

# JAMES WILSON, LEGISLATIVE AUTHORITY, & SECTION 1501 OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

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## *I. INTRODUCTION*

James Wilson helped shape two Constitutions: the United States Constitution and the Pennsylvania Constitution. An examination of Wilson’s role in creating these documents reveals that Wilson was one of the most influential founding fathers of the 18th century. This paper will show that Wilson admired federalism, the system whereby the federal government engages in limited, enumerated activity, while states and the people retain much authority.<sup>1</sup> This paper will also demonstrate

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<sup>1</sup> See Andreas Follesdal, *Federalism*, available at <http://plato.stanford.edu/entries/federalism/> (last visited Sept. 26, 2011) (defining federalism generally).

that James Wilson favored limiting the power of legislatures, with the judiciary serving a fundamental role in that process. Finally, reviewing Wilson's work in the context Supreme Court case law will show that while health care may be a market within which the federal government can efficiently and effectively participate, penalizing individuals for not buying government mandated health care is not constitutional under the Commerce Clause.

## II. JAMES WILSON'S ROLE IN CREATING THE CONSTITUTION

James Wilson was born near St. Andrews, Scotland on September 14, 1742.<sup>2</sup> Wilson immigrated to Pennsylvania in 1765.<sup>3</sup> James Madison is often said to be the "founder of the Constitution," with Wilson following the votes of Madison on key issues such as the Connecticut Compromise.<sup>4</sup> But in 1787, Wilson was ten years older than Madison and had more legislative experience.<sup>5</sup> The view that Madison is the father of the Constitution is linked to Madison creating the Virginia Plan and his role as speaker and note-taker during the Constitutional Convention.<sup>6</sup> Yet, if one looks at the United States Constitution's creation in its entirety, it is apparent that Wilson had a major influence at various stages in the creation process.<sup>7</sup> Wilson spoke more times than Madison during the convention, and Wilson's views on all three federal branches were largely incorporated into the Constitution.<sup>8</sup>

While Wilson and Madison often voted the same way, their underlying philosophies were considerably divergent. For example,

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<sup>2</sup> John Osborne & James Gerencser, *James Wilson*, THEIR OWN WORDS (July 9, 2003), <http://deila.dickinson.edu/theirownwords/author/WilsonJ.htm> (examining Wilson's biography).

<sup>3</sup> Ashbrook Ctr. for PUB. AFF., *Delegates to the Constitutional Convention: James Wilson*, TEACHINGAMERICANHISTORY.ORG, <http://teachingamericanhistory.org/convention/delegates/wilson.html> (last visited Sept. 5, 2011) (examining Wilson's biography).

<sup>4</sup> William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U.PA. J. CON. LAW 901, 901 (2008).

<sup>5</sup> Interview with William Ewald, Professor, University of Pennsylvania Law School (Sept. 27, 2011).

<sup>6</sup> Ewald, *supra* note 4, at 963. *See also* James Madison, *Journal, Tuesday May 29, 1787, of the Constitutional Convention, reprinted in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 49- 50 (Max Farrand, , Yale Univ. Press 1911) (recording the introduction of the Virginia plan by Edmund Randolph in Madison's notes).

<sup>7</sup> Ewald, *supra* note 4 generally.

<sup>8</sup> *Id.* *See also* Farrand, *supra* note 6 generally.

Madison believed in a system of filtration.<sup>9</sup> Under a filtration system, people vote for House representatives who elect the Senate, who then elects a President (along with judges).<sup>10</sup> Wilson, on the other hand, was an advocate of popular representation in its own right.<sup>11</sup> On May 31, 1787, both Wilson and Madison voted for a bicameral legislature with popular representation in the House of Representatives.<sup>12</sup>

On June 15, 1787, Wilson first protested the New Jersey plan on the grounds that it encompassed a unicameral legislature and a plurality presidency.<sup>13</sup> Madison soon *followed* Wilson in opposing the New Jersey plan.<sup>14</sup> Wilson also argued throughout the convention for a singular president, elected for a short period of time, with the power to veto bills, and authority separate from the legislature and judiciary.<sup>15</sup> Where Madison wanted property interests represented by the legislature, Wilson argued ardently against such representation.<sup>16</sup>

Wilson's influence was palpable both during and after debate of the Constitution. The words "We the People" were almost assuredly of Wilson's mind.<sup>17</sup> These words emphasize Wilson's strong views on individual liberty within a federalist system. Whereas Madison left shortly after the July 16, 1787 vote for the Connecticut Compromise (a peculiar name considering that Oliver Ellsworth of the Connecticut Delegation was not present when the Compromise was created), James Wilson stayed to complete the Constitution and was one of five members on the Committee of Detail ("COD").<sup>18</sup> The other members were John Rutledge (Chair, South Carolina), Edmund Randolph (Virginia), Nathaniel Gorham (Massachusetts) and Oliver Ellsworth (Connecticut).<sup>19</sup> On July 26, 1787, the COD began to finalize a draft of

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<sup>9</sup> Ewald, *supra* note 4, at 943.

<sup>10</sup> Farrand, *supra* note 6.

<sup>11</sup> Ewald, *supra* note 4, at 963.

<sup>12</sup> Farrand, *supra* note 6, at 54.

<sup>13</sup> *Id.* at 254.

<sup>14</sup> Ewald, *supra* note 4, at 972.

<sup>15</sup> *Id.* at 950-51.

<sup>16</sup> *Id.* at 979-81.

<sup>17</sup> *Id.* at 988. See also Elizabeth Stuart, *BYU Graduate May Have Found Draft of U.S. Constitution*, MORMON TIMES, Feb. 6, 2010, available at <http://www.deseretnews.com/article/700007460/BYU-graduate-may-have-found-draft-of-US-Constitution.html> (stating that the phrase "We the people" was found on the back of the first draft of the Constitution in Wilson's hand-writing).

<sup>18</sup> Ewald, *supra* note 4, at 982-83.

