AGGREGATE EFFECT:
JACKSON, REHNQUIST, AND THE REMAKING OF AMERICAN FEDERALISM

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By

Ryan J. Travers, B.A.

Georgetown University
Washington, D.C.
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This thesis explores the influence Robert H. Jackson had in shaping William H. Rehnquist’s Commerce Clause jurisprudence. Jackson and Rehnquist were two of the most influential Justices of the twentieth century and perhaps in the history of the United States Supreme Court. Their lives were similar in some ways — both served in Presidential Administrations prior to joining the Court — and yet, they were also divergent: Jackson was a lifelong Democrat, while Rehnquist was a Republican. Their views on the Commerce Clause, one of the most important sources of federal government power, also show some similarities and differences. Both were the authors of landmark Supreme Court decisions that defined the scope of the Commerce Clause and of the federal government. Jackson advocated the expansion of the Commerce Clause and wrote the opinion in Wickard v. Filburn, a case that significantly expanded the federal government’s power; Rehnquist led the opinion in United States v. Lopez that curtailed that same commerce power, overturning a federal statute under the Commerce Clause for the first time since before Jackson joined the Court. Their lives would intersect during two years from 1951 until 1953 while Rehnquist served as a clerk under Jackson. This experience became one of the most important milestones in Rehnquist’s life, as well as a source of significant controversy.

The forces of continuity and change press on the Supreme Court just as on other major political institutions. This thesis will address this significant reinterpretation of the Commerce Clause of the United States Constitution and place it within the doctrines of stare decisis and judicial restraint, while arguing that changing circumstances and the personal relationship of
Justices Jackson and Rehnquist contributed to a redirection in constitutional law in the United States. Jackson spent a significant portion of his career in Washington, DC advocating for the expansion of the Commerce Clause and generally continued to do so as a Justice. Rehnquist and Jackson had a difficult relationship during and after Rehnquist’s clerkship. After he joined the Court as a Justice, Rehnquist generally sought to restrain the power of the federal government and eventually did so in *United States v. Lopez*. This thesis argues that Rehnquist’s *Lopez* decision is not a repudiation of Jackson’s philosophy; rather, it complements that philosophy and illustrates the impact Jackson’s influence — along with others — had in shaping Rehnquist’s jurisprudence and the *Lopez* decision.
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INTRODUCTION

In January 1996, before a joint session of Congress, President William Jefferson Clinton announced to the country, “The era of big government is over.” It was a tacit recognition of the contemporary state of government in which conservatism was on the rise, as conservative Republicans controlled the House of Representatives and were calling for cuts in the size of government. It was also an acknowledgment of the transformation across the street, at the Supreme Court, where over half a century of liberal jurisprudence was overturned by a new conservative majority on the Court, led by Chief Justice William H. Rehnquist.

Rehnquist had risen rapidly through the ranks of the legal profession. As an undergraduate, he studied constitutional law and political theory at Stanford University, examining the role of government. He later finished near the top of his class at Stanford University Law School, serving as editor of its newly formed Law Review and earning a reputation for being one of the most conservative members on the campus.

Shortly after finishing his law degree, Rehnquist became a clerk for Justice Robert H. Jackson, who was an Associate Justice on the Supreme Court, a former attorney general and solicitor general, and the chief American prosecutor at the International Military Tribunal in Nuremberg, Germany. Jackson had begun his career as a country lawyer in rural New York, eventually getting involved with the Democratic Party, where he would befriend a rising star, Franklin Delano Roosevelt. Jackson subsequently served in a variety of posts in the Roosevelt Presidential Administration, eventually leading Roosevelt’s efforts to defend the constitutionality of the New Deal economic legislation.

The Supreme Court in the 1930s was a conservative force in the American government, frequently striking down progressive economic policies as unconstitutional, particularly under the

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interstate Commerce Clause. The Roosevelt Administration believed that the Commerce Clause granted it the power to regulate industry, allowing for legislation that set minimum wages and maximum hours, created a national social security retirement program, and set agricultural quotas. The Court, however, disagreed and spent Roosevelt’s first term striking down his legislation. Roosevelt, with Jackson aiding his efforts, then proposed to reform the Court in what was known as the “Court packing plan.” While the plan eventually fell through, Roosevelt got his wish, as the Court began interpreting the Constitution and the Commerce Clause more liberally, allowing for expansive government. After Jackson was appointed to the Supreme Court, he upheld the constitutionality of the Agricultural Adjustment Act in a case that defined a sweeping federal commerce power.

By the time Rehnquist had joined Jackson as a clerk in 1952, the Justice had become a moderate member of the Court, but he was still largely known as a face of Roosevelt’s New Deal and its expansive federal government. The clerk system was relatively new and undefined in the early 1950s, but it granted Rehnquist the opportunity to work alongside the legal leaders of the day, examining major constitutional issues. While Rehnquist proved himself as a man of great intellect, he clashed with Jackson at times — to the detriment of their relationship. On certain issues the two men were kindred spirits, but on others, they diverged significantly. Rehnquist would leave Jackson disappointed both personally and professionally. Years later, when Rehnquist was nominated to be a Supreme Court Justice, his clerkship became a topic of great examination due to the insight it offered into his views on constitutional issues and because of several controversial memos he wrote for Jackson.

The purpose of this thesis is to examine Rehnquist’s relationship with Jackson and determine how the Justice influenced his clerk’s judicial philosophy, particularly in relation to federalism and the Commerce Clause. Rehnquist was exposed to a multitude of issues as a clerk, and the foundation that he employed later as a Justice was likely formed in this time. Looking at Rehnquist’s mentors at Stanford and his time with Jackson, we will be able to witness his jurisprudence being formed. Then, comparing his philosophy through his opinions as a Justice, we will examine the ways the two men were similar and the ways in which they contrasted, looking to other sources of influence as potential answers.
It is rare for a clerk to later join the Court — only six have done it — and the relationship between Rehnquist and Jackson, along with an examination of their opinions, will allow us to consider the degree to which that relationship later impacted Rehnquist as a member of the Supreme Court and how that affected federalism in the United States.
CHAPTER ONE

ROBERT JACKSON AND COMMERCE AMONG THE SEVERAL STATES

The Early History of the Commerce Clause

Early Republic

The Articles of Confederation, which had been adopted in 1781 by the thirteen former British colonies in America, had been in effect for just five years before its deficiencies became evident to the political leaders in America. The Articles had established a loose confederation of states with an extremely limited national government. Under the Articles of Confederation, the national government lacked the power to effectively tax or regulate interstate commerce. The Articles explicitly said that each state retained “its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”

Conspicuously absent from the powers expressly delegated to the Congress was the power to regulate interstate commerce. In fact, the Congress was prohibited from making any treaty “whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to.”

The inefficiencies of the Articles of Confederation and the burdens that the commercial system they created imposed on trade in the United States were evident to the founding fathers. In response to these difficulties the leaders of the Mid-Atlantic states of the fledgling infant nation assembled in Annapolis, Maryland in 1785 to “to take into consideration the trade and

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3 U.S. Articles of Confederation art. 2.
4 Ibid., art. 9.
Commerce of the United States [and] to consider how far an [sic] uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony.” Representative from New York, New Jersey, Pennsylvania, Delaware, and Virginia — including Alexander Hamilton and James Madison — participated in the Annapolis Convention and resolved to assemble a Constitutional Convention in Philadelphia, Pennsylvania in May 1787 to devise further provisions to be rendered to the federal government.7

In over four months in Philadelphia, delegates debated the merits of a stronger federal government with increased power to regulate commerce between the states and with foreign nations.8 The Constitution, signed on September 17, 1789, was a series of compromises designed to bring about a more vigorous federal government. A cornerstone of that document was Article I, Section 8, Clause 3, which stated: “[The Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” The Commerce Clause, as it came to be known, addressed a central concern of the Annapolis Convention: the fledgling state of American commerce burdened by varied state regulations and tariffs.9

During the state ratifying debates, Hamilton and Madison, who had been two of the architects of the proposed Constitution, released a series of letters under the pseudonym

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7 Ibid.


“Publius.” The letters, which came to be known as the Federalist Papers, argued in defense of the proposed Constitution. In the Federalist 11, Hamilton declared the need for strong commerce under national authority:

An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States.  

In Federalist 17, Hamilton attempted to calm fears that the commerce power would unnecessarily introduce federal power into the jurisdiction of the states:

Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.

As such, when the Constitution was adopted in March 1789, fears persisted about the extent of federal power, but the benefits of unrestrained interstate commerce under a national power ultimately outweighed those fears.

For the first thirty years of the young American Republic there was little discussion about the commerce power, until a dispute over navigation rights reached the Supreme Court in 1822. The case, Gibbons v. Ogden, examined the constitutionality of a practice in which states that had granted navigation monopolies to certain steamboat lines forced out-of-state boats to pay substantial navigation fees to operate in those waters. Former New Jersey Governor Aaron Ogden filed an injunction against Thomas Gibbons in an attempt to block Gibbons from operating boats


on the waters between New York and New Jersey. In a 6-0 ruling, the Court ruled in favor of Gibbons, holding that New York lacked the power to regulate interstate commerce under Article 1, Section 8, Clause 3 of the Constitution. Chief Justice John Marshall, writing for the Court, said that the federal government’s power over commerce among the states was plenary:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. 12

Marshall examined the definition of “among the several States” and said that this enumerated power restricted federal control over activities which were exclusively internal commerce within the state. Marshall then established a precedent that would dictate federal power for over fifty years, declaring that Congress’ power over interstate commerce was absolute. He said, “This power, like all other vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” 13 He continued, writing that “the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government.” 14 Marshall’s opinion in Gibbons v. Ogden established that in the realm of interstate commerce federal authority was supreme. This expansive view of the Commerce Clause would dictate jurisprudence for over fifty years.

Marshall’s opinion upheld what is called the “dormant commerce power,” which prohibits state regulations that restrict the flow of interstate commerce. Hamilton and Madison had decried the burdens that were placed on commerce by varied state regulations, and the Commerce Clause was intended to make the regulation of commerce between the states and with

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

13 Ibid.

14 Ibid.
foreign nations uniform.\textsuperscript{15} The dormant Commerce Clause does not deal with Congress’ power to regulate commerce, but rather it examines restrictions on state power to enact commercial regulations. In the nearly sixty years following \textit{Gibbons} the Court predominantly focused on this application of the commerce power, striking down state legislation which either conflicted with federal regulations or burdened interstate commerce.\textsuperscript{16}

\textit{Regulation and the Lochner Era}

The focus of the commerce power began to change at the end of the nineteenth century as Congress sought to regulate the growing industrial economy. In 1887, Congress passed the Interstate Commerce Act (ICA), which made the railroad industry the first private industry subject to federal regulation. In the years that followed, state and federal legislators sought to implement social policies aimed at improving working conditions. These policies tended to inhibit business and the free market system that had defined the American economy. In 1890, the federal government passed the Sherman Anti-Trust Act, which prohibited anticompetitive business practices and tasked the federal government with prosecuting companies suspected of being in violation of the law. The law gave broad powers to the federal government to regulate business practices and that unprecedented extension of federal power was vehemently opposed by industry leaders.\textsuperscript{17}


In the 1895 case of *United States v. E.C. Knight Company*, the Court narrowly interpreted the Sherman Act’s powers and the federal commerce power, limiting the scope of the federal government’s authority. E.C. Knight was a Philadelphia sugar company that had bought out four competitor refineries and controlled 98 percent of the sugar product in the United States. The federal government sought to invalidate the buyouts of the competitors, and the case was appealed to the Supreme Court. The Court held that, because the act of refining was a manufacturing issue, the federal government did not have the authority to regulate it under the commerce power. The Court held that “commerce succeeds to manufacture, and is not part of it. . . The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce.”18 The Court saw a distinction between manufacturing, which was a strictly intrastate activity, and the sale of a product across state lines, which was an interstate commercial activity. By narrowly defining commerce as the actual sale of product, the Court severely limited the federal government’s power to regulate business.

This decision ushered in period that came to be known as the “Lochner era,” named for a 1904 Court ruling, *Lochner v. New York*, when the Court overruled a New York state law that limited the number of hours bakers could work in a week.19 The *Lochner* ruling was followed by a series of cases striking down regulation of working conditions. The federal government, spurred by the Progressive movement of the early twentieth century, saw cause to take action. Federal laws regulating child labor, minimum wages, and hours were challenged before the Court, and the conservative elements of the Court consistently struck down the legislation.

It was into this political and legal environment that Robert H. Jackson was born and came of age. The Progressive movement, which was gaining popularity, tried to implement social and

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economic policies while the conservative elements on the Court sought to block the program in
the judiciary.

Robert H. Jackson’s Early Life and Career

Early Career

Robert H. Jackson was born in 1892 and was raised in Frewsburg, New York, a small
town on the border between New York and Pennsylvania in what Jackson described as the dairy
region. The son of farmers, Jackson was raised in a time of great turbulence for the agricultural
industry in Frewsburg. Mechanization and modern capitalism had begun to transform the
Jeffersonian ideal of the yeoman farmer drastically. Jackson saw as the farmers grew increasingly
dependent on markets and machines:

When the tractor came in and the automobile, farmers had to have cash. They couldn’t
produce their own gasoline nor their spare parts. . . . They became more and more
dependent, with all this machinery and the chattel mortgage notes that went with it, on
the steady flow of cash to meet their cash demands. Hence, the condition of markets --
international, national and local -- became vastly more important to them.  

Jackson’s upbringing in rural New York instilled a sense of individualism, and the transformation
of the farm life had an impact on him in his time as public servant, spurring a desire to ease the
hardships on the poor and needy. In the last years of his life, Jackson admitted to being “rather
Jeffersonian in the sense that I believe profoundly in the soundness of farm life and country
life.”

Jackson was the last of what many called the “country lawyer.” He entered Albany Law
School without having ever enrolled in college. His choice of Albany demonstrated a pragmatic

20 Robert H. Jackson, “Justice Jackson’s Story,” manuscript of Recording taken by Dr. Harlan B.
of Congress, Manuscript Division, Washington, DC, Box 190, Folder 5, 561.

21 Ibid., 563.

22 Ibid., 570.
tendency that would define Jackson. He explained his choice of Albany, saying, “I thought I would learn more that was not in the books at Albany than in any other place, and that it would be useful to me in the practice of law in my community.”  

He was more interested in the legal duels of trials than he was in the high-minded legal research of many of his Ivy League contemporaries, and he described the professors at Albany as “not philosophical but they were practical.”

Jackson began an apprenticeship in Jamestown, New York with a local lawyer, Frank Mott, after completing his legal studies in only one year. Jackson was one of the last lawyers in the region to use a legal apprenticeship, rather than formal schooling, to complete his legal education, and he was likely the last to reach the Supreme Court.

Despite his dearth of formal education, Jackson excelled, quickly building a promising private practice in Jamestown. After Mott left the firm to pursue a post in the New York Public Service Commission, Jackson assumed control of the firm. Despite not having been admitted to the state bar — he was awaiting admission — Jackson took on his first case at the age of 21 when he defended local labor leaders who had been convicted of inciting a riot during a local railway strike.

Jackson quickly established himself as an attorney and became known as part of a group of young, “radical” Jamestown lawyers. Later in life, Jackson recalled the group’s views on the modern capitalist economy:

"All of us younger fellows discussed the short-comings of the industrial system, the needs of labor, and the struggle that was going on in the economic world, but I don’t think that we thought of the lawyer as playing so much of a part in the economic world."

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23 Ibid., 71.


