

# *NIGRO v. UNITED STATES: THE MOST DISINGENUOUS SUPREME COURT OPINION, EVER*

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## INTRODUCTION

The chief challenge presented by an opportunity<sup>1</sup> to comment on the “Worst Supreme Court Opinion, Ever,” is that so many candidates vie for the title. Fortunately, Professor Stempel has stipulated that the identification of a champion in no way implies acquiescence in any unnamed judicial wrongs.<sup>2</sup> No sane scholar could accept the invitation on any other terms.

No doubt my choice of the Court’s Prohibition-Era ruling in *Nigro v. United States*<sup>3</sup> is a surprising one. Most scholars and lawyers have probably never even heard of the decision nor of the 1914 federal narcotics law that it unconscionably upheld. *Nigro*’s obscurity might be thought to foreclose its claim to incomparable iniquity. In fact, however, *Nigro*’s anonymity is both consequence and evidence of the thoroughness of its distortion of our fundamental law. The effect of its error proved so profoundly transformative that the world it helped to destroy has been virtually forgotten. *Nigro* accomplished the astounding feat of covering its own tracks.

But *Nigro* deserves a prominent place in our pantheon of infamy, and this Essay aims to put it there. For *Nigro* not only contributed mightily to the demise of the enumerated powers doctrine, arguably the central feature of the Constitution of 1787, but, as my title asserts, was almost certainly the product of self-conscious duplicity on the part of at least some of the Justices in the majority. The only alternative to this latter conclusion is to attribute to them a failure in self-criticism so grave as to be as culpable as outright dishonesty. The case for (against?) *Nigro* can be made at many levels.

This Essay makes that case. Part I provides the background and historical context necessary to appreciate fully the extent of *Nigro*’s wickedness. Part II then examines the Supreme Court’s ruling. Part III explores the consequences of that neglect of judicial duty. Part IV explains, and laments, *Nigro*’s present relevance.

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<sup>1</sup> My deep and sincere gratitude to Jeff Stempel for the invitation.

<sup>2</sup> Jeffrey W. Stempel, *The Worst Supreme Court Case Ever? Identifying, Assessing, and Exploring Low Moments of the High Court*, 12 NEV. L.J. 516 (2012).

<sup>3</sup> *Nigro v. United States*, 276 U.S. 332 (1928).

## I. THE FIRST SHOT IN THE FEDERAL “WAR ON DRUGS”

The Harrison Anti-Narcotics Act of 1914<sup>4</sup> was precisely what its title suggested, an anti-drug law, pure and simple. In the twenty-first century, the Court has candidly acknowledged as much.<sup>5</sup> But when enacted, the statute suffered from the significant defect that a federal prohibition on the possession or use of even the most serious narcotics was quite clearly unconstitutional. Coming as it did before judicial abdication of the duty to enforce the Constitution’s limit of the federal government to only those powers found therein, the Act was fatally flawed as no enumerated power even arguably reached so far. To be sure, Congress *might* have then been able to condition use of the instrumentalities, or travel in the channels, of interstate commerce on compliance with a regulatory regime designed to preserve public morals from recreational self-pollution.<sup>6</sup> But even so, the power would have depended upon the showing of an interstate nexus on a case-by-case basis,<sup>7</sup> and the Harrison Act applied regardless of any such jurisdictional hook. Thus, Congress dressed the Act, which in reality enacted a prohibitory regime, in the garb of a federal tax.

Though few if any were fooled by this ruse, the fiction sufficed to get the law through Congress, signed by President Wilson, and sustained against constitutional challenge by the Supreme Court. In *United States v. Doremus*,<sup>8</sup> a five-Justice majority refused to look behind the transparent form to the apparent substance. Reasoning that many taxes had incidental regulatory consequences, the Court declared that Congress lawfully employed its Article I power to “lay and collect Taxes”<sup>9</sup> so long as a statute bore “some reasonable relation” to the raising of revenue, even if the law’s “effect . . . [was] to accomplish another purpose as well.”<sup>10</sup>

Under even this highly deferential standard, however, the Harrison Act was constitutionally suspect. As the federal trial court in *Doremus* had observed (along the way to its conclusion that the Harrison Act was unconstitutional), the nominal \$1 *per annum* tax raised no net revenue, not surprisingly as the Act “so restrict[ed] and narrow[ed] the uses of the drug that no vital or important excess of revenue could reasonably be expected.”<sup>11</sup> Moreover, the Act’s requirements subjected the malefactor to draconian criminal punishments “so disproportionate to the gravamen of the offense as to be further convincing

<sup>4</sup> Harrison Act, 38 Stat. 785, 785–90 (1914), *amended by* 40 Stat. 1130, 1130–33 (1919) (repealed 1970).