<sup>19</sup> *Id.*

the Constitution to present to the states for ratification.<sup>20</sup>

The COD, with Wilson as an important member, was responsible for aspects of the Constitution such as the Article I, Section 8 Necessary and Proper Clause (written by Wilson), the Article I, Section 8 Enumerated Powers (written by Edmund Randolph & John Rutledge), the Article VI, Clause 2 Supremacy Clause (written by Wilson), the Full Faith and Credit Clause (written by Rutledge), and the Article IV, Section 2 Privilege and Immunities Clause (written by Wilson or Rutledge).<sup>21</sup>

Wilson did not participate in the creation of the enumeration of powers because he wanted Congress to have general powers, which would have expanded the parameters of congressional authority.<sup>22</sup> However, Randolph and Rutledge were able to ensure that Congress' power was listed in Article I.<sup>23</sup> Although Wilson was able to put the Necessary and Proper Clause into Article I, Section 8 to enlarge the scope of the enumerated rights, the clause was blunted by the enumeration in Article I, Section 8. After Wilson's work on the COD was finished, Wilson emphasized the enumeration of federal rights as a reason for ratification by the states.\

### **III. WILSON'S VIEWS ON CONSTITUTIONAL AUTHORITY OF THE LEGISLATURE**

If James Wilson represents such an important figure in American constitutional history, an examination of his thoughts on constitutional power *after* the Committee of Detail created the Constitution is important for understanding the rights of the federal legislature. It is clear that Wilson believed the activities of the legislature needed to be monitored and restricted, including by the judiciary, in some respect.<sup>24</sup> It is equally clear that Wilson understood the impact of Rutledge and Randolph's addition of enumerated rights for Congress in terms of ensuring that Congress had a tangible parameter in which to operate.<sup>25</sup>

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

<sup>21</sup> *Id.* at 986-92.

<sup>22</sup> Farrand, *supra* note 6, at 49. *See also* Ewald, *supra* note 4, at 986-7.

<sup>23</sup> Ewald, *supra* note 4, at 987.

<sup>24</sup> Ewald, *supra* note 4, at 996-7.

<sup>25</sup> James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *reprinted in* The Documentary History of the Ratification of the Constitution 339-340 (John M. Kaminski & Gaspare J. Saladino eds., 1981) (emphasis added).

Wilson's State House Yard Speech on October 6, 1787, defending the United States Constitution to the Pennsylvania Legislature, was imperative to the passing of the Constitution by both the Pennsylvania Legislature and Congress.<sup>26</sup> The speech was sent to George Washington, who then circulated it to other delegates attempting to persuade their states' citizenry that America needed to replace the Articles of Confederation with a stronger national government.<sup>27</sup> In this speech, Wilson stated:

It will be proper . . . to mark the leading discrimination between the state constitutions and the constitution of the United States. When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case everything which is not reserved is given, *but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved.*

This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights a defect in the proposed constitution: *for it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges of which we are not divested either by the intention or the act that has brought that body into existence.* For instance, the liberty of the press, which has been a copious source of declamation and opposition, what controul can proceed from the federal government to shackle or destroy that sacred palladium of national freedom? *If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.*<sup>28</sup>

Wilson makes two separate important points. The first point is that states have all the rights not explicitly reserved by the people, but that

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<sup>26</sup> Ewald, *supra* note 4, at 913.

<sup>27</sup> *Id.*

<sup>28</sup> JAMES WILSON, *supra* note 25 (emphasis added).

the federal government only has those rights *explicitly* granted under the Constitution.<sup>29</sup> This statement is in line with the creation and maintenance of a federalist system, with the states and federal government having separate, identifiable roles. Where the federal government is authorized to act, its actions take precedence under Article VI, Clause 2, better known as the Supremacy Clause.<sup>30</sup> Where the federal government *cannot* act because it has not been given an explicit right, the states and the people reserve their power.

Wilson's first point coincides with his second point, that a bill of rights is unnecessary. An initial reading of this statement might lead one to believe that Wilson was not an advocate of individual rights. However, a deeper analysis exposes the concept that individual rights are at the heart of Wilson's statements. If the federal government only possesses a limited amount of enumerated rights to act, then documenting our individual liberties *is* in fact unnecessary because the state, or the people, would already possess any rights outside of the parameters of Articles I, II, and III. Thus, the enumerated powers listed in Article I, Section 8 would constitute the parameters of legislative authority, taking into account the narrow expansion of legislative rights under the Necessary and Proper Clause, and outside of those parameters, the states and the people would be able to operate freely.

Wilson also expressed his views on legislative authority during a series of lectures that he gave at the University of Pennsylvania Law School. Wilson wrote:

I come now to the last head, under which I proposed to treat concerning the legislative department: this was, to consider the powers vested in Congress by the constitution of the United States. On this subject, we discover a striking difference between the constitution of the United States and that of Pennsylvania. By the latter, each house of the general assembly is vested with every power necessary for a branch of the legislature of a free state. *In the former*, no clause of such an extensive and unqualified import is to be found. *The reason is plain.* The latter institutes a legislature with general, the former, with enumerated, powers. Those enumerated powers are now subject for consideration.<sup>31</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> Office of the Secretary of the Senate, S.Pub 103-21, *Constitution of the United States and notes*, available at [http://www.senate.gov/civics/constitution\\_item/constitution.htm](http://www.senate.gov/civics/constitution_item/constitution.htm).

<sup>31</sup> James Wilson, *Of the Constitutions of the United States and of Pennsylvania – Of the Legislative Department*, reprinted in 2 COLLECTED WORKS OF JAMES WILSON 870 (Kermit

During his lecture on constitutional legislative authority, Wilson did not seem to think much about the Commerce Clause's ability to expand the enumerated rights of the federal government, stating simply, "It is an object of the national government to 'form a more perfect union.' On this principle, congress is empowered to regulate commerce among the several states, to establish post offices . . . ."<sup>32</sup>

Wilson's lectures again reflect a distrust of the legislature. When comparing the U.S. Constitution with the British Constitution, Wilson wrote:

[T]he order of things in Britain is exactly the reverse of the order of things in the United States. An act of parliament, in England, can never be unconstitutional, in the strict and proper acceptation of the term: in a lower sense it may; viz. when it militates with the spirit, contradicts the analogy, or defeats the provision of other laws, made to regulate the form of government.<sup>33</sup>

Wilson's comparison illustrates a salient point: actions by the United States Congress *can* be unconstitutional, if those actions are outside the scope of Congress' enumerated rights.