25 Ibid., 86.

26 Ibid., 94.
Jackson saw the plight of industry in local towns and believed that these economic shortcomings needed to be addressed. Jackson supported the progressive program of Woodrow Wilson and what described as the “New Freedom” offered by the Federal Reserve System and the Federal Trade Commission.  

27 His interest and his work in the political sphere began to grow during this time, and, shortly thereafter, Mott introduced him to Franklin Delano Roosevelt, then an Assistant Secretary of the Navy.  

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The New Deal

In the years that followed, Jackson joined Roosevelt’s rise to power, serving in various capacities during Roosevelt’s Governorship of New York from 1929-1932 before joining him in Washington, D.C. during Roosevelt’s first Presidential Administration. Jackson served as the General Counsel of the Bureau of Internal Revenue, where he led the tax trial of former Secretary of the Treasury Andrew Mellon. The trial brought national fame to Jackson as he prosecuted Mellon, albeit unsuccessfully, for tax evasion and fraud. Jackson quickly rose in Roosevelt’s administration, serving as Assistant Attorney General for the Tax Division of the Department of Justice and later as Assistant Attorney General of the Anti-Trust Division.  

By the time Jackson was appointed to the Anti-Trust division, the Supreme Court had invalidated much of Roosevelt’s economic program. Drawing on the 1918 case of Hammer v. Dagenhart — which held that the commerce power did not give Congress the authority to regulate child labor that was strictly intrastate in nature — the Court took a narrow interpretation

27 Ibid., 99.

28 Ibid., 102.

of Congress’ powers. As a result, Roosevelt’s signature programs, including the Agriculture Adjustment Act and the National Industrial Recovery Act, were overturned by the Court.

On “Black Monday,” May 27, 1935, the Court ruled against the Roosevelt administration in three cases. The final decision, and the most significant, was *Schechter Poultry Corp. v. United States*, where the Court invalidated the NIRA in its entirety. The Court held that the Act was an unconstitutional deference by the legislative branch to the executive and was an unconstitutional application of the commerce power. In *Schechter* the Court held that the Commerce Clause gave Congress the power to regulate intrastate activities only if they directly affected interstate commerce, not activities that indirectly affected commerce. The Court believed that any further extension would grant Congress a plenary power to regulate any activity:

> If the Commerce Clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government.

*Schechter* was the highest-profile repudiation of Roosevelt’s policies, but it would not be the last as the Court later used the *Schechter* decision to overturn the Bituminous Coal Conservation Act of 1935 as an unconstitutional extension of the Commerce Clause.

In response to the Court’s rulings, Roosevelt determined to solve this problem by reorganizing the Court. Over the course of 1937, Roosevelt proposed allowing the President to add one Justice for each Justice that did not retire within six months of turning seventy. Jackson

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32 Ibid.

admitted that he did not initially approve of the plan. He did, however, believe that the Supreme Court’s opposition to the Roosevelt administration proved that the judicial body was out of touch with the plight of average Americans. He described the problems with the Court:

The difficulty was that this group of judges . . . were applying the standards of their youth to the legislation of an entirely different period. They thought they were applying the Constitution, but they really were misapplying it, in our view, because what is reasonable also has to depend on the environment and the circumstances . . . They were striking down a good deal of legislation on the basis of what conditions were when they were brought up on the frontier.

Jackson would reiterate similar concerns in testimony before the Senate Judiciary Committee, and generally is believed to have given the most convincing arguments for what was otherwise an unpopular and unsuccessful reorganization proposal.

Roosevelt’s reorganization plan eventually dissipated after 1937, when Justice Owen J. Roberts joined the liberal members of the Court in upholding a Washington State minimum wage law. The “switch in time” led to a series of decisions supporting the New Deal, most notably National Labor Relations Board v. Jones & Laughlin Steel Corporation, which held that the Commerce Clause gave Congress the power to regulate labor relations. The Court held that “it is the effect upon commerce, not the source of the injury,” which determines whether Congress can regulate it. The Court described the commerce power as plenary and said that acts which are part of a “stream,” or momentum, of commerce can be regulated under the commerce power.

34 “Justice Jackson’s Story,” 428.
35 Ibid., 448.
38 Ibid.
39 Ibid.
Jones & Laughlin signaled acceptance, at least to a degree, of the Commerce Clause interpretation that the Roosevelt administration had sought for nearly five years. Jackson later said that he did not believe that the switch was the result of the reorganization plan but was a philosophical retreat that signaled the Court’s acceptance of the Commerce Clause reinterpretation.  

In 1938, Roosevelt appointed Jackson to the position of Solicitor General, where he would defend the Administration’s policies before the Supreme Court. This position allowed Jackson to clearly articulate his views on the Commerce Clause, judicial review, and judicial restraint. The Commerce Clause battles were seemingly resolved with Jones & Laughlin, but Jackson believed it was necessary to continue to push for a broad interpretation of the clause and did so as Solicitor General. He believed that the Solicitor General “should try to broaden the interpretations of interstate commerce to make it possible to achieve on a nation-wide basis things that were essential to the well-being of a modern industrial and commercial society.”

After serving successfully as Solicitor General, Jackson was appointed to the position of Attorney General, where he would build the legal foundations for the Roosevelt Administration’s military preparations for World War II. His time at the Department of Justice was brief, however, as Chief Justice Charles Evans Hughes retired from the Supreme Court in 1941 and Justice Harlan Stone was appointed to the Chief Justiceship, leaving a vacancy on the Court that Jackson would assume.

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40 “Justice Jackson’s Story,” 450.
41 Ibid., 646.
Jackson’s Philosophy: Pragmatism and Judicial Restraint

Pragmatism

In 1941, Jackson was nominated and confirmed to be an Associate Justice on the Supreme Court. The country lawyer, who had risen to the highest realms of government, took his place on the highest Court in the nation. Later in his life, Jackson described the transition that occurred upon joining the Court:

Something does happen to a man when he puts on a judicial robe, and I think it ought to. The change is very great and requires a psychological change within a man to get into an attitude of deciding other people’s controversies instead of waging them. It really calls for quite a changed attitude. Some never make it – I am not sure I have.  

Jackson strived to be what Glendon Schubert would later call a dispassionate justice. He described the model which he aspired to, saying, “The kind of judge we admired was a man that didn’t let the personalities on either side interfere with his deciding the case on the facts and the law.”

Jackson’s first years on the Court however, generally reflected the views and judicial philosophy that he had advocated for as a member of the Roosevelt administration. His time as Solicitor General, and later as Attorney General, allowed him to articulate his belief in judicial restraint and pragmatism, and this would stay with him on the Court. He believed that the Court too often relied on theory instead of taking a pragmatic approach to the Constitution. To Jackson, the facts of the case had supreme importance, and the Court should not rely solely on theory to overturn the policies of democratic majorities. He believed that, in the realm of policy, deference

42 Ibid., 1097.


44 “Justice Jackson’s Story,” 1101.
should be showed to legislative bodies. As an Associate Justice, the philosophy Jackson articulated during his New Deal service provided a foundation for his jurisprudence.

Judicial Restraint

In his 1940 book, *The Struggle for Judicial Supremacy*, Jackson castigated the Supreme Court and called for judicial restraint. Written at the urging of President Roosevelt, *The Struggle for Judicial Supremacy* was the definitive defense of the New Deal’s constitutionality and Roosevelt’s disputes with the Court. Jackson felt that the Court in the first forty years of the twentieth century had chosen to subvert the will of democratically elected majorities to the views of nine — and often times just five — men. Jackson articulated his theory of judicial restraint, calling on the Court to respect the wishes of democratically elected majorities. He said, “The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.” Jackson felt that the Court took too much power away from democratically elected legislators and threatened the fabric of the nation. He decried the Court’s move to take “control of a large and rapidly expanding sphere of policy.” He saw the Supreme Court as an inherently undemocratic body and judicial review as an undemocratic process; he believed that there was a “basic inconsistency between popular government and judicial supremacy.” He called for a restrained Court that respected the wishes of the elected legislators unless judicial intervention was absolutely necessary.


47 Ibid., xi.

48 Ibid., vii.; “Justice Jackson’s Story,” 454.
Jackson saw the act of overturning a law of Congress as one of the gravest decisions that could be made by the Court, and he believed that such a decision should be made with extreme caution. He questioned the authority to strike down a law and held “the conviction that it is an awesome thing to strike down an act of the legislature approved by the Chief Executive and that power so uncontrolled is not to be used save where the occasion is clear beyond fair debate.”

Jackson also believed that judicial activism was misguided for pragmatic reasons. He believed that not only was the Court unequipped to legislate from the bench, but that it also tended to err when doing so. When an activist Court invalidated an Act of Congress, they were often overruled by constitutional amendment, force, or admission of error. He said, “In no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court.” In interviews near the end of his life, Jackson said that “activism was no more appropriate on the part of the judiciary in favor of reforms than it was in knocking them down. The initiative should remain with the legislative branch.”

*Stare Decisis*

Jackson also believed in the doctrine of *stare decisis*, even if he did not always advocate for its use. He felt that “There ought to be a certain adherence to precedent, as [Justice Benjamin] Cardozo has said. By and large the way a question was decided yesterday ought to the way in which it is decided today, even though the personalities have changed sides.”


51 “Justice Jackson’s Story,” 1050.

52 Ibid., 1101-1102.
the *Columbia Law Review* in 1945, Jackson wrote, “The mere fact that a path is a beaten one is a persuasive reason for following it.” Yet, Jackson, who had argued for overturning Commerce Clause precedent, was not afraid to stray away from precedent and admitted as such in his 1944 address to the American Bar Association. He said, “I never have, and I think few lawyers ever have, regarded the rule as an absolute. There is no infallibility about the makers of precedents.” He believed that flawed precedent should not stop the search for the correct application of the law. Continuing his remarks before the ABA, he said, “We cannot deny to the judicial process capacity for improvement, adaptation, and alteration unless we are prepared to leave all evolution and progress in the law to legislative processes. But because one should avoid Scylla is no reason for crashing into Charybdis.” Jackson supported a pragmatic use of stare decisis and, while he believed in following precedent, he also felt that there were times judges should stray from flawed precedent.

Jackson’s views on stare decisis also led him to embrace the strategic use of dissents. He believed that dissents offered Justices in the minority an opportunity to shape the future use of precedent:

> I think every Justice that’s ever sat on this Court was of the opinion that our system by which dissents are published is a better system than the French system, for example, in which no dissents are published. If there is a doubt in the minds of the court, if there is a division, both sides are presented to the professional. Perhaps ten years from now the

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55 Ibid.
profession will have adopted the dissenter’s views. It’s happened some times. I think the prospect of improvement in the law, advancement, progress is helped by dissents. He did not take the privilege of a dissent lightly, however. He said, “I don’t think dissent has any merit just because it is a dissent. I think it may be that we’ve got a public which thinks a dissent has some bravery about it, or some merit – just in dissenting. That I don’t agree with at all.”

Jackson respected precedent, but he also believed that strategic use of dissents could create a foundation for new legal reasoning to build upon.

Jackson viewed the Constitution as a framework left by the founders to guide the governmental function, but he believed that the document left room for interpretation. Jackson differentiated his views of the Constitution from groups that held “originalist” interpretations of the Constitution, explicitly citing the Daughters of the American Revolution, noting, “I believe in a ‘cult of the Constitution’ in the [living instrument] sense, but I don’t believe in it in the sense of the [Daughters of the American Revolution], which seems to regard it as a God-given doctrine that they would . . . stand still with.”

Jackson believed that the Constitution left room for interpretation from the Supreme Court, the legislature and the executive, and that it required a balance between the interests of the democratically elected majorities and the rights defined in the Constitution.

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56 “Justice Jackson’s Story,” 1104.

57 Ibid., 1105.

58 Ibid., 455.

Jackson, the Commerce Clause, and Wickard v. Filburn

Jackson’s Commerce Clause Philosophy

Jackson’s conception of the Commerce Clause power was one of broad federal powers. He described the deference prescribed to Congress in this field, saying, “It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress.”60 He believed that, despite the Court’s intransigence during Roosevelt’s first term, Congress was empowered under the Commerce Clause to cure the social ills of the modern market.61 Granting large deference to Congress to regulate interstate commerce, Jackson believed the federal government was justified in promoting expansive New Deal programs.

In a series of speeches towards the end of the 1930s Jackson laid out his views of the so-called dormant Commerce Clause. Before the Maryland bar, he declared that “Freedom of interstate trade is a basic postulate of our union. It is woven inextricably into the fabric of our economic life.”62 Jackson believed that the commerce power, while guaranteeing the federal government jurisdiction over interstate commerce, also restricted the states from creating burdens to trade. He thought that it was better to have “severe restrictions upon the powers of states over interstate commerce than . . . risk the multiplication of burdens.”63  

At the National Conference on

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62 Ibid.

63 Ibid.
Interstate Barriers, Jackson criticized state regulation, which would impede the freedom of the national market. Summoning the founding fathers, Jackson said they had “believed that exclusive control by Congress of commerce among the several states made certain that such trade would not be obstructed by state barriers.” He implored the audience: “We can not let trivial instincts create a sense of division among us that would tend to Balkanize America. Balkanism, I suppose, is more a state of mind than a condition of geography.” Jackson envisioned a national market dictated by the principles of the federal commerce power, with limited state obstruction.

By the time Jackson reached the Court, the Commerce Clause battles he depicted in The Struggle for Judicial Supremacy were largely over. National Labor Relations Board v. Jones & Laughlin Steel Corporation and U.S. v. Darby Lumber Co. had overturned Court rulings curbing the federal commerce power, limiting the restrictions placed on the commerce power. As Jackson joined the Court on July 11, 1941, the struggle appeared to be won. Nonetheless, Potter Stewart remarked that “no man ever came to the court with a larger conception of the commerce power.” The 1942 term offered an opportunity to put his Commerce Clause views on the docket, expanding federal power beyond any previous decision. Jackson’s Wickard v. Filburn opinion utilized his expansive view of the commerce power and his belief in judicial restraint to give the federal government unprecedented powers in the area of commerce.

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65 Ibid.

66 Jones & Laughlin.; United States v. Darby, 312 U.S. 100 (1941). In Darby, the Court, overturning Hammer v. Dagenhart, held that the federal government could regulate intrastate labor standards as they affected the interstate commerce of goods. Jackson began the initial preparation for the case as Solicitor General prior to becoming Attorney General.

Wickard v. Filburn

The Agriculture Adjustment Act of 1938 (AAA) set quotas for the level of wheat which may be grown and entered into interstate commerce in an attempt to diminish the harmful effects of overproduction. Roscoe Filburn, an Ohio farmer, exceeded the quota limit by growing surplus wheat solely for consumption on the farm. The Department of Agriculture penalized Filburn for being in violation of the AAA. Filburn appealed the decision on the grounds that his surplus wheat was not part of interstate commerce and therefore was not subject to federal regulation.68

While preparing his Wickard opinion, Jackson struggled with the implications of federal control of wheat consumed on the farm would have on the United States’ dual system of government. In a memo to his law clerk John Costelloe, he summarized his concerns with the extension of the commerce power:

If we sustain the present Act, I don’t see how we can ever sustain states’ rights again as against a Congressional exercise of the commerce power. Perhaps we should not. But if we have really reached the point where we are dealing only with the shadow of judicial review, I think we should not allow ourselves to stand as a symbol of protection to states’ rights which have vanished.69

Jackson was not blind to the fact that the regulation of an action as local as the harvest and personal consumption of wheat on a farm would tear down the wall between federal and state spheres of regulation. Refusing to hold onto the past in the face of contemporary evidence that such a regulation was necessary, he wondered whether “a frank holding that the interstate


69 Robert H. Jackson, “Memo for Mr. Costelloe” June 19, 1942, Jackson Papers, Box 125, folder 8.
commerce power has no limits except those which Congress sees fit to observe might serve a wholesome purpose.”