<sup>5</sup> See *Gonzales v. Raich*, 545 U.S. 1, 10 (2005) (describing the Harrison Act as “the primary drug control law” until Congress passed the Controlled Substance Act in 1970).

<sup>6</sup> Compare, e.g., *Brooks v. United States*, 267 U.S. 432, 436–37 (1925), *Caminetti v. United States*, 242 U.S. 470, 491 (1917), and *Champion v. Ames*, 188 U.S. 321, 356–57 (1903), with, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 271–73 (1918).

<sup>7</sup> See *Brooks*, 267 U.S. at 438–39; *Dagenhart*, 247 U.S. at 272; *Caminetti*, 242 U.S. at 485; *Champion*, 188 U.S. at 354.

<sup>8</sup> *United States v. Doremus*, 249 U.S. 86 (1919).

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>10</sup> *Doremus*, 249 U.S. at 93–94.

<sup>11</sup> See *United States v. Doremus*, 246 F. 958, 964 (W.D. Tex. 1918).

that Congress was more concerned with the moral ends to be subserved than with the revenue to be derived.”<sup>12</sup>

Still, the High Court turned a blind eye to this evidence of the Harrison Act’s actual purpose and effect. To be sure, judicial deference to claimed congressional purposes may be defensible, indeed even laudable, in light of the relative institutional competence and legitimacy of these two branches of the national government. But selective deference is, of course, not deference at all but rather merely a disguise for inchoate judicial policy judgments avowedly the province of the legislature.

Subsequently the Court’s deference was revealed as highly selective. Just prior to *Doremus*, the Court had struck down a federal statute prohibiting the shipment in interstate commerce of goods manufactured at a plant employing children below a minimum age or beyond maximum hours on the ground that it exceeded Congress’s Commerce Clause authority.<sup>13</sup> Now *Doremus* offered a way for Congress to circumvent this limitation—tax child labor to extinction. But when Congress did so, the Court demurred. Writing for eight Justices in *The Child Labor Tax Case*,<sup>14</sup> the new Chief Justice Taft sententiously invoked the Court’s solemn constitutional duty. The justices were obliged to assess independently whether a challenged “law impose[d] a tax with only that incidental restraint and regulation which a tax must inevitably involve” or whether the statute “regulate[d] by the use of the so-called tax as a penalty.”<sup>15</sup>

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.<sup>16</sup>

As to why this “high duty and function” did not require the Court to invalidate the Harrison Anti-Narcotics Act, Taft had little to say. His opinion identified only one supposed difference between the two statutes. Whereas the Child Labor Tax Law was “on the face of the act . . . a penalty,” any ulterior motive that may have contributed to the passage of the narcotics law was “not shown on [its] face.”<sup>17</sup> Of course even this distinction was specious. It simply ignored the unanswered conclusion of the *Doremus* trial court and four Supreme Court

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<sup>12</sup> See *id.* (citation omitted).

<sup>13</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918).

<sup>14</sup> *Bailey v. Drexel Furniture Co. (The Child Labor Tax Case)*, 259 U.S. 20 (1922). Justice Clarke dissented without an opinion. See *id.* at 44.

<sup>15</sup> *Id.* at 36.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 39, 43.

dissenters that the words of the Harrison Act standing alone revealed the law's actual purpose to be narcotics regulation, not revenue collection.<sup>18</sup>

Justices McReynolds and Sutherland joined Taft's *Child Labor Tax Case* opinion, but later signaled their unease with the Court's blatant inconsistency on federalism. In *United States v. Daugherty*,<sup>19</sup> Justice McReynolds delivered the opinion for a unanimous Court upholding a fifteen-year prison sentence (which, McReynolds noted, "seem[ed] extremely harsh")<sup>20</sup> for a Harrison-Act conviction. But McReynolds used the occasion to welcome—indeed to outline—an argument that *Doremus*, from which he had dissented, be overruled:

The constitutionality of the [Harrison] Anti Narcotic Act, touching which this court so sharply divided in *United States v. Doremus*, was not raised below, and has not been again considered. The doctrine approved in *Hammer v. Dagenhart* [and the *Child Labor Tax Case*] may necessitate a review of that question, if hereafter properly presented.<sup>21</sup>

Thus, McReynolds took the extraordinary step of announcing the Court's willingness to reconsider *Doremus*.<sup>22</sup> His prophecy, however, proved a false promise.