Wilson's lectures illuminate how he views the judiciary in terms of checking the power of the legislature. On Great Britain, Wilson wrote ". . . there is a very improper mixture of legislative and judicial authority vested and blended in the same assembly. This is entirely avoided in the Constitution of the United States."<sup>34</sup> Wilson fought to ensure that the judiciary was a separate and co-equal branch of the federal government, a branch not subordinate to the legislature.<sup>35</sup>

While attempting (ultimately successfully) to persuade Pennsylvania to adopt the United States Constitution, Wilson stated:

In order, sir, to give permanency, stability and security to any government, I conceive it of essential importance, that its legislature should be restrained; that there should not only be what we call a *passive*, but an *active* power over it. For of all kinds of despotism, this is the most dreadful and the most difficult to be corrected.

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L. Hall & Mark David Hall eds., 2007).

<sup>32</sup> *Id.* at 872.

<sup>33</sup> James Wilson, Comparison of the Constitution of the United States with That of Great Britain, *reprinted in* 1 *Collected Works of James Wilson* 719-20 (Kermit L. Hall & Mark David Hall eds., 2007).

<sup>34</sup> *Id.* at 736.

<sup>35</sup> Gerard J. St. John, *James Wilson: A Forgotten Father*, THE PHIL. LAWYER, Winter 2004, available at <http://www.philadelphiabar.org/page/TPLWinter04JamesWilson?appNum=1>.

These restraints arise from difference sourcesFalse Under this system they may arise likewise from the interference of those officers, who will be introduced into the *executive* and *judicial* departments.<sup>36</sup>

Wilson's work with Pennsylvania's Constitution is illustrative. Wilson disliked the lack of checks and balances in Pennsylvania's legislature before 1790 (namely, an unicameral legislature, executive officers removed at will, and an unsettled judiciary) and was the primary author of Pennsylvania's new Constitution in 1790 providing for a bicameral legislature, an executive with a limited veto, and an independent judiciary.<sup>37</sup>

Wilson's general approach to constitutional interpretation can also be discerned from his time on the United States Supreme Court from 1789 until his death on August 28, 1798.<sup>38</sup> This analysis includes his seminal opinion, *Chisholm v. Georgia*.<sup>39</sup>

*Van Staphorst v. Maryland*<sup>40</sup> – This was the first case docketed by the Supreme Court.<sup>41</sup> James Wilson would have heard the arguments concerning the Van Staphorst brothers lending money to Maryland and the state allegedly defaulting on the loan (according to the lenders).<sup>42</sup> However, the parties settled the case prior to argument before the Court.<sup>43</sup>

*West v. Barnes*<sup>44</sup> - The Court decided the case on procedural grounds, ruling that a writ of error must be issued by the clerk of the

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<sup>36</sup> James Wilson, An Address to the Delegation of Pennsylvania on the Subject of the Federal Constitution (Dec.1, 1787), *reprinted in* THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 245 (Jonathan Elliott ed., 1830) (emphasis added).

<sup>37</sup> Penn Biographies, James Wilson (1742-1798), University of Pennsylvania University Archives and Records Center, *available at* [http://www.archives.upenn.edu/people/1700s/wilson\\_jas.html](http://www.archives.upenn.edu/people/1700s/wilson_jas.html) (last visited Sept. 26, 2011).

<sup>38</sup> Ashbrook Ctr. for PUB. AFF., *supra* note 3.

<sup>39</sup> *Wilson, James* (1742-1798), in *AMERICAN ERAS* (1997), *available at* [http://www.encyclopedia.com/topic/James\\_Wilson.aspx](http://www.encyclopedia.com/topic/James_Wilson.aspx); 2 U.S. (2 Dall.) 419(1793).

<sup>40</sup> *Van Staphorst v. Maryland* (1791).

<sup>41</sup> THE DOCUMENTARY HISTORY OF THE UNITED STATES, 1789-1800 8 (Maeva March eds., Columbia University Press 1996).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *West v. Barnes*, 2 U.S. (2 Dall.) 401, 401 (1791).



Supreme Court of the United States.<sup>45</sup>

*Case of Hayburn*<sup>46</sup> - Wilson's judicial actions here illustrate his view that legislative power is finite. "In 1792, Congress enacted legislation that required the United States Circuit Courts to hear disability pension claims for veterans of the American Revolutionary War and to certify their findings to the Secretary of War."<sup>47</sup> James Wilson and four other Supreme Court justices, sitting as Circuit Court judges, tendered opinions in letter form to President George Washington *declining to serve in that capacity*.<sup>48</sup>

Wilson wrote in his letter to Washington, "[i]t is worthy to remark, that in Congress the whole legislative power of the United States *is not vested*. An important part of that power was exercised by the *people themselves*, when they ordained or established the Constitution."<sup>49</sup> Wilson further wrote "[u]pon due consideration, we have been unanimously of the opinion, that, the circuit court held for the Pennsylvania district could not proceed; Because the business directed of this act is not of a judicial nature. *It forms no part of the power vested by the Constitution in the Courts of the United States.* . . ."<sup>50</sup>

*Hayburn* demonstrates that Wilson believed that each branch of the federal government was given a parameter within which to operate under the Constitution. The three branches cannot impose restrictions on each other if the right to do so is not found in the Constitution. Wilson's earlier remarks that the whole of the legislative power is not found in Congress further indicates that he was not a proponent of the federal government acting outside the scope of powers granted explicitly in the Constitution.

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<sup>45</sup> *Id.*

<sup>46</sup> Case of Hayburn, 2 U.S. (2 Dall.) 409, 409 (1792).