Jackson understood that modern economics touched nearly every aspect of society, and the growing role of economic determinism meant that nearly every action had an economic effect. He saw this reality, coupled with the extension of the federal commerce power, to its logical end, that this decision would give the federal government carte blanche to regulate nearly every activity no matter how local or indirect. Costelloe saw the Wickard opinion as a chance for Jackson to finally remove the arbitrary distinction between acts that had a direct effect on commerce and those that were indirect. Certainly Jackson, who spent several years advocating for these principles in print and speech, saw a prime opportunity to put this to rest. At the same time, Jackson knew that this doctrine, taken to its logical conclusion, would leave nearly every activity subject to federal regulation. Jackson expressed this concern to Costelloe, previewing the logic used by Chief Justice William Rehnquist in United States v. Lopez and United States v. Morrison to restrict federal power, saying that “the relation between interstate commerce and the regulated activity would have to be so absurd that it would be laughed out of Congress.”

Jackson understood the implications of the Court’s opinion in Wickard and expressed some concern, but his philosophy of judicial restraint enabled him to rationalize the decision to uphold the law, as he left policy decisions to the policymakers and legal decisions to the lawyers. First, Jackson felt that the introduction of economic determinism into legal thought, combined with the deference granted to the Congress under Commerce Clause, “marked the end of judicial control of the scope of federal activity.” Once economics had been introduced, he felt, “the

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70 Ibid.
71 Ibid.
72 Ibid.
extent of commerce power is no longer a legal question but an economic, and hence policy, one.” 73 Jackson had long advocated for policies in line with the AAA, believing they were in the best interest of farmers, whom Jackson, through his upbringing rural New York, believed to be independent to their own detriment. 74

Jackson also felt that judges should show restraint when overturning the policies of democratically elected legislators. In the course of his discussions with Costelloe, Jackson questioned the prudence in overturning the AAA’s penalty. To him, it was not for the Court to decide the law’s fate, but for the voters. He wrote to Costelloe, saying, “The same people elect the state and the federal officers. The interests represented by the two are the same. The people can punish irresponsibility in the use of the commerce power by Congressmen [at the polls].” 75 Jackson wondered if, in a case like Wickard, it was best to let the voters determine whether a policy was appropriate or not. He felt that federal power could “discredit itself by attempting more than is just or can break down attempting more than it has capacity to organize or administer. Its excesses and responsibilities it must answer for at the polls.” 76

The Wickard opinion, following Costelloe’s suggestion, laid to rest the argument over indirect and direct acts of commerce, maintaining that in the realm of commerce the federal government was superior. Jackson’s opinion was written much like his previous works, as he examined the evolution of the interstate commerce power from Gibbons v. Ogden through the Interstate Commerce Act to the Lochner era until the 1937 “switch in time.” 77 Jackson saw in

73 Ibid.

74 Jackson, Judicial Supremacy, 125.; “Justice Jackson’s Story,” 173.

75 Ibid.

76 Ibid.

Chief Justice Marshall’s *Gibbons* opinion “federal commerce power with a breadth never yet exceeded” whose restraints “must proceed from political, rather than judicial, processes.”\(^7\)\(^8\) As Jackson saw it, the Gibbon’s ruling dictated a vital and expansive federal commerce power. The opinion, citing *U.S. v. Wrightwood Dairy Co.*, declared that the power of Congress over interstate commerce was plenary, and therefore an action could not be foreclosed simply by calling them indirect. Once and for all Jackson removed the debate over indirect and direct effect on commerce, declaring that even if an “activity be local, and though it may not be regarded as commerce, it may still ... be reached by Congress if it exerts a substantial economic effect on interstate commerce ... irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”\(^7\)\(^9\) The *Wickard* ruling enabled Jackson to implement his vision of a federally-regulated market economy, which he had espoused as a New Dealer during the 1930s. As the opinion said, Roscoe Filburn’s “own contribution to the demand for wheat may be trivial [but that] by itself is not enough to remove him from the scope of federal regulation where, as here his contribution, taken together with that of many others similarly situated, is far from trivial.”\(^8\)\(^0\)

The public’s reaction to the Wickard case was swift and forceful. Recognizing the expansion of federal power that the ruling enacted, American citizens bombarded Jackson with vitriolic correspondence. “You have declared the CONSTITUTION null and void, it’s decisions to be ignored whenever the man in power so desires. You say an AMERICAN CAN NOT RAISE WHEAT ON HIS OWN FARM! You – breaking the Constitution! [sic] A filthy traitor!” said one

\(^7\) Wickard v. Filburn, 317 U.S. 111 (1942).

\(^8\) Ibid.

\(^9\) Ibid.

\(^0\) Ibid.
anonymous letter from Berkley, California. Another letter, from A.C. Blatt of Suffern, New
York asked where the federal government’s power stopped: “If Congress can prevent us from
growing tomatoes for our own use, or knitting ourselves a pair of socks, or mixing our own drinks
if the mixture is manufactured, just what does Article IX of the Bill of Rights refer to?”
Another telegram from “An American” recalled the days of feudalism, “We hate to give up and
become serfs but you are forcing us into it. We love our former form of government but we cant
[sic] understand what you are trying to do to us.”

Despite the public’s reaction, the Wickard opinion did not have an immediate impact on
the Court’s jurisprudence — the Court did not cite the opinion once in the next two terms — but
it did clarify several aspects of the Commerce Clause power. Legal scholar Robert L. Stern felt
that the opinion added little to the Darby case on aggregative effects, and, in some respects, he
was correct. The battles which led to the Court packing plan had largely been won, but the
revolutionary nature of the case was evident. The debate over direct and indirect effect of an act
was largely settled, and an activity as innocuous as growing excess wheat on one’s farm for
personal consumption was under the purview of the federal government. Wickard did not create
the concept of aggregate effect that was noted in several cases previously, including Wrightwood
Dairy Co. and the Shreveport Rate cases, both of which were cited in the opinion, but it did
reinforce the concept.

Jackson himself saw the implications of his opinion. In a December 1942

81 Letter from Berkley, California, November 14, 1942, Jackson Papers, Box 124, folder 8.
82 A.C. Blatt to Jackson, November 13, 1942, Jackson Papers Box 124, folder 8.
85 Ibid.
86 Wickard v. Filburn; The “Shreveport Rate Case,” Houston E. & W. T. Ry. Co. v. United States,
234 U.S. 342 (1914), expanded the commerce power by holding that it granted Congress the power to
letter he doubted whether Congress’ power could be curbed whenever there is a perceived effect on commerce:

If we are to be brutally frank, as you suggest, I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. I know that the Wickard case is by no means a simple or satisfactory solution. I suppose that soy beans compete with wheat, and buckwheat competes with soy beans, and a man who spends his money for corn liquor affects the interstate commerce in corn because he withdraws that much purchasing power from the market.\(^{87}\)

The *Wickard* opinion was the manifestation of Jackson’s years fighting for the Roosevelt administration and the New Deal. If *Jones & Laughlin* and *Carter* put an end to the obstructionist court described in *The Struggle for Judicial Supremacy*, then *Wickard* reinforced those gains and solidified an era of big, proactive government.

*Deferment to the States*

Jackson’s opinion two years later, in *United States v. Southeastern Underwriters*, seemingly contradicts *Wickard* as well, but the ruling abides by Jackson’s conception of a national preeminence over commerce, while simultaneously rejecting a federal power grab. In *Southeastern Underwriters* the Court held that the Sherman Anti-Trust Act applied to insurance, giving the federal government, which to that point had not regulated the insurance industry, regulatory authority.\(^{88}\) Jackson dissented on the grounds that the states had traditionally been the regulators of the insurance industry and that Congress had not explicitly chosen to regulate the industry.

\(^{87}\) Jackson to Shermon Minton, December 12, 1942. Jackson Papers, Box 124, folder 8.

\(^{88}\) *United States v. Southeastern Underwriters*, 322 U.S. 533 (1944). The decision overruled *Paul v. Virginia*, 75 U.S. 7 Wall. 168 168 (1869), which had declared that corporations are not citizens protected by the Fourteenth Amendment and insurance was not to be considered commerce.
Southeastern Underwriters is a prime example of the intersection of Jackson’s conception of the commerce power and his philosophy of judicial restraint. Jackson admitted that, in his mind, insurance should be considered commerce. The Court’s traditional interpretation that insurance was not commerce, he said, was “unrealistic, illogical, and inconsistent with other holdings of the Court.”\textsuperscript{89} He went on, saying, “I would have no misgivings about holding that insurance business is commerce and, where conducted across state lines, is interstate commerce, and therefore that congressional power to regulate prevails over that of the states.”\textsuperscript{90} Jackson’s concern was not whether insurance could be considered commerce, but rather, that it was the duty of the Congress, not the Court, to decide whether the insurance industry should be regulated. He felt that “The orderly way to nationalize insurance supervision, if it be desirable, is not by court decision, but through legislation.”\textsuperscript{91} A law by Congress designed to regulate the industry would have “the most forceful presumption of constitutional validity,” but at that time no such law existed, and the extension of the Sherman Act would be a case of the judges making policy from the bench.\textsuperscript{92} Jackson’s decision in Southeastern Underwriters upheld the framework of the Wickard, decision. He reiterated that an intrastate act, like the purchase of insurance, was commerce. He also emphasized his belief in judicial restraint, saying that it was not the role of the Court but Congress to make such policy.

**Conclusion**

Wickard has repeatedly been seen as the furthest expansion of the commerce power, and some would argue — as Jackson himself said to Costelloe — that it is proof that Jackson felt the

\textsuperscript{89} Ibid.

\textsuperscript{90} Ibid.

\textsuperscript{91} Ibid.

\textsuperscript{92} Ibid.
commerce power was a means to whimsically grant the federal government jurisdiction over any activity. It may debated whether this was Jackson’s intention, but *Wickard* was certainly one of the most significant opinions Jackson wrote while on the Court, and it demonstrated Jackson’s belief in a strong, unencumbered national economy.
CHAPTER TWO

A LAW CLERK COMES TO WASHINGTON

Rehnquist at Stanford

Early Life

William Hubbs Rehnquist was born in 1924 to a small family outside of Milwaukee, Wisconsin. As Robert Jackson was climbing from the life of a country lawyer to the highest realms of the Roosevelt Administration, Rehnquist was busy excelling in the classroom. His upbringing was somewhat typical of middle-class Midwestern whites in the years following the First World War. Shorewood, where Margery and William Benjamin Rehnquist settled, was predominately Republican.¹ In Richard Jenkins book, The Partisan: The Life and Times of William Rehnquist, he quotes a childhood friend of Rehnquist who described his upbringing, saying, “Everybody we knew was pretty much Republican. We learned early on how bad Roosevelt was. Our parents would listen to FDR on the radio, gnash their teeth and then turn the dial to Father Coughlin.”²

Rehnquist was bright and ambitious from an early age. He reportedly told his teacher in elementary school, “I’m going to change the government.”³ After graduating from Shorewood High School, Rehnquist attended Kenyon College on a full scholarship, majoring in political science.⁴ Rehnquist only stayed at Kenyon for a semester, however, and enlisted in the Army in the spring of 1943 to join the war effort against the Axis powers. His time in the Army took him

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² Ibid.


⁴ Ibid., 7.
to the warm climates of the American Southwest and Northern Africa, and Rehnquist came to favor the temperate weather over the harsh Wisconsin winters that he had experienced growing up. While serving in North Africa as a weather observer in 1945 – he was stationed in Cairo, Casablanca, Tripoli, and Tunis – he read the antisocialist work, *The Road to Serfdom*. The book, written by the Austrian economist and philosopher Friedrich von Hayek, warned of the dangers of government control of economic decision making and central planning. Hayek warned that increased government control led to a loss of freedom and individualism. The book would become a tenet of libertarianism in the second half of the twentieth century. “It made quite an impression on me,” Rehnquist said about the book, in a 2001 interview with C-SPAN.

**Stanford**

With the GI Bill to aid him, Rehnquist enrolled at Stanford to pursue a bachelor’s degree in political science. Justice Sandra Day O’Connor, a classmate, who called Rehnquist the brightest student at Stanford, would later remember that “Like many of my classmates who had served in the war, he was serious about his studies.”

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7 Ibid.


While at Stanford, Rehnquist took a constitutional law class taught by Charles E. Fairman, a political science professor and an expert on the history of the Fourteenth Amendment and its impact on the relationship between the federal government and the states.\textsuperscript{11} A summer 2005 edition of \textit{Stanford Magazine} examined Fairman’s legacy. Former students described the teacher as “quite austere, but as you came to know him, the more you’d like him . . . He tended to teach in a very descriptive manner, trying to communicate to you how each justice had grown up and what made him tick.”\textsuperscript{12} Fairman’s focus was Reconstruction and the Fourteenth Amendment, particularly Section 1 of the amendment:

\begin{quote}
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{13}
\end{quote}

In his scholarship and in his teaching, Fairman taught that the Fourteenth Amendment, in its literal interpretation based on the understanding at the time of its adoption, did not apply the Bill of Rights to the states. Bill Davies, a student of Fairman’s, said that “[Fairman] clearly taught that the Fourteenth Amendment did not apply the Bill of Rights to the states.”\textsuperscript{14}

Fairman would have a major impact on young Rehnquist and his developing judicial philosophy. John Q. Barrett, professor at St. John’s University, said, “Charles Fairman is a big piece of the story of Bill Rehnquist at Stanford. He was his very influential role model and teacher as an undergraduate.”\textsuperscript{15} Justice Anthony Kennedy, who served with Rehnquist on the

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\textsuperscript{11} Lane, “Head of the Class.”
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\textsuperscript{12} Ibid.
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\textsuperscript{13} U.S. Constitution, amend. 14, sec. 1.
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\textsuperscript{14} Ibid.
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\textsuperscript{15} Ibid.
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Court for over 15 years, also cited Fairman as an influential mentor. Kennedy said, “My surmise is that Professor Fairman taught the future Chief Justice how to be so confident in using original sources when writing history.” Rehnquist clearly appreciated what he learned under Fairman, because many years later, in his 2004 book, Centennial Crisis: The Disputed election of 1876, Rehnquist dedicated the book to his former professor, a lifelong Democrat. He wrote, “I dedicate this book to Charles Fairman, who first introduced me to the Supreme Court in an undergraduate course in constitutional law at Stanford University. His published work in the era of the Court which this book deals has been an important source for it.” Rehnquist, in several memos for Jackson as a clerk and in opinions when he became a Justice, would echo the Fourteenth Amendment doctrine of Fairman and his interest in the Reconstruction period. The interest of constitutional law that Fairman instilled in Rehnquist would serve as a guiding principle as he finished his undergraduate work and completed a master’s degree from Stanford.

“Contemporary Theories of Rights”

Rehnquist used credits from Kenyon and summer courses at Stanford to complete both his bachelor’s and his master’s degrees in political science in 1948. Rehnquist’s master’s thesis, “Contemporary Theories of Rights,” examined the rights granted to individuals by nature and government and sought to balance the individual’s right to be free from government intrusion,

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17 Ibid.