## II. NIGRO'S UNHAPPY DAY IN THE HIGH COURT

Frank Nigro was indicted and convicted for selling an ounce of morphine without compelling the purchaser to submit an order for the drug on a government form, as section 2 of the Harrison Act arguably required.<sup>23</sup> Chief Justice Taft's opinion for the Court rejecting his appeal first embraced the government's broad interpretation of the Act, which in effect criminalized receipt of the covered narcotics by anyone absent a physician's lawful prescription for an approved medicinal use.<sup>24</sup> So interpreted, the Act obviously constituted a spurious use of the taxing power to prohibit private conduct deemed dangerous and immoral, a responsibility not entrusted by the Constitution's enumerated powers to the federal government but rather one reserved to the states.

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<sup>18</sup> As David Currie observed in an analogous context, "It is hard to believe that the majority found its own distinctions persuasive." See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986*, at 98 (1990).

<sup>19</sup> *United States v. Daugherty*, 269 U.S. 360 (1926).

<sup>20</sup> *Id.* at 364.

<sup>21</sup> *Id.* at 362–63 (emphasis added) (citations omitted).

<sup>22</sup> To be sure, just over a year after *Daugherty*, McReynolds wrote the Court's opinion in *Alston v. United States*, which rebuffed a federalism challenge to the Harrison Act. See *Alston v. United States*, 274 U.S. 289, 294 (1927). In rejecting one constitutional challenge, however, McReynolds expressly preserved a more compelling one for a future day. *Alston* arose "under those provisions of [the Harrison Act] which impose[d] a stamp tax on certain drugs and declare[d] it unlawful to purchase or sell them except in or from original stamped packages." *Id.* These provisions were the most impervious to constitutional attack because they did "not absolutely prohibit buying or selling [and] ha[d] produced substantial revenue." See *id.* Accordingly, McReynolds deemed them to be "clearly within the power of Congress to lay taxes," stressing that they had "*no necessary connection with any requirement of the act which may be subject to reasonable disputation.*" *Id.* (emphasis added).

<sup>23</sup> *Nigro v. United States*, 276 U.S. 332, 337–38 (1928).

<sup>24</sup> See *id.* at 344.

In form, at least, Chief Justice Taft agreed that the federal government lacked any such power. Early in his analysis, he conceded that

[i]n interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid, just as the Child Labor Act of Congress was held to be.<sup>25</sup>

Nevertheless, Taft upheld the Act on the transparent fiction that its strict constraints on both those who might sell *and* those who might buy narcotics were merely incidental to tax collection.<sup>26</sup> Taft reasoned that the section's requirement that *purchasers* also be registered (unless they held a valid physician's prescription) relieved the revenue service of a significant enforcement burden—namely, the need of “sending to examine the list” of registered sellers to determine whether a particular seller's name appeared thereon.<sup>27</sup> But this imagined administrative convenience was eclipsed by the prohibitory effect worked by such a broad construction of the Act. Because would-be non-medicinal users were not even permitted to register, they could never obtain the forms necessary to make a purchase.<sup>28</sup> It was as if Congress prohibited the sale of all alcoholic beverages in order to ensure that distributors paid the excise tax on alcohol sales. Taft justified congressional elimination of the non-medicinal narcotics market as a means of ensuring that the distributors in that market paid their registration fees. The surgery succeeded, albeit by killing the patient.