<sup>47</sup> Kermit L. Hall, *Hayburns Case*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (2005), available at [http://www.encyclopedia.com/topic/Hayburns\\_Case.aspx](http://www.encyclopedia.com/topic/Hayburns_Case.aspx).

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> JAMES WILSON, HAYBURN'S CASE, 2 U.S. 409, 411-414 (1792), reprinted in COLLECTED WORKS OF JAMES WILSON 1, 346-347 (Kermit L. Hall & Mark David Hall eds., 2007) (emphasis added).

<sup>50</sup> *Id.* at 347. (emphasis added).

*Chisholm v. Georgia*<sup>51</sup> - Wilson's most well known decision continues to show that he was a strong proponent of individual liberty and looked to the words in the Constitution to establish the parameters of federal power. In *Chisholm*, Alexander Chisholm attempted to sue Georgia in the United States Circuit Court for money owed to the testator, Robert Farquhar, for goods that Farquhar supplied to Georgia during the American Revolutionary War.<sup>52</sup> Georgia refused to appear, stating that appearance would waive any objection to jurisdiction.<sup>53</sup> A courtroom reporter later observed, "Georgia was right in not appearing in this action" because Chief Justice John Jay "said from the bench that had the State pleaded it would have been an acknowledgement of the jurisdiction of the Court."<sup>54</sup>

Wilson wrote a lengthy opinion upholding the individual's right to sue a state in federal court and emphasizing federalism under the Constitution.<sup>55</sup> "Let a State be considered as subordinate to the PEOPLE: but let every thing else be subordinate to the State."<sup>56</sup> Wilson's opinion further reads "[a] State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully [sic] refuses to discharge it: The latter is amenable to a Court of Justice."<sup>57</sup> Wilson emphasized that it is the people who maintain the most rights under our Constitutional framework.

Wilson turned to the words in the Constitution to decide the case. First, Justice Cushing wrote:

The point turns not upon the law or practice of England. . .but upon the Constitution established by the people of the United States; and particularly upon the extent of powers given to the Federal Judicial in the 2d section of the 3d article of the ConstitutionFalseThe judicial power, then, is expressly extended to 'controversies, between a State and citizens of another StateFalse<sup>58</sup>

Wilson then wrote, "Could the strictest legal language . . . describe,

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<sup>51</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419(1793).

<sup>52</sup> *Chisholm v. Georgia*, WEST'S ENCYCLOPEDIA OF LAW (2005), available at [http://www.encyclopedia.com/topic/Chisholm\\_v.\\_Georgia.aspx](http://www.encyclopedia.com/topic/Chisholm_v._Georgia.aspx) (last visited Sept. 26, 2011).

<sup>53</sup> *Id.*

<sup>54</sup> Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1593 (2002).

<sup>55</sup> *Chisholm*, 2 U.S. at 466.

<sup>56</sup> *Id.* at 455.

<sup>57</sup> *Id.* at 456.

<sup>58</sup> *Chisholm*, 2 U.S. at 466.

with more precise accuracy, the cause now depending before the tribunal?”<sup>59</sup>

Wilson believed the Constitution’s words and phrases formed the outer bounds for the powers of federal branches. Here, the words explicitly stated that an individual could sue a state in federal court, so the judiciary had the power to hear the case.<sup>60</sup> Because the states, or rather the people, were not satisfied with this result, the Eleventh Amendment was passed, and a state could no longer be sued by an individual from another state (or under *Hans v. Louisiana*, by citizens of their own state).<sup>61</sup>

*Chisholm* is incredibly important in understanding the parameters of federal-branch power under the Constitution. *Chisholm* also shows the Court’s role in determining through judicial review whether an act is constitutional, albeit a judicial act. Wilson’s opinion here shows that he believed 1) in judicial review and 2) that it is the Constitution’s words and phrases that give the federal government the entirety of its power.

*Georgia v. Brailsford*<sup>62</sup> - This case involves Chief Justice Jay instructing a jury that the jury has the right to decide both facts and law in a trial.<sup>63</sup> Although Wilson was still on the Supreme Court in 1794, he did not deliver a separate opinion in *Brailsford*.<sup>64</sup>

*United States v. Peters*<sup>65</sup> - This case held that the federal district court had no jurisdiction over a foreign individual because a ship was not within the jurisdiction of the court. Wilson did not deliver a separate opinion in *Peters*.<sup>66</sup>

*Talbot v. Janson*<sup>67</sup> - *Talbot* held that the jurisdiction of the Court extended to the seas and that a citizen of the United States could also be a citizen of another state.<sup>68</sup> Wilson did not deliver a separate opinion in

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>62</sup> *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794).

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *See generally* *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794).

<sup>65</sup> *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795).

<sup>66</sup> *Id.*

<sup>67</sup> *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795).

<sup>68</sup> *Id.*

*Talbot.*

*Hilton v. United States*<sup>69</sup> - This case held that a tax on carriages did not violate Article I, Section 9 of the Constitution, mandating apportionment.<sup>70</sup> Importantly, the Court used judicial review to determine that the Congressional statute was constitutional. Wilson wrote a short opinion joining the majority and stating that his views had not changed from the opinion he wrote while in the Virginia Circuit Court.<sup>71</sup> However, no copy of his opinion in Virginia's Circuit Court exists.<sup>72</sup>

*Henfield's Case*<sup>73</sup> - In this Circuit Court case, a jury was determining whether Henfield committed an act of hostility against members of a United States peace treaty, thus violating the treaty.<sup>74</sup> Pertaining to the case, Wilson stated, "[t]he Constitution of the United States has declared that all treaties made, or to be made, under the authority of the United States, shall be part of the supreme law of the land."<sup>75</sup> Wilson's statements to the jury further show his strict adherence to his belief that federal action should be guided by the words actually *in* the Constitution.