19 Lane, “Head of the Class.”
with the need for a safe and cohesive society brought about by government power.\textsuperscript{20} It was a work that was informed by Fairman’s teachings on the Fourteenth Amendment, by \textit{The Road to Serfdom}, and by the conservative foundation that had been instilled in Rehnquist in Shorewood.

In his personal journal, alongside a diary account of a trans-American road trip, Rehnquist outlined and summarized the bibliography he would use for the thesis, and these synopses provide a glimpse of Rehnquist, the young political philosopher. In a summary paragraph on Carl Becker’s \textit{Modern Democracy}, Rehnquist wrote, “The ideal of 18th century democratic philosophers – of unrestricted individualism leading to social harmony does not correspond with the 20th century democratic actuality, which shows economic power becoming more and more concentrated.”\textsuperscript{21} Rehnquist expressed concern with the modern economic reality, but as he wrote the thesis, he struggled to reconcile that belief with his conservative values. In another summary, on Edward Cowin’s \textit{The President: Office and Powers}, Rehnquist’s expresses an early concern for federalism in the post-New Deal government, writing that one of the causes of the aggrandizement of the presidency was the “breakdown of dual federalism.”\textsuperscript{22} This concern, which was largely absent from the final version of his thesis, would be a centerpiece of his judicial philosophy on the Court, nearly forty years later.

In his thesis itself, Rehnquist takes a somewhat moderated tone, balancing individual rights with majoritarian rule, differentiating political rights from moral rights. Rehnquist was critical of the progressive system and the rise of the welfare state under the New Deal:

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It is unfortunately true that with some of those who would develop democratic planning on a large scale, the welfare of the citizens is equated with their idea of the welfare of the
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\textsuperscript{21} William H. Rehnquist Diary, Papers of William H. Rehnquist, Hoover Institution Archives, Palo Alto, CA, Box 1.

\textsuperscript{22} Ibid.
\end{footnotesize}
citizens. In conclusion, if our criticism of the pragmatic functionalist approach to rights could be generalized under one heading, it would be that they set too low a value on the individual human being. One cannot help but get the impression that with the functionalist man is too often only another factor in a gigantic social process which is itself the paramount consideration.  

Rehnquist’s belief that the individual was of surmounting importance was clear. He said, “A truly meaningful basis of rights must start from the individual as a three dimensional entity . . . it must recognize in the individual human being the ultimate integer upon which all solutions to political, social, and moral questions are to be based.”  

He noted that, while democratic and majoritarian rule was preferred, majority rule should not be given unlimited deference. He compared democracy to the Hitler and Stalin regimes in Germany and Russia, saying that, “There is little reason to believe that [those regimes] were not approved of by the majority of the people living under them.”  

Rehnquist felt, however, that individual rights relied on government, and therefore a balancing act was required:

The state represents not only the majority, but it represents an institution which will stand as a bulwark against all others and against itself in preserving for me those rights which I claim as a moral personality. With the state which recognizes rights which are not bestowed by it, but rather are permanent limitations upon its authority, my obligation stems from the fact that this state enables me to live in a system such as would be impossible without government.

Rehnquist posits that anarchy is not the solution and that a limited government is a useful tool for preserving the rights of individuals, as it attempts the functionalist goal of greater good for society through majority rule. Anarchy may not be ideal, but neither is absolute majoritarian rule, which intrudes on the individual for the functionalist greater good. Rehnquist said that “government per se is neither good nor bad,” but he also noted that the modern welfare state

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23 Rehnquist, “Contemporary Theories of Rights” 2045.

24 Ibid., 2047.

25 Ibid., 2045.

26 Ibid., 2036.
impinges on the individual in a way that even absolute monarchies in the past did not. He would later reformulate this position into one that called for a limited government with increased state and local control — which he believed was more closely connected to the individual — and less control for the federal government, which he equated with the functionalist approach that professed social process which was itself the ultimate consideration, rather than the individual.

Rehnquist’s theory of rights was restricted to negative liberties, or protections, rather than positive rights. He wrote, “Generally speaking, the political rights of which we have spoken are claims which the individual makes, not as a means to some higher end, but ends in themselves.” Those rights included freedom of speech, freedom of worship and due process. Beyond that he saw limited rights guaranteed by the government. In a direct rebuttal of the Lochner-era Court, he said that he did not believe in laissez-faire economic rights, protecting business from government regulation. He also countered the New Deal, saying that there was no right to work or right to minimum subsistence, even if these were desirable ends. In the end, Rehnquist saw limited areas where rights were guaranteed. As we will see from his statements in the area of segregation, his theory of rights — or what parts of it were present in his thinking years later — did not mandate an end to segregation in his mind. Instead, he believed that contemporary rights guaranteed a few select negative rights, but still deferred to majority rule. Later, on the Court, Rehnquist would modify these views, looking to the states to protect individual rights rather than the federal

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27 Ibid., 2027.


30 Ibid., 2010.

31 Ibid.
government and believing that majoritarian rule at the state and local level was preferred to the distant federal government.

Rehnquist’s thesis explored themes about the role and extent of government power that would eventually inform his views on federalism, particularly his preference on state power versus federal power. His views would later change, spurning some of the general philosophy — particularly his defense of individual rights — for his own personal political and judicial views on issues like segregation. What persisted throughout his life was a constant examination of the role of government in individuals’ lives.

After briefly pursuing a Ph.D. in government from Harvard University, Rehnquist, disappointed in the liberalism of Cambridge, returned to Palo Alto to enroll in law school and build on the legal foundation that Fairman and his studies had instilled in him.32

Law School

Constitutional Law

Rehnquist returned to Palo Alto after leaving Harvard and enrolled in Stanford Law, which, at the time, was an up and coming law school held in high regard, but outside of the Ivy League. Rehnquist established himself as an intellectual leader in his class, and he became editor-in-chief of the Stanford Law Review.33 The man who would become the Chief Justice was being molded in those years at Stanford, and his notebooks from that time provide insight into his judicial underpinnings.

The notebook from his constitutional law class offers a look at the foundations that would form his jurisprudence. Rehnquist had already taken Fairman’s constitutional law course as an


33 Lane, “Head of Class.”
undergrad, and he used that experience in his classes. His professor, whom he refers to as “M” in his notes, had a relatively moderate view of the law, expressing his disproval of the Lochner era of the Court while articulating some concern that the New Deal court had ceased to put a limit on the commerce power. Rehnquist infrequently expresses his own views, but the instances when he does, combined with the opinions of his professor, give insight into the jurisprudence that was being formed.

His notes indicate that both Rehnquist and his professor disapproved of the Lochner era interpretations of the Commerce Clause. It should not be a complete surprise that Rehnquist was opposed to the Lochner era, as his master’s thesis clearly expressed the view that there needed to be a balance between the rights of individuals and the rights of majoritarian rule to make policy. In his notes he wrote, “For 30 years, Ct [sic] put ‘freedom of contract’ in a preferred position . . . . ‘rule is freedom, restraint is exception.’”34 In the margin, regarding the cases Bunting v. Oregon and Adair v. United States, he wrote, “M says these two cases are outstanding examples of judges reading in their own personal opinion.”35 An aversion to this practice would be an outward philosophy that he would take to the Court as a clerk and later as a judge.

Rehnquist and his professor both appear to generally approve of the New Deal interpretation of the Commerce Clause to an extent, but they expressed concern that it would bring about the breakdown of the federal system. In the section of his notes devoted to administrative law, he noted that the test for Congress’ implied constitutional powers are those that are reasonable rather than essential, but he added his own commentary, writing “doubtful” underneath his notes.36 When looking at the 1903 Commerce Clause case, Champion v. Ames, in

34 Rehnquist Law School Notebook no. 1, Rehnquist Papers, Box 1.

35 Ibid.

36 Ibid.
which the Court held that the trafficking of lottery tickets was a form of commerce that could be regulated by the Congress, Rehnquist wrote, “I would say that this case raises serious question as to correctness of broad definition of regulate so as to include prohibition of articles not themselves injurious to commerce.”37 As he moved to the more contemporary cases, we see the beginnings of the jurisprudence that would develop into the Lopez decision. He wrote that, while his professor approved of the Jones and Laughlin decision, he was “always concerned about defining limitations.” On Wickard, using language that would appear in Lopez forty-five years later, he said, “M says [Wickard is] the most extreme Lioed to day [sic], whether right or wrong.”38 He goes on to compare Jackson’s “substantial effect on commerce” test to his professors “real test,” which was, “Does this attempt to regulate break down the integrity of federal system.”39

Rehnquist’s notebook shows vestiges of Fairman’s teachings as he demonstrates concern for the dual federalist system. He doubts Congress’ implied powers, and while he notes that the Lochner era was judicial malpractice, it is apparent that he holds some level of concern for increasing federal power over the states. On the topic of First Amendment rights, his similarities to Fairman particularly shine. Next to a section about the incorporation of the Bill of Rights — the idea, championed by Justice Hugo Black, that the Fourteenth Amendment applied the Bill of Rights to the states rather than just federal power — he drew an eyeball, perhaps meaning the first person “I,” and then below, in all capital letters and underlined, he wrote, “HATE BLACK!”40 Fairman had been an intellectual adversary of Black’s, having written the article “Does the

37 Ibid.
38 Ibid. Rehnquist appears to mean “opinion” or “ruling” where he wrote “Lioed.”
39 Ibid.
40 Ibid.
Fourteenth Amendment Incorporate the Bill of Rights?” which was a direct repudiation of Black’s theory of incorporation. 41 Rehnquist’s hatred of Black also aligned him with Jackson, who had a very bitter and public falling out with Black while he was in Europe serving as the American prosecutor at the International Military Tribunal at Nuremberg, which will be discussed further below.

As a student, it is clear that Rehnquist was concerned that federal overreach under the Commerce Clause could diminish the principles of federalism essential to the American form of government. By the time Rehnquist closed his law school notebooks for good, it was clear he was ready to enter the legal world, with the hopes of one day sitting as a judge. In the margin of the final page of his notebook — a space that he usually reserved for notes or crude caricatures of everyone from his future wife, Natalie “Nan” Cornell, to “Uncle Louie,” Justice Louis Brandeis — he asked the simple question, “What now Hon. W. H. Rehnquist.” The answer came quickly, as he joined the highest court in the United States as a clerk.

Offer to Clerk

On July 15, 1950, Justice Robert H. Jackson traveled to Palo Alto to dedicate the Stanford Law School’s new building. Commenting on the occasion, Jackson said, “That a Justice of the United States Supreme Court should help Stanford Law School dedicate its new home is only to observe that comity which one educational institution owes to another.” 42 Jackson’s words were prescient because he would shortly look to Stanford for a law clerk. It is unclear if he met Rehnquist during that trip, however. In his book, The Supreme Court, Rehnquist said they met in

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the summer of 1951 when Jackson came to “dedicate the new Stanford Law School building.”\textsuperscript{43} That event occurred in 1950, however. Jackson did return to Palo Alto in the summer of 1951 and met with Rehnquist, who was approaching his final semester of law school.\textsuperscript{44}

In \textit{The Supreme Court}, Rehnquist describes the manner in which he was able to secure a clerkship on the highest court in the nation. Rehnquist’s administrative law professor, Phil Neal, had clerked for Jackson during the Court’s 1943 and 1944 terms. Neal, who remained in contact with Jackson, proposed that Rehnquist meet and interview with the Justice for a clerkship.\textsuperscript{45} Rehnquist described his initial impression, saying, “[Jackson’s] pleasant and informal demeanor at once put me at ease.”\textsuperscript{46} The interview was an informal affair, but Rehnquist walked out, “convinced that [Jackson] had written me off as a total loss in the first minutes of our visit.”\textsuperscript{47}

Rehnquist expected to graduate from Stanford in December 1951, and initial correspondence with Jackson implied that a decision would not be reached until the spring of 1952. Rehnquist’s reply was forceful, but polite, as he wrote, “At the risk of presuming, I write to ask you if there is any possibility that you will make your clerkship appointment at a date earlier than you led me to believe in our conversation last August . . . My position as one graduating from law school this December leads me to make this request.”\textsuperscript{48} Jackson admitted to Rehnquist that the burden of the Court’s work was becoming too much for him and his single clerk, George C. Niebank, and that Rehnquist should join in early 1952. Jackson said, “I felt at our talk at


\textsuperscript{44} William Rehnquist to Robert Jackson, September 21, 1951, Jackson Papers, Box 184, folder 8.

\textsuperscript{45} Rehnquist, \textit{The Supreme Court}, 4.

\textsuperscript{46} Ibid.

\textsuperscript{47} Ibid., 5.

Stanford that you and I would get along pretty well together and, if we can make proper arrangements, I will be glad to take you on.” First, however, he suggested that Rehnquist take the bar, saying, “I strongly urge you to get yourself admitted to some bar while your law school preparation is fresh in mind.” Rehnquist resisted, telling Jackson that he had “never been sold on California as a place to either live or practice,” and that it was not feasible to take the bar in his preferred states, New Mexico and Arizona. Although it would not be the last time the two men disagreed, the issue was put to rest, and it was determined that Rehnquist would start on January 25, 1952.

Rehnquist in Washington, D.C.

The Court in 1952

By the time Rehnquist joined Jackson in Washington, D.C., Jackson’s position on the Court and in government had changed tremendously. Since 1942, when he wrote Wickard, Jackson had moderated some as a justice. Glendon Schubert, for instance, called the post-war Jackson a conservative. Some of this stemmed from Roosevelt’s death in May 1945, stripping Jackson of his biggest ally in Washington. Many felt that Roosevelt had implicitly promised the Chief Justice position to Jackson, but the ascent of Harry S. Truman to the Presidency left the offer of that post up in the air. Perhaps sensing this, Jackson accepted the position of United States chief counsel for the prosecution at the International Military Tribunal at Nuremberg. Jackson’s performance, and the entire concept of the tribunal, received mixed reviews at home.


52 Schubert, Dispassionate Justice, 28.
Chief Justice Harlan Fisk Stone commented that Jackson was “conducting his high-grade lynching party in Nuremberg.” Time would be kinder to Jackson’s role at Nuremburg, which has since been seen as an important milestone in the development of international law.

While Jackson was in Nuremburg, a controversy erupted that would effectively cost him the Chief Justice position and alter his jurisprudence to an extent. Previously, in *Jewell Ridge Coal Corp. v. United Mine Workers of America*, a case involving Justice Black’s former law partner, Black refused to recuse himself from the decision in the case, despite an apparent expectation from Jackson that he would. The *Jewell Ridge* case passed without much public controversy until years later. Jackson had heard rumors that Black was trying sabotage his candidacy; from Nuremburg, he sent a philippic in the form of two public cables that accused Black of participating in *Jewell Ridge* when he should not have and of forcing the Court to decide the case prematurely. The incident shook the Court, damaged Jackson’s legacy, and doomed Jackson’s candidacy for the Chief Justiceship. According to Dennis Hutchinson, it was the only time in the Court’s history that one judge had publicly accused another of unethical behavior, and it was a rare example of the Court airing its dirty laundry for the public to see. The aftermath would leave Jackson as an Associate Justice and cemented animosity between Jackson and Black.