McReynolds dissented in an opinion Sutherland joined. His dissent, like so many of the best throughout the Court's history, merely gave voice to what must have been apparent to all.<sup>29</sup> Having explained the prohibitory character of what was nominally a registration regime, he made the commonsense observation that tax collection would not be aided by requiring purchasers to use a federal form that they could not lawfully obtain.<sup>30</sup> “[I]nhibition of sales ha[d] no just relation to the collection of the tax laid on dealers,” and any “suggestion to the contrary [was] fanciful.”<sup>31</sup> Nor was it difficult to discern that Congress's “plain intent [was] to control the traffic within the States by preventing sales except to registered persons and holders of prescriptions, and this amount[ed]

<sup>25</sup> *Id.* at 341 (citing *Bailey v. Drexel Furniture Co. (The Child Labor Tax Case)*, 259 U.S. 20 (1922)).

<sup>26</sup> *Id.* at 353–54.

<sup>27</sup> *Id.* at 345. Chief Justice Taft also noted that, in the years intervening between the events at issue in *Doremus* and those with which the instant case was concerned, Congress had amended the Act to increase the tax and the revenue produced thereby. *Id.* at 353. For an argument that because this intervening amendment augmented the revenue raised under the Act, the amendment supplied the foundation for constitutionality woefully lacking in *Doremus*, see Robert C. Brown, *When Is a Tax Not a Tax?*, 11 *IND. L.J.* 399, 421–22 (1936).

<sup>28</sup> See Harold Gill Reuschlein & Albert B. Spector, *Taxing and Spending: The Loaded Dice of a Federal Economy*, 23 *CORNELL L.Q.* 1, 20–21 (1937) (discussing the practical effect of the Harrison Act).

<sup>29</sup> *Cf.* *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (“Every one knows that the [Louisiana] statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”).

<sup>30</sup> See *Nigro*, 276 U.S. at 356 (McReynolds, J., dissenting).

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

to an attempted regulation of something reserved to the States.”<sup>32</sup> McReynolds closed his brief dissent by noting the broad implications of the Court’s ruling for federalism:

The habit of smoking tobacco is often deleterious. Many think it ought to be suppressed. The craving for diamonds leads to extravagance, and frequently to crime. Silks are luxuries, and their use abridges the demand for cotton and wool. Those who sell tobacco, or diamonds, or silks may be taxed by the United States. But, surely, a provision in an act laying such a tax which limited sales of cigars, cigarettes, jewels, or silks to some small class alone authorized to secure official blanks would not be proper or necessary in order to enforce collection. The acceptance of such a doctrine would bring many purely local matters within the potential control of the federal government. The admitted evils incident to the use of opium cannot justify disregard of the powers ‘reserved to the States respectively, or to the people.’<sup>33</sup>

Unlike his colleagues in the majority, McReynolds resisted the temptation to honor federalism in the breach in service of the apparently worthy causes of preventing addiction and preserving traditional mores. This self-restraint was all the more remarkable given McReynolds’s well-known antipathy to unorthodox social behavior.<sup>34</sup>

On the surface, *Nigro* was justifiable as faithful adherence to its prior ruling in *Doremus*. In the meantime, however, the Court had purported to stand on a federalism principle in the context of child labor, one of the most compelling and divisive social issues of the day.<sup>35</sup> The Court’s child-labor decisions provoked a massive effort to supersede them by constitutional amendment.<sup>36</sup> McReynolds saw that a partial federalism was indefensible and unsustainable. Worse still, it was not really federalism at all, but rather merely a convenient judicial tool for jurists to dismantle laws they did not like for other, unspoken reasons, leaving intact laws equally obnoxious to federalism principles that the judges happened to believe salutary. Such a regime empowers unelected, life-tenured judges to pick and choose among federal statutes on a basis they never need articulate let alone defend. To his enduring credit, McReynolds declined to participate in this constitutional farce. But his was a voice crying in the wilderness, heard but unheeded. Instead, his prophecy of federalism’s demise soon earned the dubious honor of subsequent vindication.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 357 (quoting U.S. CONST. amend. X).

<sup>34</sup> McReynolds expressly acknowledged the “evils incident to the use of opium.” *Id.* at 357 (McReynolds, J., dissenting). For a discussion of McReynolds’s disdain for outsiders and non-traditional conduct, see JAMES E. BOND, *I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK McREYNOLDS* 124–26, 136 (1992).

<sup>35</sup> See *supra* notes 13–17 and accompanying text.

<sup>36</sup> See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 255–61, 307–13 (1996).