*Ware v. Hylton*<sup>76</sup> - In *Ware*, the Court held that the Treaty of Paris, providing that British creditors from before the American Revolution could recover debts owed to them by Americans, overrode a Virginia law nullifying these same debts.<sup>77</sup> Wilson agreed that the constitutional right to make a treaty was supreme to Virginia state law.<sup>78</sup> Wilson reiterated his view that the Constitution protects individual rights,

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<sup>69</sup> *Hilton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

<sup>70</sup> *Id.* at 173.

<sup>71</sup> *Id.*

<sup>72</sup> Daniel B. Evans, *The Tax Protestor FAQ*, EVANS-LEGAL.COM, <http://evans-legal.com/dan/tpfaq.html>. (last updated Feb. 27, 2011).

<sup>73</sup> *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Penn. 1793); 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 33, at 367.

<sup>74</sup> Lecture on Law by James Wilson (1790-2), 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 33, at 368.

<sup>75</sup> *Id.* at 368.

<sup>76</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

<sup>77</sup> *Id.* at 281.

<sup>78</sup> *Id.*

stating, “. . . the Constitution of the United States authoritatively inculcates the obligation of contracts.”<sup>79</sup>

Wilson’s actions in securing independent judicial and executive branches of the United States and Pennsylvania, his speeches after the Constitutional Convention, and his Supreme Court opinions all suggest that Wilson believed the legislature was capable of abusing its power and that other branches, along with the people, needed to serve as watch-dogs over the legislature. Wilson also emphasized that the federal legislature had limited, enumerated power, while most rights remained with the states, or the people. The question is, then, what actions taken by our Legislature today would constitute the “abuse” that Wilson fought so ardently to avoid? Passing a portion of a statute that effectively ends federalism regarding state *and individual rights* may qualify as a sound answer.

#### ***IV. THE COMMERCE CLAUSE: EXPANSION LEADING TO UNCHECKED LEGISLATIVE AUTHORITY***

As Wilson notes, the federal government *only* has the power granted by the Constitution.<sup>80</sup> The extent of the federal legislature’s power comes from Article I, Section 8, which explicitly lists *all* of Congress’ powers. Article I, Section 8, Clause 3 grants Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>81</sup> The part of the clause giving the federal legislature the authority to regulate commerce among the several states has often been called the “Commerce Clause” and will be referred to as such.<sup>82</sup> Commerce regulated under this clause is often referred to as “interstate commerce” and will also be referred to as such here.<sup>83</sup>

Congress’ power to regulate *any activity* under the umbrella idea that the state or the individual is engaging in “interstate commerce” has expanded on a sigmoid curve since the Constitution’s adoption.<sup>84</sup> A full

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<sup>79</sup> *Id.*

<sup>80</sup> James Wilson, Speech At A Public Meeting In Philadelphia, *supra* note 25.

<sup>81</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>82</sup> Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL’Y 849, 849-93 (2002), available at <http://www.constitution.org/lrev/bork-troy.htm>.

<sup>83</sup> *Id.*

<sup>84</sup> See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 82-143 (Robert C. Clark ed., Foundation Press 16th ed. 2007) (1937).

review of this growth in federal legislative authority will show that, while the Commerce Clause has already been used in ways unstated by Wilson, the clause can still be kept within some form of the federalist framework he advocated. Conversely and logically, continuing to expand the Commerce Clause's power to include the right to regulate non-activity will signal the end of the federalist system as Wilson knew it.

*Gibbons v. Ogden*<sup>85</sup> - The New York Legislature granted Robert Livingston and Robert Fulton the exclusive right to operate steamboats in New York waters.<sup>86</sup> Thomas Gibbons began operating a competing steamboat service, licensed under a federal statute for "vessels to be employed in the coasting trade and fisheries."<sup>87</sup> Chief Justice Marshall upheld Gibbons' right to operate despite New York's law because the commerce in question was not simply confined to New York, but expanded beyond the state's borders.<sup>88</sup> Chief Justice Marshall wrote:

Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; *and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated;* and that something, if we regard the language or subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then may, be considered as reserved for the State itself.<sup>89</sup>

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<sup>85</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>86</sup> *Id.* at 1.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> *See generally id.*

<sup>89</sup> *Id.* at 194-95. (emphasis added).

Because the federal steamboats were engaged in interstate commerce, the federal law was constitutional.<sup>90</sup> Under the Supremacy Clause, any valid federal law preempts state law, so the federal steamboat license stood against Livingston and Fulton's steamboat monopoly issued by New York.<sup>91</sup>

Marshall also touched upon the judiciary's role in overturning legislative statutes under the Commerce Clause:

[The commerce power], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the [C]onstitution*. . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse.<sup>92</sup>

It is clear that Marshall believes the will of the people should be the final voice of reason, subject *only to whether the Constitution provides Congress with the initial right to act*. Whether the federal legislature possessed that right in the first place would continue to be scrutinized judicially.

The Supreme Court implemented various approaches to ensure the parameters of the Commerce Clause were defined and understood.<sup>93</sup>

#### A. *Direct Effects Test*

This test, while in line with Article I, Section 8, Clause 3 as actually written, is the most restrictive approach to interpreting the Commerce Clause.

*United States v. E.C. Knight Co.*<sup>94</sup> – The Court ruled that manufacturing ninety-eight percent of the nation's sugar<sup>95</sup> “bore no direct relation to commerce between the states” and could not be regulated under the Commerce Clause.<sup>96</sup> The Court has not favored this approach, and instead developed an expansive view of the term

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<sup>90</sup> See generally *id.* at 194-95.

<sup>91</sup> U.S. CONST. art. VI, cl. 2.

<sup>92</sup> *Gibbons*, 22 U.S. at 196-97 (emphasis added).

<sup>93</sup> SULLIVAN & GUNTHER, *supra* note 84, at 85.

<sup>94</sup> *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

<sup>95</sup> *Id.* at 44.

<sup>96</sup> *Id.* at 17.

“interstate commerce,” using the “substantial economic effects” test for the most part, while at times also using the “stream of commerce” test.

