 602.

154. *See id.* at 604.

155. *See id.* at 607–18 (citing *Lopez*, 514 U.S. 549 (1995)).

state commerce.[156] Thus the Court concluded that this was a matter purely for the state's general police power, not federal law.[157]

Believers in Madisonian principles of federalism cheered both the *Lopez* and *Morrison* decisions, since the Supreme Court was, for the first time since the 1930s, trying to define some limits to federal commerce power. *Lopez* and *Morrison* appeared to stand for the proposition that the Court would give Congress essentially a blank check to regulate purely *economic* activities, following the precedent set in *Wickard v. Filburn*; the Court, however, would draw lines when Congress went beyond economic regulation and tried to use the Commerce Clause to justify some types of extremely broad social regulation, particularly when Congress intruded on policy areas historically left to the states.[158] Not coincidentally, both *Lopez* and *Morrison* involved education and crime, two traditional areas of state, not federal, responsibility.

Yet the Commerce Clause element of the Supreme Court's modern "federalism revolution" was short-lived. In *Gonzales v. Raich*,[159] an opinion handed down in June 2005, a six-member majority of the Supreme Court refused to uphold California's medical marijuana law against efforts initiated by President Bush's then-Attorney General John Ashcroft to use the federal Controlled Substances Act (the "CSA")[160] to override the state law.[161] The California law, adopted by California voters in a 1996 referendum, allowed persons suffering from painful and debilitating diseases such as cancer and AIDS to use marijuana for pain relief with physician approval.[162] The California law fell squarely within the state's historic police power to protect public health. The marijuana used for medicinal purposes did not travel across state lines, but was grown locally and not sold.[163] The Court relied on *Wickard v. Filburn* to justify the federal law's negation of the law enacted by California's citizens.[164] Justice Stevens, for the

156. *See id.* at 615–16.

157. *See id.* at 617–18.

158. *See Morrison*, 529 U.S. at 617–18.

159. 125 S. Ct. 2195 (2005).

160. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

161. *See Raich*, 125 S. Ct. at 221.

162. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Cum. Supp. 2005).

163. *See Raich*, 125 S. Ct. at 2201.

164. *See id.* at 2205–07 (citing *Wickard*, 317 U.S. 111 (1942)).

majority, found that Congress could rationally conclude that marijuana grown locally for use as prescribed by the California law could undermine national enforcement of the CSA and could have a substantial effect on the interstate market for marijuana, and thus, using the same very deferential standard the Court used in *Wickard*, upheld the federal law.[165]

Surprisingly, Justice Scalia, given his prior expressions of belief in federalism, voted to allow the federal law to override the state law, but put forth his reasons in a separate concurrence.[166] Scalia said that the federal law in this case was part of a comprehensive nationwide scheme to regulate certain controlled substances, and under the Necessary and Proper Clause of the Constitution, Congress had the power to override state laws that could frustrate a federal regulatory scheme that was a valid exercise of Commerce Clause power.[167] Scalia distinguished *Lopez* and *Morrison* by saying that the federal laws at issue in those cases were not proper exercises of federal commerce power, while regulating controlled substances on a national basis was.[168]

Justices O'Connor and Thomas, along with Chief Justice Rehnquist, dissented strongly.[169] O'Connor argued why there must be limits to federal Commerce Clause power:

> We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[170]

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165. *See id.* at 2207.

166. *See id.* at 2215 (Scalia, J., concurring).

167. *See id.* at 2215–20 (Scalia, J., concurring); *see also* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."). The "foregoing Powers" include the Commerce Clause power found in Clause 3 of article I, § 8. *See id.* art. I, § 8, cl. 3.

168. *See Raich*, 125 S. Ct. at 2219–20 (Scalia, J., concurring).

169. *See id.* at 2220 (O'Connor, J., dissenting).

170. *Id.* at 2220 (O'Connor, J., dissenting) (citations omitted) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

O'Connor continued, "[t]his case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens."[171]

O'Connor charged that the Court had rendered *Lopez* as nothing more than a "drafting guide" for Congress, meaning that all Congress had to do to justify regulating virtually any activity, no matter how intrinsically local in nature, was to find that it was necessary to further a national regulatory scheme.[172]

Are there any limits to federal regulatory power using the Commerce Clause after *Gonzales v. Raich*? While Justice Scalia, in his concurrence, insisted there are still limits on that power,[173] it is hard to determine from the *Raich* opinion what those limits realistically might be.

Rather than asking *are* there still limits to federal Commerce Clause power, a more important question, perhaps, is *should* there be? For the reasons put forth so eloquently in Justice O'Connor's dissent in *Raich*, the answer is emphatically *yes*. While we must not return to the days when the federal government failed to protect the rights of all citizens guaranteed by the Fourteenth and Fifteenth Amendments against state denial, under some misbegotten theory of "states' rights," limiting federal power to pre-empt the states' exercise of their historical policy authority is important for two broad reasons: first, by distributing powers over several different branches and levels of government the threat of tyranny is reduced, as James Madison and other Framers of the Constitution fully understood; and second, allowing states to serve as policy laboratories, in the manner described by Justice Brandeis, serves the entire nation.

VI. CONCLUSION

Understanding the constitutional framework of economic regulation in the United States requires understanding the intellectual roots of the Founding Fathers' concept of government itself, the federal structure of government in America, the plenary pow-

171. *Id.* at 2221 (O'Connor, J., dissenting).
172. *See id.* at 2223 (O'Connor, J., dissenting).
173. *See id.* at 2216–17 (Scalia, J., concurring).

ers inherent in the state governments that were inherited from the British sovereign, and the enumerated nature of federal powers. The Framers of the United States Constitution were passionate about the protection of individual property rights and the right of private parties to form and enforce contracts, both rights essential to the functioning of a market economy, but they did not intend to enshrine *laissez-faire* capitalism in the new republic's basic law. State governments inherited the power to regulate economic activities from the British sovereign upon independence, and the Framers considered that power inherent in government. Through the Commerce Clause of the Constitution, the Framers gave the federal government an enumerated power of economic regulation, which most would agree has properly grown as the American economy has evolved from one essentially local in nature to one that is national in scope. The Commerce Clause power, however, has been expanded through Supreme Court opinions such as *Gonzales v. Raich* beyond economic regulation into areas of traditional state police-power authority, such as criminal law, to a degree that clearly exceeds the intention of James Madison and many other Founders of the United States.