## III. THE WAGES OF JUDICIAL SIN

Judicial inconstancy and duplicity are deplorable regardless of observable consequences. They constitute violations of a judge's most fundamental obligations in a society premised on the rule of law.<sup>37</sup>

*Nigro*'s unique harm, however, far exceeded that attributable to the ordinary judicial delict. Most obviously it entrenched the allocation of drug policy to the national level, resulting in a century-long blunderbuss "war on drugs" characterized by few if any tangible victories but with as many as a million casualties distributed throughout the exponentially increasing federal prison system.<sup>38</sup> But even if one believes this approach to the problem of self-poison a wise one, there remains the far more sweeping consequence that federalism, in the form of the enumerated powers doctrine, became a distant memory.

*Nigro* was one of a handful of cases that revealed the Court's avowed commitment to an avowedly apolitical enforcement of the limits on congressional power for the sham that it was. Indeed, the Court embraced broad assertions of federal authority at least as often as it resisted them. Moreover, this inconsistency was hardly random. Federal progressive economic or labor legislation were met with suspicion, whereas federal morals regulations, like the Harrison Act, were nearly always sustained. This pattern became increasingly evident through the first two decades of the twentieth century.<sup>39</sup> Numerous, distinguished commentators<sup>40</sup>—of whom Princeton's Edward Corwin<sup>41</sup> was probably the most prominent<sup>42</sup>—documented in detail the Court's unforgivable fickleness in its federalism jurisprudence.

"In 1930 Charles Evan Hughes succeeded as chief justice the man who had, then as president, first appointed Hughes to the Court twenty years before.

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<sup>37</sup> See generally BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE LAW* 227 (2006).

<sup>38</sup> See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 564 (6th Cir. 2011) (Sutton, J., concurring) (observing that "States' rights sometimes are individual rights. Doubt it? Go to any federal prison in the country to see how a broad conception of the commerce power has affected individual liberty through the passage of federal gun-possession and drug-possession laws and sentencing mandates.") (emphasis omitted) (citation omitted); Robert Higgs, *Lock'em Up!*, 4 INDEP. REV. 309, 309–13 (1999) (discussing phenomenal growth of the U.S. state and federal prison populations and attributing much of it to drug prohibition).

<sup>39</sup> A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL'Y 101, 122–29 (2007) (documenting contemporaneous discussion of the Justices' manipulation of federalism to achieve favored outcomes).

<sup>40</sup> See, e.g., Robert E. Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 759, 782–83 (1934); Thurlow M. Gordon, *The Child Labor Law Case*, 32 HARV. L. REV. 45, 65 (1918); Joseph R. Long, *Federal Police Regulation by Taxation*, 9 VA. L. REV. 81, 96 (1922); Arthur W. Machen, Jr., *The Strange Case of Florida v. Mellon*, 13 CORNELL L.Q. 351, 375 (1928); Thomas Reed Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 S.L.Q. 175, 201–02 (1918).

<sup>41</sup> See, e.g., EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS: BACK TO THE CONSTITUTION* 254–55 (Peter Smith 1962) (1936).

<sup>42</sup> G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 17 (2000) (describing Corwin as "one of the ablest American scholars of the twentieth century"); Gerald Garvey, *Edward S. Corwin in the Campaign of History: The Struggle for National Power in the 1930s*, 34 GEO. WASH. L. REV. 219, 219 (1965) (asserting that "Corwin stands among the giants of American constitutional commentators—with Kent, Story, and Cooley").

At this changing of the guard,” judicial enforcement of the enumerated powers scheme “rested on a frail foundation.”<sup>43</sup> “Severe, sustained, world-wide economic depression” shook that foundation tremendously.<sup>44</sup> When at the beginning of FDR’s second presidential term his clash with the Court reached its apogee, the fact that the Court had built its federalism house on sand mightily contributed to its collapse.<sup>45</sup> By the early 1940s, the Justices had signaled that Congress would henceforth be the principal if not sole judge of the scope of its own powers.<sup>46</sup>

#### IV. CONCLUSION: HERE WE GO AGAIN (AND AGAIN?)

Thereafter, the abandonment of federalism to Congress’s painfully “underdeveloped capacity for self-restraint”<sup>47</sup> became the equilibrium that reigned through most of the rest of the twentieth century—until 1995. The Court’s decision that year in *United States v. Lopez*,<sup>48</sup> as well as that ruling’s reaffirmation five years later in *United States v. Morrison*,<sup>49</sup> sparked a decade of hopes and fears of a sweeping revival of judicially enforced limits on congressional power. But in an astounding parallel to *Nigro*, the Court’s friendship with federalism collided with federal drug policy. Once again, the latter prevailed.