*B. Stream of Commerce Test*

The Court has also used a “stream of commerce” test.<sup>97</sup> Under this approach, some local, or intrastate activities could be regulated by Congress because the activities could be viewed as “in” commerce or as an integral part of the “current of commerce.”<sup>98</sup>

*Swift & Co. v. United States*<sup>99</sup> – Justice Holmes wrote:

Commerce . . . is not a technical legal conception, but a practical one, drawn from the course of business. ‘When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.’<sup>100</sup>

Under this interpretation, the federal government can regulate some intrastate activity under the Commerce Clause.

*C. Substantial Economic Effects Test*

The most expansive test used by the Supreme Court is the “substantial economic effects” test which holds that *any activity* (locally or interstate) that, in the aggregate, affects interstate commerce physically or economically is part of interstate commerce and can be regulated by the federal government. It is this view that has been the basis for the Commerce Clause’s nearly unlimited use as the basis for federal regulation.

*Houston, E. & W. Tex. Ry. Co v. United States* [The Shreveport Rate Case]<sup>101</sup> – The Court upheld congressional regulation of intrastate rail rates that discriminated against interstate railroad traffic by raising

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<sup>97</sup> SULLIVAN & GUNTHER, *supra* note 84, at 87.

<sup>98</sup> *Id.*

<sup>99</sup> *Swift & Co. v. United States*, 196 U.S. 375 (1905).

<sup>100</sup> *Id.* at 398-99.

<sup>101</sup> *Houston, E. & W. Tex. Ry. Co v. United States*, 234 U.S. 342 (1914).



the prices for routes between Texas and Louisiana compared to routes that stayed within Texas. Justice Hughes wrote:

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the nation, would be supreme within the national field . . . This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce [of a state], and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.<sup>102</sup>

#### *D. The National "Police" Regulation*

Congress increasingly used the Commerce Clause in the late 19th century to handle problems of morality and criminality.<sup>103</sup>

*Champion v. Ames* [The Lottery Case]<sup>104</sup> - The Court upheld the Federal Lottery Act of 1895.<sup>105</sup> The Act prohibited the importation, mailing, and interstate transport of lottery tickets.<sup>106</sup> Justice Harlan wrote:

Lottery tickets are subjects of traffic and therefore are subjects of commerce. . . the suppression of nuisances injurious to public health or morality is among the most important duties of government. If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by carrying of lottery tickets from one state to another?<sup>107</sup>

The Court used this precedent to sustain many laws prohibiting

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<sup>102</sup> *Id.* at 352-53 (internal citations omitted).

<sup>103</sup> SULLIVAN & GUNTHER, *supra* note 84, at 87.

<sup>104</sup> *Champion v. Ames*, 188 U.S. 321 (1903).

<sup>105</sup> *Id.* at 363-364.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 354-56.

objects or people deemed dangerous from interstate commerce.<sup>108</sup> It is important to note that even here, Harlan and the other Justices still analyzed whether some activity was occurring between the states.

*Hammer v. Dagenhart* [The Child Labor Case]<sup>109</sup> - The Court struck down a congressional act of 1916 that excluded the products of child labor from interstate commerce.<sup>110</sup> Justice Day wrote:

[The commerce power] is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that [the Lottery Case, *Hipolite Egg* and *Hoke*] establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities. [These] cases demonstrate the contraryFalse[In each] of these instances *the use of interstate transportation was necessary to accomplish the harmful results*.<sup>111</sup>

*Hammer* shows the importance of *first* engaging in commerce between states, as the Constitution explicitly states, before federal action can be justified.

#### *E. The New Deal*

Even though the federal government argued that the targeted activity had a substantial effect on interstate commerce (using the most expansive view of the commerce clause possible), the courts initially invalidated much of the New Deal measures that attempted to use the Commerce Clause as the basis for federal regulation.<sup>112</sup>

*Railroad Retirement Board v. Alton Railroad Co.*<sup>113</sup> – The Court ruled that Congress lacked the power to establish a compulsory

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<sup>108</sup> SULLIVAN & GUNTHER, *supra* note 84, at 88; *see also* *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding the confiscation of preserved eggs that did not have a proper label); *Hoke v. United States*, 227 U.S. 308 (1913) (upholding the prohibition of transporting women in interstate commerce for immoral purposes).

<sup>109</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>110</sup> *Id.* at 277.

<sup>111</sup> *Id.* at 269-71 (emphasis added).

<sup>112</sup> SULLIVAN & GUNTHER, *supra* note 84, at 91-92.

<sup>113</sup> *R.R. Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935).

retirement and pension plan for all railroad carriers.<sup>114</sup> Justice Roberts wrote for the majority and stated, “[T]he act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution.”<sup>115</sup> Roberts further wrote, “[I]s it not apparent that [such regulations] are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such?”<sup>116</sup>

*Schechter Poultry Corp. v. United States*<sup>117</sup> – The Court held a provision of the National Industrial Recovery Act of 1933, authorizing the President to issue “codes of fair competition for the trade or industry,” unconstitutional in relation to regulating wages and hours of individuals within one state.<sup>118</sup> Chief Justice Hughes rejected both the stream of commerce and substantial effects tests.<sup>119</sup> Justice Hughes wrote that these were not transactions in interstate commerce:<sup>120</sup>

If the federal government may determine the wages and hours of employees in the internal commerce of the state, because of their relation to costs and prices, and their indirect effect on interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting price, such as the number of employees, rent, advertising, methods of doing business, etc.<sup>121</sup>

Justice Day and the Court looked at the impact that this one decision could have on federal legislative power in terms of opening Pandora’s box. The Court’s concerns are in line with James Wilson’s concerns that the expansion of legislative power is the most difficult to undo.

*Carter v. Carter Coal Co.*<sup>122</sup> – The Court invalidated a federal regulation for minimum wage and maximum hours in coal mines.<sup>123</sup> Justice Sutherland wrote “the effect of the labor provisions of the

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 362 (emphasis added).

<sup>116</sup> *Id.* at 368.

<sup>117</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>118</sup> *Id.* at 523.

<sup>119</sup> SULLIVAN & GUNTHER, *supra* note 84, at 92.