By the time Rehnquist walked into Jackson’s office in January 1952, much of this had been settled, but the wounds had clearly not healed. Rehnquist hinted that Jackson had turned away from the New Deal by this time, saying, “Remarks he made to me at various times gave me the impression that by 1952 he no longer believed very enthusiastically that the New Deal

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formulas of governmental solutions for the country’s problems would work.” 55 Rehnquist would reiterate this point years later in a speech to the Albany Law School on Jackson’s life:

But I think that Justice Jackson, at least by the time that I was his law clerk, would have been the first to admit that [The Struggle for Judicial Supremacy] was “curiously dated” in many respects. . . . He did not boast about it, comment frequently about it, or, so far as I am aware, make repeated references to it in his later writings. It was very much the product of his Washington experience between 1934 and 1941. Just as it probably neither could nor would have been written by a lawyer who had simply practices in Jamestown, New York for several decades, it likewise neither could nor would have be regarded as gospel by the man who, as an Associate Justice of the Supreme Court in 1952 wrote one of the concurring opinions in the famous Steel Seizure Case. 56

The Justice Jackson that Rehnquist clerked for in 1952 was certainly different than the one he would have clerked for in 1943, but Jackson’s own comments indicate that, while he questioned the expansive New Deal federal government, he still believed in the plenary power of the Commerce Clause.

Jackson’s interview with Harlan Phillips reveals Jackson’s own uncertainty over one of his great legal achievements, the Wickard opinion. Discussing Wickard, Jackson said, “[It] probably marks the farthest extent to which the interstate commerce power has ever been pressed and it is an opinion that has been subject to more than a little criticism on that ground.” 57 In his conversations with Phillips, Jackson admitted reexamining his support for large centralized governments after the events of the Second World War, saying:

“I, for myself, have been highly desirous of preserving the federalist form and keeping vitality in it. Perhaps I’m more inclined to do that since the Second World War than I was before, because of the post-mortem examination of the Hitler regime which took place at Nuremberg.” 58

55 Rehnquist, The Supreme Court, 180.


57 “Justice Jackson’s Story,” 652.

58 Ibid., 659.
It was a candid admission of the impact the Nuremburg experience had on his thinking.

Rehnquist may have been right that Jackson had begun to eschew the New Deal formula, and Schubert agrees that Jackson’s rulings tended to fall on the conservative side of the spectrum; but, in the months before his death, Jackson reiterated his views of the Commerce Clause that he had espoused in *The Struggle for Judicial Supremacy*. He told Phillips, “My own philosophy favored a very broad power in the federal government over finance, . . . old age and unemployment benefits which were beyond state reach, and over interstate commerce, and a very narrow power in the federal government over civil liberties or individual rights.”59 Despite his belief in limiting federal power over some areas, Jackson maintained its plenary power over interstate commerce until his death in 1954. In his Godkin Lectures, which were posthumously published under the title *The Supreme Court in the American System*, he reiterated his views on the commerce power and judicial supremacy, saying, “It is more import today than it was then that we remain one commercial and economic unit . . . I believe that this controversy was rightly settled.” 60

*Junior Justice*

Rehnquist arrived at the Court as the clerk system was becoming much more standardized than it had been earlier in the twentieth century. The relationship between a clerk and a Justice is a unique relationship that combines aspects of the outdated apprentice system of law, the lawyer-client relationship, and a father-son relationship. The Supreme Court clerk system has been termed the “junior court” for the important role that clerks play in the certiorari process,

59 Ibid., 576.

60 Jackson, *The Supreme Court in the American System*, 67.
advising justices on each case’s merits.\textsuperscript{61} Artemus Ward said that, because of their important role in helping to decide the cases that come before the Court, clerks are “less like junior associates and more like junior justices.”\textsuperscript{62} This environment has led some to charge that the clerks are legal Rasputins whispering in the ear of the Justices, and Jackson alluded to that notion in 1952:

A suspicion has grown at the bar that the law clerks constitute a kind of junior court which decides the fate of certiorari petitions. This idea of the law clerk’s influence gave rise to a lawyer’s waggish statement that the Senate no longer need bother about confirmation of justices but ought to confirm the appointment of law clerks.\textsuperscript{63}

The level of influence that clerks have is debatable, but their position offers them an intimate relationship to the Court, its decisions, and their particular justices. Justice John Paul Stevens likened it to a lawyer-client relationship:

An interesting loyalty develops between clerks and their Justices. It is much like a lawyer-client relationship, close and confidential. Like a lawyer, a clerk can’t tell his client, the Justice, what to do. He can only suggest what can happen if he does or doesn’t do something.\textsuperscript{64}

The bond formed at the Court often endured long after the clerkship ended, and Jackson had many similar relationships with clerks, particularly Phil Neal, who had introduced him to Rehnquist.

Years later, Rehnquist described his awe upon entering the massive Court building with its quiet halls for the first time.\textsuperscript{65} After Jackson arranged for him to be placed on the government payroll, Rehnquist immersed himself in work, with help from his fellow clerk, George Niebank. Rehnquist found that the majority of his work would deal with applications for certiorari —

\begin{thebibliography}{9}
\bibitem{ward} Artemus Ward, \textit{Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court} (New York: New York University Press, 2006), 14.
\bibitem{ward2} Ibid., 159.
\bibitem{ward3} Ibid., 121.
\bibitem{ward4} Ibid., 256.
\bibitem{rehnquist} Rehnquist, \textit{The Supreme Court}, 6.
\end{thebibliography}
applications for review by the Supreme Court. Rehnquist and Niebank were tasked with writing memos, judging the merits of each petition, and suggesting whether Jackson should grant or deny the petition for review. Rehnquist admitted his unease with such a significant responsibility and explained, “This seemed like a lot of responsibility for a brand-new law clerk, but George told me that the Justice felt perfectly free to disregard a recommendation with which he disagreed, and so I should concentrate on the descriptive part of the memorandum.”

Niebank was correct on that point, and on numerous occasions Rehnquist’s views on the merits of a petition would differ from Jackson’s.

Rehnquist’s time as a clerk was marked by the feeling that he was an outcast among the Northeast liberal intelligentsia. In *The Supreme Court* he discussed being an outsider among the clerks.

The majority [of clerks] came from a very few law schools – Harvard, Yale, Columbia, Pennsylvania, Chicago, and Northwestern . . . I was not surprised by the fact that of all the clerks that term, only [Justice William O. Douglas’s clerk] Marshall Small and I came from law schools west of the Mississippi river, but sitting there at the lunch table I began to feel a bit defensive about it.

Among the liberal clerks, Rehnquist’s conservatism showed, and he expressed a level of contempt for the clerks in memos to Jackson. His disdain was for law clerks in general, not just liberal ones, and he later commented that “it would be all but impossible to assemble a more hypercritical, not to say arrogant audience than a group of law clerks criticizing an opinion circulated by one of their employers.” It is possible that Rehnquist’s place as one of the most, if

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66 Ibid., 10.

67 Ibid., 18.

68 Rehnquist, “A Few Random Thoughts on the Segregation Cases,” memo, Jackson Papers, Box 184, folder 5.

not the most, conservative clerks reinforced his conservatism and his distaste for the liberal philosophy of his colleagues.

Rehnquist approached his work for the Court with the same tenacity, thoroughness, and confidence that he had employed as a student at Stanford. His memos regarding petitions for certiorari were comprehensive, never shied away from attempting to persuade Jackson on the merits of a case, and utilized opportunities to ingratiate the clerk with the Justice. He told Jackson things like, “May I humbly state my hope that the opinion of the ct [sic] in these cases will be yours.”\textsuperscript{70} In another instance, he complimented Jackson, saying, “I was happy to see that you have always been on the side of the angels.”\textsuperscript{71} It was clear that, either for personal or professional reasons, he wanted to earn the Justice’s respect and friendship.

\textit{Working with Jackson}

Despite his compliments to Jackson, Rehnquist’s advice was often cast aside by Jackson, who frequently reversed the counsel of his clerk. In \textit{Nathanson v. National Labor Relations Board}, a case involving whether back wages owed to the NLRB should be considered in the same regard as debts to the government, Rehnquist counseled to overturn the lower court ruling, but Jackson affirmed. Jackson ruled against Rehnquist on several other occasions, and it is clear that, at least on a number of jurisdictional issues, Jackson and Rehnquist did not see eye-to-eye judicially. This is not to say that Rehnquist did not have any influence over Jackson or that his views were not aligned with the Justice’s. In the case of \textit{Brown v. Allen}, which dealt with the denial of habeas corpus in a series of cases in the South, Rehnquist’s own personal views were


\textsuperscript{71} Rehnquist, “Memo for Justice Jackson. United States v. the Public Utilities Commission of the State of California,” Jackson Papers Box 180, folder 7.
evident in Jackson’s opinion.  

Eric Freedman, of the Hofstra University School of Law, contends that Rehnquist’s memos had an important impact on Jackson’s concurrence in the case, and his memos are reflected in the opinion.

A series of cases dealing with the issues of federalism illuminate Rehnquist’s position on the role of the federal government and the contrast between his views and Jackson’s. Rehnquist’s memos indicate that the concerns about federalism, which he had discussed earlier in his law notebooks and in the outline of his thesis literature, were still an important part of his judicial philosophy. Rehnquist understood that the Court was different than at the peak of the New Deal, and he clearly believed that Jackson’s views on federalism had become more conservative and malleable to persuasion. In some cases his belief that Jackson had changed was true, but in many others, the New Deal warrior was still present in Jackson.

Rehnquist’s memos to Jackson in United States v. Kahriger demonstrate his deep concern for the dual system of government. Kahriger examined whether the Gamblers' Occupational Tax Act, which required gamblers to register with the Collector of Internal Revenue and levied a tax on their gambling income, violated the Tenth Amendment, reserving powers to the states. Rehnquist’s memo to Jackson focused on the Tenth Amendment and what he viewed as federal encroachment on the states’ powers. He admitted that the reason for federal intervention was that the state authorities were viewed as either corrupt or inept, but he asked his boss, “Is the best answer federal intervention? Is that the way to built [sic] self-governing, self-reliant citizenry.” He then pleaded for Court intervention to uphold federalism, saying, “It is not a question of this

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75 Rehnquist, “Memo to Justice Jackson,” Jackson Papers Box 180 folder 3.
Court substituting its will for that of Congress, but rather of this Court attempting to maintain the balance which the people originally sought to strike between the state and the national governments.\textsuperscript{76} Rehnquist understood Jackson’s aversion to judicial activism, and he catered his memo to that philosophy, telling Jackson that a decision would not be activism but rather the restoration of balance to the federal-state relationship.

Jackson’s opinion in the case indicates that he may have shared some of Rehnquist’s sentiment, but he ultimately upheld the law. The Court upheld the Act, but in his concurring opinion Jackson admitted, “I concur in the judgment and opinion of the Court, but with such doubt that, if the minority agreed upon an opinion which did not impair legitimate use of the taxing power, I probably would join it.”\textsuperscript{77} Jackson was clearly uncomfortable with giving such deference to the federal government, but he believed that Justice Black’s dissent hamstrung the federal taxing power to an extreme degree. He echoed Rehnquist’s memo, saying, “But we deal here with important and contrasting values in our scheme of government, and it is important that neither be allowed to destroy the other.”\textsuperscript{78} Jackson still erred on the side of granting federal power, but he had reconsidered the implications his decisions had on the federalist system.

Rehnquist’s concerns over federalism did not mean, however, that he always sided with the states; in \textit{Bode v. Barrett} there is evidence that his view of the dormant Commerce Clause was in line with Jackson’s. \textit{Bode} involved an Illinois statute that licensed and taxed trucks based solely on the weight of their cargo, not their use of the Illinois roads. The appellants were a group of truck drivers who operated in interstate and intrastate commerce and felt the tax burdened interstate commerce. In his memo to Jackson, Rehnquist said, “the state claims that appts [sic] are

\textsuperscript{76} Ibid.

\textsuperscript{77} United States v. Kahriger, 345 U.S. 22 (1953) (Jackson, J. concurring)

\textsuperscript{78} Ibid.
not engaged in interstate commerce, and therefore cannot raise the question of undue burden. Rspdts [sic] reply that some of them are in interstate commerce, pointing to the record which seems to so indicate.”\textsuperscript{79} Rehnquist reiterated the belief that Commerce Clause questions came into play in the case, saying, “The Ct would disregard economic reality if it hled [sic] that there was no undecided federal question here . . . the fact should be announced by an opinion of this Ct and not a per curiam dismissal.”\textsuperscript{80}

Rehnquist’s memo foreshadowed Justice Frankfurter’s opinion, which Jackson joined. Countering a majority opinion that dismissed questions of the Commerce Clause, Frankfurter said that the Court had considered similar cases previously and should do so in \textit{Bode}:

\begin{quote}
As far back as 1888, in \textit{Leloup v. Port of Mobile}, the Court struck down because of the Commerce Clause a tax attacked by a taxpayer doing both intrastate and interstate business. In a hundred-dd [sic] cases since, a claim under the Commerce Clause in similar situations was considered.\textsuperscript{81}
\end{quote}

From his memo, we can see that Rehnquist obviously saw the jurisdictional issues involved in the case, and while he may not have totally agreed that the tax presented an undue burden on commerce, it would appear that he did seem to favor the appellants’ claim of a burden. \textit{Bode} represents an alignment of Rehnquist’s Commerce Clause philosophy with Jackson’s, and it is evident that on such an issue they both tended to hedge in favor of protecting the interstate market.

Yet, several weeks later in a case focused on the commerce power, \textit{United States v. Public Utilities Commission of the State of California}, Rehnquist demonstrated that he viewed the Vinson Court as a departure from the New Deal Court, meaning increased authority for the states


\textsuperscript{80} Ibid.

\textsuperscript{81} \textit{Bode v. Barrett}, 344 U.S. 583 (1953) (Frankfurter, J. concurring).
was possible.\textsuperscript{82} This case dealt with a jurisdictional dispute of who — the Federal Power Commission or the California Public Utilities Commission — had the right to regulate power that was generated in California and delivered to the Navy in California, which the Navy then transferred to a base in Nevada. Rehnquist spent the majority of his three page memo to Jackson focusing on the merits of the case, but his final remarks illustrate his concern with overreach by the federal government. He noted, “Once again it seems that the issue is drawn between those who want to expand federal regulation and those who don’t.”\textsuperscript{83} He then expressed concern with the power of the Federal Power Commission, and federal agencies in general, saying, “The problem here is whether a federal agency, in theory the creature of Congress, is going to be able once more to wave the ‘public interest’ in order that it may acquire jurisdiction the Congressional mandate for which is very dubious.”\textsuperscript{84} Despite Rehnquist’s attempt to woo Jackson, by saying that in similar issues in the past, the Justice had “been on the side of angels,” Jackson joined the majority in upholding the Federal Power Commission’s right to regulate the power at issue.\textsuperscript{85}

Rehnquist’s clerkship also coincided with a series of cases challenging the legality of segregation in the United States under the separate, but equal doctrine established in \textit{Plessy v. Ferguson}.\textsuperscript{86} Rehnquist wrote a series of memos on these cases that called on Jackson to uphold the constitutionality of the doctrine. While these memos illuminate Rehnquist’s racial views at the

\begin{itemize}
\item \textsuperscript{82} United States v. Public Utilities Commission, 345 U.S. 295 (1953).
\item \textsuperscript{83} William H. Rehnquist, “Memo to Justice Jackson re: United States v. Public Utilities Commission of the State of California,” Jackson Papers, Box 180 Folder 7.
\item \textsuperscript{84} Ibid.
\item \textsuperscript{85} Ibid.; United States v. Public Utilities Commission.
\item \textsuperscript{86} Plessy v. Ferguson, 163 U.S. 537 (1896). In Plessy, the Court held that services, facilities and public accommodations were allowed to be separated by race, on the condition that the quality of each group’s public facilities was equal.
\end{itemize}
time, they also highlight his views on judicial restraint as well as the federalist views that he had inherited from his former professor, and Jackson’s correspondent, Charles Fairman.