Angel Raich challenged the constitutionality of the federal Controlled Substances Act (the much broader, linear successor of the Harrison Act) as applied to her wholly intrastate, non-commercial possession of small amounts of marijuana for medicinal purposes in conformity with the law of California, where she resided. In the two decades before 1995, the claim that her conduct lay outside the scope of Congress’s Article I enumerated powers would have been frivolous; between 1937 and 1995 the Court rejected *every* claim that private conduct exceeded congressional grasp.

Raich, however, thought *Lopez* gave her claim new legal validity. Since, as *Lopez* held, Congress lacked power to prohibit possession of a gun near a school, did it not also lack the power to prohibit possession of a small amount of marijuana in one’s own home? The efforts of Justices Stevens and Scalia to answer that question when the Court, by a 6-3 vote, ruled against Raich were unusually unconvincing.<sup>50</sup> Numerous court watchers concluded that *Raich* signaled an end to the *Lopez* frolic and a return to the pre-1995 deferential posture in questions of congressional power.<sup>51</sup>

<sup>43</sup> See THOMAS B. McAFFEE ET AL., POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 143 (2006).

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

<sup>45</sup> See Bryant, *supra* note 9, at 134–38.

<sup>46</sup> See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1137–49 (2000).

<sup>47</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O’Connor, J., dissenting).

<sup>48</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>49</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>50</sup> See Gonzales v. Raich, 545 U.S. 1, 26–32 (2005); *id.* at 34–40 (Scalia, J., concurring). For a more thorough discussion of the manifest weakness of *Raich*, see Bryant, *supra* note 39, at 146–51.

<sup>51</sup> See, e.g., Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 777 (2005) (concluding that *Raich* repudiated *Lopez*).



Yet it remains to be seen whether the parallel between the early twentieth and twenty-first centuries will end there. At the time of writing, several constitutional challenges to the Patient Protection and Affordable Care Act are pending in the lower federal courts. *Raich*, having demonstrated beyond peradventure that the Court either cannot, or in any event will not, enforce meaningful constraints on congressional power, one would be excused for thinking that congressional power to intervene in a market comprising eighteen percent of the U.S. economy<sup>52</sup> would be a foregone conclusion. So far, however, the contrary claim has received a warmer reception from the lower courts than many had expected.<sup>53</sup> If the Supreme Court rediscovers federalism for the purpose of invalidating one of the central provisions of that long-sought, comprehensive regulatory scheme, the ensuing decades may resemble the New Deal Era more than anyone could desire.

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and *Morrison*); Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 818 (2005) (arguing that *Raich* reveals that even a dedicated “coalition of judicial conservatives would not be unified enough to undo the New Deal transformation of Congress’s powers”); Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705, 719 (2006) (asserting that “*Raich* turns *Lopez*’s substantive limitations on what activities Congress can constitutionally regulate into procedural limits that Congress will generally be able to easily overcome”); Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 844 (2005) (“*Lopez* and *Morrison* have been largely confined to their facts.”); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 932 (2005) (expressing “doubt that a robust judicially-enforceable federalism has much future left” after *Raich*); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 955 (2006) (“The most enduring legacy of the Rehnquist Court might simply be its failure to convince those of us with an understandable skepticism about invocations of federalism that federalism can in fact be applied in a neutral and principled fashion.”); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 508 (2005) (contending that “*Raich* represents a major—possibly even terminal—setback for efforts to impose meaningful judicial constraints on Congress’ Commerce Clause powers”).

<sup>52</sup> COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE ECONOMIC CASE FOR HEALTH CARE REFORM 2 (2009), available at [http://www.whitehouse.gov/assets/documents/CEA\\_Health\\_Care\\_Report.pdf](http://www.whitehouse.gov/assets/documents/CEA_Health_Care_Report.pdf).

<sup>53</sup> See A. Christopher Bryant, *Constitutional Forbearance*, 46 U. RICH. L. REV. 695 (2012) (discussing the Affordable Care Act litigation).