<sup>120</sup> *Schechter*, 295 U.S. at 542-43.

<sup>121</sup> *Id.* at 549.

<sup>122</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>123</sup> *Id.*

[Act] . . . primarily falls upon production, and not upon commerce.”<sup>124</sup>

Despite Franklin Delano Roosevelt’s attempts to have the legislature pass a wide variety of measures under the Commerce Clause, the courts looked at the words and phrases in the Constitution to determine which actions were permissible, much as Wilson did during his time on the Supreme Court. However, frustrated with the Supreme Court, Roosevelt launched his court-packing plan.<sup>125</sup> Roosevelt’s ongoing plan sought to put more judges on the bench and to remove judges over seventy years of age.<sup>126</sup> While the controversy was ongoing with hearings in the Senate, the Court seemed to change direction in a number of decisions sustaining regulatory statutes under the Commerce Clause.

*NLRB v. Jones & Laughlin Steel Corp.*<sup>127</sup> – The Court held valid the National Labor Relations Act, which prohibited unfair labor practices in interstate commerce.<sup>128</sup> Chief Justice Hughes wrote:

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?<sup>129</sup>

The Court here is clearly shifting toward an expansive view of the Commerce Clause, and this shift constitutes the move away from the actual words and phrases in Article I, Section 8, Clause 3 of the Constitution. The Court also moved away from federalism as advocated and understood by James Wilson.

*United States v. Darby Lumber Co.*<sup>130</sup> - The Court held that the Fair Labor Standards Act of 1938, which established minimum wage and maximum hours for employees involved in the production of goods in interstate commerce, was valid against Darby, even though Darby was

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<sup>124</sup> *Id.* at 304.

<sup>125</sup> SULLIVAN & GUNTHER, *supra* note 84, at 94.

<sup>126</sup> *Id.* at 95.

<sup>127</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>128</sup> *Id.* at 49.

<sup>129</sup> *Id.* at 41-42.

<sup>130</sup> *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

engaged in manufacturing lumber within Georgia.<sup>131</sup>

As to the prohibition on shipments of proscribed goods in interstate commerce, Justice Stone wrote “[w]hile manufacture is not, of itself, interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.”<sup>132</sup> The Court explicitly overruled *Hammer*.<sup>133</sup> Notably, the Court continued to analyze whether activity between the states existed at some point.<sup>134</sup>

As to the validity of federal wage and hour requirements, the Court upheld these as well.<sup>135</sup> Justice Stone wrote:

[T]he evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as “unfair.” . . . The means adopted by § 15(a)(2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce, and so affects it, as to be within the reach of the commerce power.<sup>136</sup>

However, even *Darby* is well removed from where the Court would next take the Commerce Clause. *Wickard v. Filburn* represents a ruling diverging from the actual words in phrases in Article I, Section 8, Clause 3 as James Wilson understood it.

*Wickard v. Filburn*<sup>137</sup> – In *Wickard*, Filburn was a farmer in Ohio who produced a small acreage of wheat to sell, feed his livestock, use for seed, and make flour for home consumption.<sup>138</sup> Under the Agricultural Adjustment Act of 1938, Filburn’s quota for wheat

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<sup>131</sup> *Id.* at 125-26.

<sup>132</sup> *Id.* at 113.

<sup>133</sup> *Id.* at 115-17.

<sup>134</sup> *Id.* at 113.

<sup>135</sup> *Id.* at 122-25.

<sup>136</sup> *Darby*, 312 U.S. at 122-23.

<sup>137</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>138</sup> *Id.* at 114.

production was approximately three acres, but he harvested approximately seven acres.<sup>139</sup> Even though Filburn's production was limited to his farm, the Court ruled that the activity was a part of interstate commerce. The Court wrote, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." False<sup>140</sup>

*Wickard* either represents the outermost boundary of federal power under the Commerce Clause, or the ruling was outside the parameters of the Commerce Clause from the start. When compared with the statement "[t]he Congress shall have the power to regulate commerce . . . among the several states . . .," this ruling seems inconsistent with the words and phrases in the Constitution.<sup>141</sup> Yet, under this ruling, most activities would be deemed to fall within interstate commerce.

*Perez v. United States*<sup>142</sup> - In determining the constitutionality of the Consumer Credit Protection Act prohibiting loan sharking under the Commerce Clause, the Court reiterated the parameters of interstate commerce.<sup>143</sup> Federal legislative action under the Commerce Clause was permissible (1) to regulate the channels of interstate commerce, (2) to regulate and protect the instrumentalities of interstate commerce and persons and things within interstate commerce, and (3) to regulate activities that substantially affect interstate commerce.<sup>144</sup>

#### ***V. THE RE-EMERGENCE OF JUDICIAL REVIEW REGARDING FEDERAL LEGISLATION PASSED UNDER THE COMMERCE CLAUSE***

The Supreme Court did not invalidate any legislation as exceeding Congress' power under the Commerce Clause for sixty years.<sup>145</sup> The Court used the substantial effects test which, as noted above, establishes a low bar for activity to be deemed interstate commerce. However, in

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<sup>139</sup> *Id.* at 119.

<sup>140</sup> *Id.* at 125.

<sup>141</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>142</sup> *Perez v. United States*, 402 U.S. 146 (1971).

<sup>143</sup> *Id.* at 156-57.

<sup>144</sup> *Id.* at 150.

<sup>145</sup> SULLIVAN & GUNTHER, *supra* note 84, at 106.

the past fifteen years, the Court has returned to ensuring that the bar still exists.