By the time Rehnquist began his clerkship, Jackson had already dealt with segregation on a few occasions, notably the 1948 case *Bob-Lo Excursion v. Michigan*. Bob-Lo Excursion, a private company transporting passengers to Bois Blanc Island in Ontario, Canada, refused to transport African-Americans. The Court upheld the state’s regulation of Bob-Lo, but Jackson, joined by Chief Justice Fred Vinson, dissented on the grounds that the Civil Rights Act’s protections did not apply to transportation between Michigan and a foreign entity under the Commerce Clause. Jackson’s opinion demonstrated that any concern he had for civil rights did not trump his belief in the Commerce Clause. Jackson opened his dissent by stating that New York’s anti-discrimination law would be constitutional if it only dealt with intrastate commerce.87 He also said that if the Congress enacted a similar law “of like tenor [it] would undoubtedly be valid”88 Jackson cited precedents where the Court had struck down both segregation and anti-discrimination laws under the commerce power, and he expressed anxiety over the effect this seeming inconsistency would have. He said, “All is left to case-by-case conjecture. The Commerce Clause was intended to promote commerce, rather than litigation.”89

In 1948, around the time that *Bob-Lo* was being argued, Jackson engaged in a series of letters with Rehnquist’s mentor, Charles Fairman. The letters initially concerned Fairman’s work on the Fourteenth Amendment, a paper that Jackson seemed enthusiastic to read. He would later write that the paper was “a great service to the legal profession.”90 Their letters turned to the

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88 Ibid.

89 Ibid.

90 Jackson to Charles Fairman, October 18, 1949, Jackson Papers, Box 12, folder 10.
segregation cases coming before the Court, and their insights on the matter shed light on Rehnquist’s judicial philosophy due to its similarities and its stark differences.

In the letters, Jackson struggled to come to terms with the judicial restraint that he had called for in *The Struggle for Judicial Supremacy* ten years before and what seemed to be inevitable judicial action. He explained this dilemma to Fairman:

> But I really did, and still do believe the doctrine on which the Roosevelt fight against the old Court was based – in part that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs. We insisted that a majority out of nine appointed life-tenure men should not settle such issues. . . . The problem in my mind is not merely should we nine decide this case, but should such an institution decide such questions for the Nation.  

Fairman also articulated his concerns about judicial restraint. Despite reservations about the role of the Court, Fairman implied support for judicial intervention, and he cautioned Jackson from comparing the segregation cases to the Lochner era because those cases had dealt with “political questions” that the “Justices never had any business to pronounce.”

In 1953, the confluence of their judicial views was brewing inside Rehnquist. Two memos dealing with the segregation cases showed that he shared the view of judicial restraint espoused by Jackson and Fairman, but he was quite dissimilar on the issue of segregation. In a memo titled “A Random Thought on the Segregation Cases,” Rehnquist compared the Court’s intervention to the Lochner era. He said that the Court had eventually stopped the “reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.” He called segregation “quite clearly not one of the extreme cases,”

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92 Charles Fairman to Jackson, March 30, 1950. Jackson Papers, Box 12, folder 10.

and cautioned that should the Court intervene, “it must be prepared to see its work fade in time,” like the Lochner Court.  

His memo to Jackson on the 1953 case *Terry v. Adams* also demonstrated these views. *Terry* examined whether a private political party that controlled election violated the Fifteenth Amendment by restricting access to the party for African-Americans. Like the previous memo, this case shows Rehnquist’s views on judicial restraint. After summarizing Justice Black’s and Frankfurter’s opinions, Rehnquist wrote, under the heading “your ideas,” that “the constitution does not prevent the majority from banding together, nor does it attain success in the effort.” The contents of the memo would later be a source of considerable consternation for Rehnquist.

Rehnquist’s two segregation memos shed light on his views on judicial restraint, deference to the majority, and deference to the sovereignty of the states. Jackson would dismiss his clerk’s suggestions, however, joining the majority in *Terry v. Adams*, and eventually, in 1954, joining the unanimous decision in *Brown v. Board of Education*.

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94 Ibid.

The Relationship Between Jackson and Rehnquist

Personal Communication Post-Clerkship

The relationship between a law clerk and their Justice is a unique one that requires a rapport on both a professional and a personal level. In contrast to the close bond that Felix Frankfurter had with his clerks, the relationship between Rehnquist and Jackson was distant at best, but this was not necessarily out of the ordinary for Jackson’s interactions with clerks in his final years.\(^{96}\) Despite his best efforts, Rehnquist could only seem to get terse responses from Jackson in their correspondence. Rehnquist criticized Jackson in the years immediately following the Justice’s death. His stance would soften as the years went on, but it was apparent that Rehnquist left Washington discouraged and bitter at Jackson.

Rehnquist left the Court in the spring of 1953, before the Court term had ended. He would eventually settle in Phoenix, Arizona, one of his two preferred states in his pre-clerkship letter to Jackson.\(^{97}\) Chief Justice John Roberts would later say that Rehnquist chose Phoenix because he had conducted research at the Library of Congress while a clerk, discovering that Phoenix had the third-most days of sun per year and better legal markets than the two cities with more sun, Tampa and Albuquerque.\(^{98}\)

Rehnquist may have traveled across the country to Phoenix, but his mind stay interested in the activities at the Court. Shortly after he left, the Court agreed to hear a case of Julius and Ethel Rosenberg, a couple arrested for giving atomic secrets to the Soviet Union. The Court

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\(^{97}\) Rehnquist to Jackson, December 10, 1951, Box 19, folder 3.

initially blocked a petition for a grant of certiorari, but eventually agreed to hear the case in the final days of the term. Jackson’s opinion in the case focused on the hurried and unprecedented nature of the Court’s action to take the case. The Rosenbergs were eventually executed following the Court’s ruling.  

Rehnquist wrote to his former boss following the case to congratulate him on the decision. He wrote, “I wanted to write as soon as I could, and tell you how much I admired the opinion that you wrote on that occasion.” He would go on to call Jackson the “only lawyer on the Court” before inquiring whether it would be appropriate for him to write a law review article about the case. His letter took up an entire page, with the signature being pressed on the last inch of paper. Jackson’s response was typically unceremonious, consisting of five sentences. He said he was glad that Rehnquist was settled in Phoenix. He then cautioned that, while he “saw no reason why [Rehnquist] should not” write the article, he said, “I cannot guarantee against criticism as a result of it, but even judges get criticized.” The letter ended with a friendly request that the two keep in touch.

Rehnquist would write Jackson again months later to inquire about the Justice’s health after Jackson suffered a heart attack. Rehnquist used the letter to reflect on his time at the Court and on his views on the new Chief Justice, Earl Warren. He expressed concern for Jackson’s condition before moving onto other matters, saying, “I know that you are anxiously awaiting my critique of the year’s work of the Court to date; I am, in short, surprised to find out how thoroughly I agree with most everything you have done, and how well you seem to get along

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100 Rehnquist to Jackson, Jackson Papers Box 19, folder 4

101 Ibid.

102 Ibid.
Perhaps Rehnquist missed the action of the Court, but it was clear he was still engaged in its activities and in the struggle between state and federal authority. He told Jackson that he was “anxiously awaiting the next chapter, either judicial or Congressional in this drama of (to put it as I am sure Felix [Frankfurter] would) ‘the delicate balance between the orbits of federal and state jurisdiction.’”

On Warren, he expressed his disappointment and said, “What the Court really needs is a Chief Justice; an ability to handle the administrative side and to compromise dissidence would be an asset to an able, experienced lawyer in the job, but they certainly are no substitute for some experience in the forums whose actions he is called on to review.”

Rehnquist seems to approve of Jackson’s decisions before the Court, but it is unclear whether that is a genuine sentiment or just an example of Rehnquist flattering his former boss.

Towards the end of the letter, he took a moment to reflect on his time as a clerk for Jackson and, again, his words are flattering:

I have occasionally reflected on the experience which I got while working for you; I think there is a tendency when one first leaves a job like that, and turns to the details of a general law practice, to feel, “Why, hell, that didn’t teach me anything about practicing law.” In a sense it didn’t, and in that regard I am sure you would be the first to agree that there is no substitute for actually practicing. But I can’t help feel that, in addition to the enjoyment from the personal contacts, one does pick up from a clerkship some sort of intuition about the nature of the judicial process. It is so intangible I will not attempt to describe it further, but I think it is valuable especially in appellate brief-writing.

Rehnquist’s attitude towards Jackson seems to have been fairly positive at this point in 1954. Jackson’s clerk at the time, E. Barrett Prettyman, believes that this was because Rehnquist saw Jackson as a useful connection to keep for his professional growth.

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103 Rehnquist to Jackson, Jackson Papers, Box 19, folder 4.
104 Ibid.
105 Ibid.
106 Ibid.
107 Barrett and Snyder, “Rehnquist’s Missing Letter.”
that this praise is reflective of a respect for Jackson and a lingering hope that Jackson would side with Rehnquist in the critical segregation cases before the Court.\textsuperscript{108} Perhaps it was a combination of both of these motives that spurred Rehnquist’s glowing reviews of his former boss and his time working for him, but that would be his last letter to Jackson, as he did not write Jackson after the May 1954 decision in \textit{Brown v. Board of Education} until Jackson’s death in October.

**Rehnquist After Jackson’s Death**

Following Jackson’s death, Frankfurter circulated a memorial he had prepared for Jackson to be published in the Harvard Law Review. Around that time, Rehnquist sent a letter to Frankfurter criticizing Jackson and commenting on their relationship with one another. The letter itself was stolen in the early 1970s from Frankfurter’s papers at the Library of Congress, but its contents can be pieced back together through a response written by Prettyman to Frankfurter. John Q. Barrett has surmised, based on Prettyman’s letter, that there were four major points brought up by Rehnquist in his letter to Frankfurter.\textsuperscript{109} First, Rehnquist said that Jackson reached the apex of his career as solicitor general and did not leave a lasting impression on the Court.\textsuperscript{110} Second, he claimed that Jackson had a tendency to “go off half-cocked” in opinions.\textsuperscript{111} Third, his opinions did not seem to “go anywhere.”\textsuperscript{112} And fourth, Rehnquist never felt that he had become a personal friend of Jackson’s.\textsuperscript{113} The letter represented a departure from his views in the letters to

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\textsuperscript{108} Ibid., 654.

\textsuperscript{109} Ibid., 659.

\textsuperscript{110} Ibid.

\textsuperscript{111} Ibid.

\textsuperscript{112} Ibid.

\textsuperscript{113} Ibid.
Jackson, and Frankfurter took such umbrage to the accusations that he called on Prettyman, who was then serving as Frankfurter’s clerk, to write a rebuttal for the historical record.\textsuperscript{114}

Prettyman’s October 13, 1955 response rebutted many of Rehnquist’s charges. He said that it was too early to tell Jackson’s impact, particularly in light of his participation at Nuremburg. He said that the Jackson had “a thorough and deeprooted knowledge of the law” and that any opinions that seemed to be indecisive were an example of his pragmatism being applied to that knowledge of the law.\textsuperscript{115} He also offered pragmatism as a reason for Jackson’s opinions seemingly “going nowhere,” and he said that Jackson did not let ideology interfere with his decisions, contrasting the Wickard decision with the 1953 case \textit{United States v. Five Gambling Devices}, in which Jackson held that the commerce power did not give the FBI the authority to confiscate slot machines that had never been shown to be in interstate commerce.\textsuperscript{116} Prettyman conceded that Jackson was not the warmest person to his clerks, but he also contended that, when one better understood Jackson, they could see signs of friendship:

When I first became his law clerk, I thought he must not like me; I thought I just wasn’t getting through to him. But as I studied him, I came to recognize the small signs that meant friendship, displeasure, etc. He was never demonstrative, except in anger, but I got to feel, perhaps mistakenly, that he liked me. He took me on a fishing trip once, and coming back in the evening, as we were chatting in the back of the boat, he came as close as he ever did to saying: We’re having a good year, aren’t we?; we like each other, and we get along fine. For me, this peculiar friendship meant more than I could ever express.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{114} Feldman, \textit{Scorpions}, 398.
\item \textsuperscript{115} Barrett and Snyder, “Rehnquist’s Missing Letter,” 659.
\item \textsuperscript{116} Ibid., 659.; \textit{United States v. Five Gambling Devices}, 346 U.S. 441 (1953).
\item \textsuperscript{117} Barrett and Snyder, “Rehnquist’s Missing Letter,” 659.
\end{itemize}
Jackson did not have the same relationship with his clerks that Frankfurter had with his, who were called the childless Justice’s “surrogate sons,” but Prettyman believed that Rehnquist was wrong to intimate that Jackson was a cold person.¹¹⁸

Prettyman felt that the letter reflected the true relationship between Jackson and Rehnquist. He and former clerk from the Wickard term, James Marsh, believed that Jackson, who had used two law clerks from 1949 until 1952, chose to return to one law clerk because there was “friction between the justice and Rehnquist as well as tension between Rehnquist and co-clerk Donald Cronson.”¹¹⁹ In fact, Prettyman, in a 2010 lecture, said that Jackson “never got along too well with one of his two clerks preceding me—later-to-be Chief Justice William Rehnquist—and that that relationship, in fact, was pretty rocky all Term long.”¹²⁰ As noted above, Prettyman felt that Rehnquist’s correspondence with Jackson simply reflected an ambitious young lawyer hoping to keep his connection with Jackson.¹²¹ Prettyman told Barrett that he believed that Rehnquist disliked Jackson prior to Brown “because Rehnquist foresaw the possibility that Jackson would support the Court’s decision.”¹²² It is clear that Brown was a defining point in their relationship, and Barrett thinks it was the sole reason for the split. Prettyman believed that the comments in Rehnquist’s letter to Frankfurter were indicative of his true views and that Jackson’s

¹¹⁸ Peppers and Ward, In Chambers, 179.


¹²² Ibid.
death — which meant that Rehnquist no longer had a relationship to utilize — liberated Rehnquist to speak freely about his true view of his former boss.123

Rehnquist likely left the Court with an ill taste in his mouth. It was clear to him, as evidenced by his memos, that the Court was going to utilize judicial activism to strike down segregation under the equal protection clause, an approach Rehnquist considered judicial activism. As Barrett notes, Jackson joining the Brown decision clearly disappointed Rehnquist. This disappointment, however, was just the latest in a series of disappointments that had left Rehnquist with a negative view of Jackson. Jackson had spurned Rehnquist’s counsel several times before, and it is possible that Rehnquist, who was a proud man — he once spent several days trying to disprove Justice John Paul Stevens’s assertion during oral arguments that Hazen Cuyler had played right field for the Chicago Cubs rather than centerfield — was discouraged by their professional interactions.124 Rehnquist must have felt that his judicial philosophy, while sometimes in line with Jackson’s, was also frequently at odds with his boss, in contrast to the way that the other liberal clerks — whom Rehnquist called the “Roddell school” — aligned with their more liberal Justices125. This difference of opinion between Rehnquist and Jackson likely added to Rehnquist’s feelings of isolation and his unhappiness with Jackson. Conversely, Jackson’s ruling in Brown and may have seemed to Rehnquist as an abandonment of one of their major areas of judicial agreement, judicial restraint. As such, he may have viewed Jackson’s acceptance of the “liberal” view of judicial intervention on segregation as a betrayal of their stance and lost esteem for the Justice. This would have reinforced his belief in the need for a return to conservatism on

123 Ibid.

124 Jenkins, The Partisan, 200.

the Court. Rehnquist’s 1955 letter represents his unhappiness with his time with Jackson and the liberal drift of the Court, but there is evidence that Rehnquist grew to look somewhat more fondly on his experience as the years passed.