*United States v. Lopez*<sup>146</sup> – The Gun-Free School Zone Act of 1990 made it a crime to knowingly possess firearms in school zones.<sup>147</sup> Lopez brought a handgun to school and was charged under the Act.<sup>148</sup> The Court held that having a handgun in school did not substantially affect commerce between the states.<sup>149</sup> Chief Justice Rehnquist wrote, “[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.”<sup>150</sup>

*United States v. Morrison*<sup>151</sup> - The Violence Against Women Act awarded civil remedies to victims of gender-based violent crimes.<sup>152</sup> Following the ruling in *Lopez*, the Court wrote:

*Lopez*’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor . . . Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.<sup>153</sup>

*Gonzales v. Raich*<sup>154</sup> - The Court upheld the federal legislation banning the growth of marijuana pertaining to strictly intrastate activity.<sup>155</sup> The Court used the maximum capacity of the substantial effects test just as it did in *Wickard*. Justice Stevens wrote, “[i]n both cases, the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.”<sup>156</sup>

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<sup>146</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>147</sup> *Id.* at 551 (citing 18 U.S.C. § 922 (q)(1)(A) ( Supp. V 1988)).

<sup>148</sup> *Id.*

<sup>149</sup> *Lopez*, 514 U.S. at 561.

<sup>150</sup> *Id.* at 560.

<sup>151</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>152</sup> *Id.* at 601-02 (citing 42 U.S.C. § 13981 (1995)).

<sup>153</sup> *Id.* at 611, 613.

<sup>154</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>155</sup> *Id.* at 10-33

<sup>156</sup> *Id.* at 2

As noted above, James Wilson was a strong proponent of federalism. It is axiomatic that using the Commerce Clause for activities well beyond what would first be thought of as “Commerce between the States” brings with it a loss of federalism, as the states, or the people, are denied the right to engage in some activity as the states or the people see fit. However, even this framework leaves the potential for a federalist system to work because when the states, or the people, are not engaged *in any activity* the federal legislature cannot reach them through the Commerce Clause.

## VI. THE END OF FEDERALISM

In 2010, Congress passed The Patient Protection and Affordable Care Act.<sup>157</sup> Section 1501 states:

An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month. If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).<sup>158</sup>

Section 1501 sets forth, as the basis for the federal legislative action, the following findings: “The individual responsibility requirement provided for in this section (in this subsection referred to as the “requirement”) is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).”<sup>159</sup> Paragraph (2) lists the ways that health care has a substantial impact on the national economy.<sup>160</sup> Finally, paragraph (3) states that under the Supreme Court ruling in *United States v. South-Eastern Underwriters Association*,<sup>161</sup> insurance markets fall within interstate commerce.<sup>162</sup>

Importantly, Congress’ findings did not base the individual

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<sup>157</sup> The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010).

<sup>158</sup> *Id.* at 244.

<sup>159</sup> *Id.* at 242.

<sup>160</sup> *Id.* at 243.

<sup>161</sup> *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

<sup>162</sup> The Patient Protection and Affordable Care Act § 1501, 124 Stat. at 244.



mandate on generating revenue under the tax and spend provision.<sup>163</sup> Although an analysis here would show that Section 1501 is a penalty and not a tax (as described *in the statute*, “there is hereby imposed a *penalty* with respect to the individual in the amount determined under subsection (c)”<sup>164</sup>), Congress itself based the propriety of the individual mandate on the Commerce Clause.<sup>165</sup> As such, the Commerce Clause is the basis for examination.

If Section 1501 of The Patient Protection and Affordable Care Act is upheld, the system of federalism Wilson cited so often, whereby the federal government has limited power, reserving most of the rights to the states, or to the people, would be destroyed. One clause in Article I would be the basis for the federal Legislature’s ability to regulate virtually anything. Every prior Commerce Clause case analyzed some *activity* to determine if the *activity* was commercial. Without activity, no commerce can possibly exist. Here, even if one is the farthest removed from engaging in commerce between the states (not engaging in any activity at all), one would still be subject to federal regulation. Therefore, the sphere for the states and individuals to operate without federal intervention would be abolished.

Fatal to coinciding Section 1501 with any reasonable Wilsonian view is the fact that *the people* would be subject to federal power *at all times*. There is no possible way that the author of the words “[W]e the people” in the Constitution contemplated Congressional power that usurped virtually all-individual autonomy under the Commerce Clause. Wilson’s view that the Constitution left most of the rights to the states and the people would be obliterated.

If the COD ever intended the Commerce Clause to be used in this manner, why would the committee list the powers of the federal government at all? Similar to Wilson’s original contention, the federal legislature would have been given general rights, broadly encompassing the right to mandate that people participate in a government program. Alternatively, the COD could have simply added the Commerce Clause and stopped at this point, as it would have encompassed virtually all activity.

Wilson’s views on granting general rights did not prevail in the

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<sup>163</sup> *Id.* at 242.

<sup>164</sup> *Id.* (“[T]here is hereby imposed a *penalty* with respect to the individual in the amount determined under subsection (c).”) (emphasis added).

<sup>165</sup> *See generally* The Patient Protection and Affordable Care Act § 1501.

COD, and Rutledge and Randolph were able to include specific, enumerated rights. After Wilson, Rutledge, Randolph, Ellsworth and Gorham completed their work drafting the Constitution, Wilson advocated the merits of enumerated rights as much as anyone; he used the words and phrases within the Constitution as the basis for his Supreme Court decisions, relying heavily on their reasonable meaning.

Wilson worked tirelessly to ensure that the judiciary had independence from the legislature so the judiciary could determine with impunity that the legislature's actions were constitutional (whether the Federal Judiciary or Pennsylvania's). While on the Supreme Court, Wilson also showed that he was a proponent of judicial review and limited Congressional power.

## ***VI. CONCLUSION***

James Wilson was one of the most influential founding fathers of the 18th Century in creating the Constitution. James Wilson's work to refine Pennsylvania's Constitution by reigning in the legislature and giving the judiciary autonomy, his statements on the Constitutional enumeration of power and limited federal rights, and his Supreme Court opinions, demonstrate that James Wilson was a proponent of individuals retaining much autonomy under the United States Constitution. A reasonable analysis of James Wilson's views on the Constitution and Supreme Court case law generally suggests that Section 1501 should be struck down under judicial review. Neither James Wilson nor any Justice writing a Supreme Court opinion to date contemplated non-action as a basis for enacting the Commerce Clause because the interpretation cannot be reconciled with the notion that the Constitution maintains states' and individual rights.