In 1957, Rehnquist again returned to the topic of his clerkship, writing an article for *US News and World Report* that outlined some of his views on the role of clerks. Rehnquist’s article shied away from a critique of Jackson and focused on the role the liberal clerks had in setting the agenda of the Court. In fact, he even praised Jackson’s writing — not necessarily a difficult compliment to conjure — saying, “Robert H. Jackson had one of the finest literary gifts in the history of the Supreme Court. Even a casual acquaintance with his opinions . . . indicates that he neither needed nor used ghost writers.”126 Rehnquist used the article to assert the influence that the liberal clerks were having on what was increasingly being seen as the liberal Warren court. He wrote that, while the clerks had little influence in the decision of the Court, they did influence what cases were granted certiorari, saying, “I do not believe it can be denied that the possibility for influence by the clerks exists in this realm of the Court's activities.”127 He then stressed that the biases of the clerks predominately leaned to the left and were “by no means representative of the country as a whole nor the Court which they served . . . It is nonetheless fair to say that the political cast of the clerks as a group was to the ‘left’ of either the nation or the Court.”128

Jackson’s abandonment of judicial restraint in *Brown* and his embrace of liberal stances may have made Rehnquist feel as if the Court was lost to the liberal point of view. As such, Rehnquist likely hoped for the days when the Court would recalibrate to the right, and this may have fueled his continued conservatism and his eventual entry into Republican political circles in Phoenix.

126 Ibid.
127 Ibid.
128 Ibid.
Rehnquist’s initial feeling of isolation during his first day as a clerk — that he was a western conservative surrounded by eastern liberals — appears to have stayed with him even after he left the Court and was likely enhanced by decisions like *Brown*.

In 1964, Rehnquist would again have the opportunity to write about Jackson — his time with Prettyman as the latter worked to organize a series of lectures in Jackson’s honor. Rehnquist’s tone in this letter indicates that he had begun to soften in his stance on Jackson. Surely his disappointments remained, but he had come to appreciate many aspects of Jackson’s jurisprudence and his role at Nuremburg. He reiterated his view on the personal relationship between Jackson and himself, saying that he did not feel that he “was ever an intimate of the Justice’s.”

Nonetheless, he told Prettyman that he would enjoy the opportunity to discuss one of four major areas of Jackson’s legacy: his role at Nuremburg, his place as a lawyer’s judge, his jurisprudence on criminal law, and his First Amendment philosophy. On the final topic Rehnquist demonstrated a level of self-awareness that was perhaps missing from his 1955 letter to Frankfurter, as he said, “I am very much of a conservative [philosophy], and I realize that one is inevitably tempted to read his own views into the opinions of others -- particularly those whom he respects.”

Rehnquist’s letter demonstrates a transition, or a softening, from his 1955 letter to Frankfurter and indicates that the wounds from his time as a clerk and the *Brown* decisions had begun to fade, allowing him to take a measured assessment of the impact of his former mentor.

The stressed relationship between Jackson and Rehnquist, like their judicial differences, seems to have had a subtle impact on Rehnquist, his recollection of the clerkship experience, and the continued growth of his conservatism. The distinctions between their judicial stances certainly

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129 Rehnquist to E. Barrett Prettyman, December 21, 1964, The Papers of E. Barrett Prettyman, University of Virginia, Charlottesville, VA, Box 1 folder 11, no. 4.

130 Ibid.

131 Ibid.
played a role in their relationship, but the relationship itself may have impacted — at least to some degree — Rehnquist’s views on Jackson’s jurisprudence and, as a result, the development of his own judicial philosophy. While many law clerks look back fondly on their relationship with a Justice, Rehnquist looked back bitterly on that time. The combination of his alienation among his liberal colleagues and his distant, perhaps bitter, relationship with the moderate Jackson may have left Rehnquist feeling increasingly isolated, reinforcing his conservatism. It was easier for him to show disdain for Jackson following the *Brown* decision and it was easier for him to cast aside the man’s influence on the Court because he felt little affection for Jackson, both personally and professionally. To Rehnquist in the years after *Brown*, Jackson was not a great pragmatist employing dialectic reasoning to form judicial decisions, rather he was a lost Justice going off “half-cocked” and “going nowhere” in his opinions. This may have led Rehnquist to turn to the conservatism that he had developed at Stanford. Rehnquist’s strained relationship with Jackson had an impact on how he viewed the Justice and likely reinforced his own conservative judicial philosophy. His contentious relationship with Jackson was an issue that would stay with Rehnquist over the course of the next several decades.

**Conclusion**

Rehnquist’s jurisprudence was formed at Stanford University in Charles Fairman’s class and at the law school, and this philosophy was solidified in his time on the Court. From his thesis to his law school notebooks, there is evidence that Rehnquist was concerned that the modern federal government was beginning to breakdown federalism at the expense of state sovereignty. This concern for federalism, combined with support for judicial restraint, defined Rehnquist’s time as a clerk for Jackson. While the two men were aligned in their views of the dormant Commerce Clause, they frequently diverged on issues of federalism — much to Rehnquist’s discouragement. It is unclear what direct impact his time with Jackson had on Rehnquist’s
jurisprudence, but Jackson’s cold demeanor to Rehnquist and his dismissal of the clerk’s counsel on several instances left Rehnquist upset at Jackson and the increasingly liberal Court in the years after he left his clerks. Rehnquist’s harsh words about Jackson in 1955, therefore, can be seen as a direct result of his dissatisfaction with his experience as a clerk and with Jackson’s judicial philosophy. That experience working for Jackson, however, would have a major impact on Rehnquist when he joined the Court as an Associate Justice in 1971.
CHAPTER THREE
REHNQUIST ON THE COURT
Nomination to the Court

Arizona and the Nixon Administration

Rehnquist spent the years following Jackson’s death working in Phoenix, building his law practice. He never strayed too far from the political world, however. Years later, Rehnquist would recall a piece of advice that Jackson had given him, saying that the Justice told him, “If you ever want to come back to Washington in a policymaking position. Go back to where you came from. Get out now. That’s where those guys come from—they’re chosen from the outside.”\(^1\) Rehnquist later questioned whether that statement was still valid in twenty-first century Washington, but he followed Jackson’s advice and quickly became an influential member of the Arizona Republican Party. The Arizona Republicans were gaining national prominence through their Senator, and eventual Presidential nominee, Barry Goldwater. Rehnquist became an advisor to Goldwater; serving on the Senator’s failed 1964 Presidential campaign.\(^2\) The campaign was a series of misadventures for the candidate and his staff in advance of a decisive 486-52 Electoral College victory for President Lyndon Johnson.\(^3\) The experience did serve Rehnquist, however, allowing him to write speeches and providing strategic counsel to the candidate by the end of the campaign.\(^4\) It was a brief reintroduction to national politics, but it gave Rehnquist an opportunity to look beyond his law practice in Phoenix and work on important national issues.

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2 Jenkins, *The Partisan*, 70-74.


4 Jenkins, *The Partisan* 73.
Following the 1964 campaign, Rehnquist continued to work at his legal practice and stayed involved in politics, gathering the acquaintance of Richard Kleindienst, who, in 1967, became the chairman of the Arizona Republican Party and chose Rehnquist to be the general counsel for the Party.\(^5\) When Richard Nixon won the 1968 Presidential election, Kleindienst was chosen to be the deputy attorney general to John Mitchell.\(^6\) Again Kleindienst brought Rehnquist with him, securing him a position as the assistant attorney general in the Office of Legal Counsel.\(^7\) It was a job that had been described as a “stepping stone” because of the rapid rise of some of the previous office holders.\(^8\) This new position brought Rehnquist back to Washington after fifteen years in Phoenix, and it also brought Rehnquist back to the highest realms of the legal and policy circles in the nation.

Rehnquist’s position situated him as the legal counsel for the attorney general and it involved him in many of the important legal battles of the day, from civil rights to protests of the Vietnam War. He also was tasked with providing counsel on potential Supreme Court nominees. Two interesting exchanges during that time shed light on Rehnquist, the eventual justice. During his confirmation hearing, Rehnquist was only asked one question, and it centered on whether Rehnquist would defend Supreme Court decisions with which he did not agree. Rehnquist said that it was his duty to “call it as he sees it. You give them the interpretation of the law that you honestly place on the thing.”\(^9\) In another instance, Rehnquist wrote a memo for John Dean, an associate deputy attorney general, calling for a commission to rewrite the Constitution in response

\(^5\) Ibid. 90-91.

\(^6\) Ibid.

\(^7\) Ibid.

\(^8\) Ibid.

\(^9\) Ibid.
to recent developments in criminal law at the Court.\textsuperscript{10} In it, he recited the lessons he learned from Charles Fairman years before and castigated the Warren Court for using the Fourteenth Amendment to apply the Bill of Rights to the states.\textsuperscript{11} The letter never got passed Dean’s desk, but Dean later recalled that the memo was a “smoking cannon accidentally left on the testing range” and would have likely sunk Rehnquist’s eventual nomination had it come to light.\textsuperscript{12} It did not reach the public, however, and within two years of being in Washington, Rehnquist would go from vetting nominees to being the unlikely nominee for an Associate Justice position on the Supreme Court of the United States.

\textit{Nomination}

Nixon’s ascendancy to the presidency occurred at a time of great upheaval for the Court. The liberal Warren Court had interpreted the Constitution to expand the Fifth Amendment rights of citizens; it also articulated a right to privacy in the Constitution and used the Commerce Clause doctrine from \textit{Wickard} to affirm the Civil Rights Act of 1964, which began the process of desegregating the South.\textsuperscript{13} Nixon’s constitutional views differed greatly from those of the remaining New Dealers and other liberal stalwarts on the Court. Fortunately for the President, the Court was aging, and Chief Justice Warren had announced his retirement in 1968, pending a replacement. There appeared to be several opportunities on the horizon for Nixon to put other nominees on the bench.

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\textsuperscript{11} Ibid., 269-270.
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\textsuperscript{12} Ibid., 268.
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Nixon replaced Warren with relative ease, but as subsequent vacancies on the Court arose, he struggled to get his replacements through. The stalemate led to a thirteen-month period in which the Court lacked its full membership, the longest since the Civil War.\(^{14}\) Nixon first nominated Warren Burger for the Chief Justice position. Burger was a critic of the Warren Court’s extension of safeguards to suspected criminals, such as the *Miranda* rights.\(^{15}\) His confirmation was easy, if not well attended by the Senate, as he received seventy-four votes, with twenty-two Senators absent.\(^{16}\) The next opportunity to fill a Court vacancy did not go as well.

Justice Abe Fortas resigned from the Court due to a conflict of interest accusation in 1969, giving Nixon another appointment. He initially turned to Lewis Powell, who declined, before turning to Clement Haynsworth, a judge on the Circuit of Appeals.\(^{17}\) Rehnquist advised the Administration on the choice and supported Haynsworth’s nomination, calling him a strict constructionist.\(^{18}\) Haynsworth was accused of being slow to support civil rights and an end to segregation, and his nomination was defeated by a vote of 55-45.\(^{19}\) Nixon then turned to G. Harrold Carswell, a southern judge, but Carswell was accused of being underqualified and of having favored segregation. Again Rehnquist supported the nomination, saying that Carswell, like Haynsworth, was a strict constructionist.\(^{20}\) Carswell’s nomination ended before it ever went to the

\(^{14}\) Jenkins, *The Partisan*, 118.


\(^{17}\) Dean, *The Rehnquist Choice*, 18.

\(^{18}\) Ibid., 19.

\(^{19}\) *Cong. Rec.*, 91st Cong., 1st sess., 1969, 115, 35396.

Senate for a vote. Finally, Nixon settled on Henry Blackmun, a moderately conservative judge on the Eighth Circuit Court of Appeals, who was confirmed 94-0 in the Senate. 21

In 1971, another two seats on the Court opened when Justices Black and John M. Harlan both retired from the Court within a month of each other in August and September. Nixon did not immediately learn his lesson from the Haynesworth and Carswell debacles, however, and he turned to a series of underqualified and underwhelming candidates. First, the Administration released a series of names that Nixon was considering to Time magazine. The list included Senator Robert Byrd from West Virginia, Herschel Friday of Arkansas, and Mildred Lillie of the California Court of Appeals. 22 Time criticized all of them and said, “But last week, when the names of six potential appointees, including two women, were made known, Richard Nixon once again demonstrated his inability or unwillingness to nominate renowned jurists to the highest tribunal in the land.” 23 Nixon doubled down on his picks, however, and nominated Friday and Lillie for the two vacancies. Rehnquist’s name came up in conversations, but the mentions were cursory at best. Nixon hoped to make a pick that would be ground-breaking, and Attorney General John Mitchell admitted this fact when Rehnquist’s name was mentioned, saying, “It’d be a great appointment, but why? ... you don’t buy anything.” 24 Nixon wanted a pick that would be outside of the mold, and at that point Rehnquist did not seem to be worth the effort.

After the American Bar Association deemed Friday and Lillie to be unqualified, Nixon turned his attention to his original choice, Lewis Powell, and Senator Howard Baker of


22 Dean, The Rehnquist Choice, 200.


24 Dean, Rehnquist Choice, 139.
Tennessee. While Powell eventually accepted Nixon’s offer, Dean recalled that Baker “dithered,” and unbeknownst to Rehnquist, the assistant attorney general increasingly became a more attractive choice to Nixon.\textsuperscript{25} When a reporter asked if Nixon was considering him for the Court, Rehnquist sardonically replied, “Why should he? I’m not a woman, black, or mediocre.”\textsuperscript{26}

Ironically, key to Rehnquist’s chances to get nominated were his ties to Jackson, a man whom he had criticized vigorously sixteen years before. Two days before a scheduled address to the nation about his nominees, Nixon was still waiting on Baker when the topic of Rehnquist came forward again. He asked about the assistant attorney general’s credentials, and an aide mentioned that Rehnquist had clerked for Jackson, with special counsel to the President Richard Moore adding, “To Robert Jackson, who is the cream of the crop.”\textsuperscript{27} Stanford was described in terms that would have made a younger Rehnquist uncomfortable years before, as Moore responded to Nixon’s question of whether Stanford was elite by saying, “It’s the western of the elite, sort of an answer to Harvard.”\textsuperscript{28} Being from an elite law school outside of the Ivy League probably enhanced Rehnquist’s credentials in Nixon’s eyes, a man who was known to hold Harvard degrees in contempt.\textsuperscript{29} Later in the conversation, Nixon returned to the Jackson clerkship, saying, “He’s clerked for Jackson, who is one of the best judges on the Court. Should have been chief judge.”\textsuperscript{30} He would reiterate that sentiment in his national address to the nation.

\textsuperscript{25} Ibid., 221.

\textsuperscript{26} Roger Mudd, \textit{CBS Evening News}, October 22, 1971 quoted in Jenkins, \textit{The Partisan}, 126.

\textsuperscript{27} Dean, \textit{The Rehnquist Choice}, 228.

\textsuperscript{28} Ibid., 229.


\textsuperscript{30} Dean, \textit{The Rehnquist Choice}, 229.
that evening announcing the nomination.\footnote{31 President Richard Nixon, Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States (Oct. 21, 1971), in \textit{Public Papers of the Presidents of the United States: Nixon, 1971-1972} (Washington, DC: Government Printing Office, 1999), 1056.} Rehnquist’s clerkship for Jackson gave him the appellate experience that was necessary if he were to join the Court, but more importantly it gave him credentials that would allow him to get passed the confirmation firewall that had been erected by the Senate Democrats and the American Bar Association. Simply put, without clerk Rehnquist, there is not — at least in 1971 — a Justice Rehnquist.

When Rehnquist appeared before the Senate Judiciary Committee, the questions revolved around his time in Phoenix, his service in the Nixon Administration, and his clerkship and how that experience prepared him for his new role. Phil Neal, the professor and former law clerk to Jackson who helped Rehnquist secure his own clerkship, testified on Rehnquist’s behalf, saying, “He was not only the top student in his class but one of the best students in the School over a number of years,” and added that Rehnquist was “one of the most impressive students I have had in some twenty-two years of teaching.”\footnote{32 Senate Committee on Judiciary, \textit{Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices of the Supreme Court of the United States}, 92\textsuperscript{nd} Cong., 1st sess., 1971, 11. http://www.loc.gov/law/find/nominations/rehnquist-aj/hearing.pdf (accessed March 2, 2013).} Later, Senator Strom Thurmond commended him on his clerkship, saying that it would be “very valuable” on the Court.\footnote{33 Ibid., 79.} Senator John McClellan asked Rehnquist about whether he would change opinions he had held in the Justice Department, and Rehnquist immediately turned to Jackson:

\begin{quote}
I not only can conceive it to be true, Senator McClellan, but I can recall at least one instance in which Justice Jackson, to whom I clerked, found as a Supreme Court Justice that he was obliged to disagree with something he had done as Attorney General.\footnote{34 Ibid., 20.}
\end{quote}
Senator Phil Hart, a Michigan Democrat, asked his views on precedent and Rehnquist’s citation of Jackson’s belief that a Justice should be free to change their position. Rehnquist reaffirmed that belief, saying, “I do not think there is any lack of fidelity to the Constitution. . . . I would add only the qualification that he must take into consideration the reasoning and the strength of the earlier precedents which really is a part of the Constitution.”\textsuperscript{35}

The hearing also allowed Rehnquist to articulate his views on many constitutional issues. Rehnquist noted his belief in stare decisis, but like Jackson, he did not think this theory should be absolute. He said that a Justice should carefully consider precedent and supported the constitutionality of cases like \textit{Heart of Atlanta}, which relied on the Commerce Clause — and the \textit{Wickard} and \textit{Darby} doctrines of aggregate effect — to uphold civil rights legislation. He said:

As I said, a decision that was handed down unanimously and has been unanimously reconsidered by a succeeding group of judges, of which Brown \textit{v}. Board of Education would be an example, is to my mind the established constitutional law of the land. To the extent that one takes other decisions which were by a closely divided Court more recently, I would regard these precedents as not being as strong, though nonetheless entitled to weight. So far as to the power of the Congress to enact civil rights legislation . . . under the Commerce Clause, . . . I think they have been sufficiently set at rest by a constitutional decision that one need not hesitate to say that that is so.\textsuperscript{36}

This admission implicitly meant that Rehnquist would not seek to overturn the rulings in cases like \textit{Wickard}, but instead would work on the periphery to define and control their reasoning. The hearing demonstrated the judicial philosophy Rehnquist would bring to the Court, and through his embrace of established modern Commerce Clause doctrine, it implied a subtle influence that Jackson may have had in informing that philosophy.

While his clerkship was the defining credential in his nomination, Rehnquist’s work for Jackson almost derailed the entire nomination. On the eve of the Senate’s floor vote, \textit{Newsweek}

\textsuperscript{35} Ibid., 23.

\textsuperscript{36} Ibid., 76.
magazine published a story about Rehnquist’s memos to Jackson on the civil rights cases, bringing to light his memos calling for the Court to uphold *Plessy v. Ferguson* and segregation. Rehnquist was already under fire for his civil rights record, and the story had the potential to derail his entire nomination. Rehnquist immediately sent a letter to the Judiciary Committee chairman, Senator James Eastland, denying that the memo represented his views. He wrote, “I am fortified in this conclusion because the bald, simplistic conclusion that ‘*Plessy v. Ferguson* was right and should be reaffirmed’ is not an accurate statement of my own views at the time. . . . I believe that the memorandum was prepared by me as a statement of Justice Jackson’s tentative views for his own use at conference.”

Jackson’s former secretary, Elsie Douglas, and Rehnquist’s former co-clerk, Donald Cronson, both responded to Rehnquist’s letter. Douglas told *The Washington Post* that Rehnquist had “smeared the reputation of a great justice.” Cronson came to the aid of Rehnquist, saying that the letter did not represent Rehnquist’s views, but did not go so far as to say those were Jackson’s views. Cronson, in a telegram from London, said that as he recalled it, the memo was supposed to depict one side of the debate over segregation, and that he had written a memo outlining the other side. Cronson’s telegram backed up Rehnquist’s claim that the memo did not represent his views — and it likely saved his nomination — but his response and further research has shown that Rehnquist had distorted the true meaning of the memo’s contents when he said that it reflected Jackson’s views. E. Barrett Prettyman, Jackson’s subsequent clerk, said that 

37 “Supreme Court: Memo from Rehnquist,” *Newsweek*, December 13, 1971, 32.


40 Ibid.
Jackson’s personal views did not align with the letter.\textsuperscript{41} Jackson’s biographer Dennis Hutchinson later claimed that his research showed that Jackson never asked a clerk to write a memo from Jackson’s point of view.\textsuperscript{42} It is apparent that even if the memo did not represent Rehnquist’s own personal view, it likely was not an intentional articulation of Jackson’s views either.

Certainly it was easier for Rehnquist to defend himself at the expense of the deceased, and perhaps Rehnquist still carried over some of the bitterness he displayed in his letter to Frankfurter. More likely than not, Rehnquist’s statement was simply a matter of expediency. Discussing the nuance of a clerk memo would be time consuming and difficult, and Rehnquist knew how difficult Nixon’s Supreme Court nominations had been. It may have simply been a matter of practicality, and Rehnquist sought to remove any barriers that stood in his path to the nomination. It is not unreasonable to see why one would do this, but it is also entirely possible that Rehnquist would not have done it to a Justice he admired, like Frankfurter. He may have seen no reason to fall on his sword for Jackson’s legacy.

Rehnquist’s nomination was not derailed by the controversy, however, and he was confirmed by the Senate by a vote of 68-26.\textsuperscript{43} Now, it was the United States and not Rehnquist that would ask, “What now, Hon. W. H. Rehnquist?” Rehnquist was no longer on the junior court; he was on the Supreme Court, and this offered an opportunity for him to demonstrate what, if anything, he took from Jackson’s judicial philosophy.

\textsuperscript{41} E. Barrett Prettyman, interview by author, Washington, DC, February 5, 2013.

\textsuperscript{42} Jenkins, \textit{The Partisan}, 42.

\textsuperscript{43} Cong. Rec., 92\textsuperscript{nd} Cong., 1\textsuperscript{st} sess., 1969, 117, 46197.
Associate Justice

Early Years

Rehnquist did not need a grace period before asserting himself on the Court. It may have been due to the fact that he had already worked on the Court for over a year as a clerk, he had worked in the Justice Department, or because of his incredible intelligence and self-confidence. Nonetheless, Rehnquist made his impact felt immediately on the Court, even if he did not determine the Court’s trajectory.

In his first four terms, Rehnquist filed fifty-seven dissents and joined another forty-five.\(^44\) He would issue over 400 dissents over the course of his thirty-three years on the Court. His dissents ranged across a number of constitutional principles, but their one commonality was that they were all what could be categorized as conservative-leaning dissents.\(^45\) It was clear that even in his first few terms, Rehnquist looked to be the ideological leader of conservatism on the Court. Rehnquist’s propensity to issue dissents, many times alone against a large majority, garnered him the nickname, “The Lone Dissenter.”\(^46\) His clerks during the 1974 term even gave the Justice a Lone Ranger doll to commemorate his nickname. Rehnquist’s affection for dissents paralleled that of Jackson, who had said that it was more fun to write a dissent than a majority opinion.\(^47\) Rehnquist later said that his dissents were intended to change future rulings. He said, “In a dissenting opinion, that’s really the purpose of a dissent: to lay the seeds for, hopefully, a change of doctrine.”\(^48\)


\(^{45}\) Ibid.

\(^{46}\) Jenkins, The Partisan, 149.

\(^{47}\) “Justice Jackson’s Story,” 1104.
This inclination to dissent likely stemmed from his feeling of isolation and estrangement with the liberal drift of the Court. Years later, Rehnquist would describe this time in similar terms to how he described his time as a clerk. Like in the 1950s, he believed the Court was excessively liberal and he believed that he needed to provide the conservative counterweight to his liberal colleagues:

I came to the court sensing, without really having followed it terribly closely, that there were some excesses in terms of constitutional adjudication during the era of the so-called Warren Court. And I felt that I probably would disagree with some of those decisions. . . . So I felt that at the time I came on the Court, the boat was kind of heeling over in one direction. Interpreting my oath as I saw it, I felt that my job was, where those sort of situations arose, to kind of lean the other way.\(^49\)

In some cases Rehnquist may have been dissenting for dissenting’s sake, a practice that Jackson disdained, but in many of his dissents it is apparent that they were intended to serve as the foundation for future opinions should the Court come to embrace his ideology.\(^50\) One of his first chances to issue such a dissent in the area of federalism and Commerce Clause jurisprudence would come in 1974.

\(Fry v. United States\)

The 1974 case of \(Fry v. United States\) offered Rehnquist one of his first chances to truly rein in the federal commerce power, but the sentiment of the Court was not on his side, and Rehnquist was left with nothing more than a lonely dissent against a seven Justice majority. The case dealt with the constitutionality of the Economic Stabilization Act of 1970, which aimed to curb inflation by stabilizing wages and salaries, including at the state level. \(Fry\) examined


\(^{49}\) Ibid.

\(^{50}\) Ibid., 1105.
whether the stabilization of the wages of state employees was an unconstitutional use of the commerce power to infringe on a state’s sovereignty. *Fry* drew on two other cases, *United States v. California*, which upheld the federal right to impose the safety provisions on trains operating completely intrastate, and *Maryland v. Wirtz*, which held that Congress could regulate the maximum hours and minimum wages of state employees of hospitals, institutions, and schools. Justice Thurgood Marshall’s majority opinion rested on the precedents of these two cases to uphold the Economic Stabilization Act.

Despite diverging greatly from majority, Rehnquist’s dissent was reasoned and moderate and sought to illustrate crumbling state sovereignty. In fact, he initially told Marshall that he would consider joining the majority opinion but determined that he needed to rein in the opinion with a clarifying dissent. Rehnquist saw the case as dealing with an essential question of the federal system, as he said, “Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments.” In his dissent, Rehnquist noted the plausibility of *California, Wirtz*, and even the majority’s reliance on them, but he described the case as another example of the increasingly slippery slope to plenary federal power over the states. Harkening to Fairman’s preferred time of scholarly research, Reconstruction, he articulated Chief Justice Salmon Chase’s belief in an “indestructible Union, composed of indestructible states,” but he said that all three decisions cast doubt on the indestructibility of the states. He questioned whether the Tenth Amendment had any power in the face of the ruling, despite the majority’s claim that

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51 Rehnquist to Thurgood Marshall, January 14, 1975, Rehnquist Papers, Box 73, no. 822.


53 Ibid.

54 Ibid.
the amendment still had significance. Rehnquist used his dissent to depict a status quo in which state sovereignty was being reduced with each Commerce Clause opinion.

Rehnquist then turned to a theme that would define his Commerce Clause jurisprudence on the Court, as he highlighted the difference between an individual’s protest against the federal commerce power and that of a state.\(^\text{55}\) Citing *Wickard* and *Heart of Atlanta Motel*, he said that individuals who attack the congressional authority under the Commerce Clause only assert “a claim of lack of legislative power” and that this “claim is ordinarily very difficult to sustain.”\(^\text{56}\) There were instances, he said, where individuals could claim an affirmative constitutional defense under provisions like the First Amendment, and these instances would have a better chance of success against government power. Rehnquist viewed the Constitution as giving a clear affirmative defense:

> In this case, as well as in *Wirtz* and *United States v. California*, the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority.\(^\text{57}\)

He believed that a state’s rights place “inherent affirmative constitutional limitation on congressional power.”\(^\text{58}\) In his defense of a state’s rights and its sovereignty beyond the Tenth Amendment, Rehnquist returned to the nineteenth century — perhaps another example of Fairman’s influence — and cited the 1890 case of *Hans v. Louisiana*. He said that there was “impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the

\(^{55}\) Ibid.

\(^{56}\) Ibid.

\(^{57}\) Ibid.

\(^{58}\) Ibid.
Tenth Amendment.59 Rehnquist viewed the wages of state employees as an inherent authority of the sovereign states and believed that Congressional regulation of this arena demonstrating the diminishing sovereignty of the states.

Rehnquist’s opinion also harbors many of the platitudes that Jackson articulated later in his life. Jackson said that he believed in the essential role played by dual federalism but also believed in the power of the federal government under the Commerce Clause. Rehnquist’s opinion sought to bridge the divide between these two clashing philosophies, reconciling state’s rights and the power of the federal government.

Fry was both an example of Rehnquist’s ideology and his strategic foresight. It seems unlikely that he thought he would be able to bring anyone from the majority over to his side — though he seems to have tried to appear to seriously consider joining the majority — but he knew there was strategic value in getting a dissent on the record. Perhaps he learned this from Jackson, but it is clear that he was laying the groundwork for the day when the argument in his dissent would be the orthodoxy.

League of Cities v. Usery

Just one year later, Rehnquist would have an opportunity to turn his dissent into a majority opinion and transform himself from a novice Associate Justice into an influence at the Court. In 1975 the Court heard arguments in National League of Cities v. Usery, a case that examined the constitutionality under the Commerce Clause of a 1974 amendment to the Fair Labor and Standards Act that extended the Act’s minimum wage and maximum hour requirement to nearly all state employees.60 In many ways the case was the logical extension of the Wirtz

59 Ibid.

opinion’s upholding wage requirements of hospitals and schools, but Rehnquist viewed the case differently, as did several other members of the Court.

After the oral arguments, the Justices held their conference, and it was clear that there was a striking division on the Court. Four Justices, including Rehnquist, wanted to rule the amendment to the Act as unconstitutional; three wanted to uphold the law; and two, Justices Potter Stewart and Harry Blackmun, were unsure of how to vote.61 Stewart had disagreed with Wirtz in 1968, but he did not want to be the deciding vote in a split 5-4 decision that would overrule precedent, so he told the Justices that he would only vote to overrule Wirtz if he was joined by Justice John Paul Stevens.62 Egged on by Justice Byron White, who disagreed with upholding precedent just for the sake of it, Stewart announced that he would join Rehnquist and vote to overrule.63 Blackmun later announced that he would consider joining Rehnquist and Stewart if the opinion was carefully written.64

With a majority behind him, Rehnquist went to work on the opinion. His draft opinion echoed many of the sentiments that he had articulated in Fry, but he also tried to make sure that it was inclusive enough that the other Justices would join. Stevens was aghast when Rehnquist circulated his first few drafts of the opinion, saying that he had rarely seen such a misuse of precedent.65 Brennan, who was also upset with Rehnquist’s opinion and called it a “catastrophic judicial body blow at Congress’ power,” viewed the case as a test on Rehnquist’s influence on the Court and his philosophical influence on the Court’s jurisprudence.66 Blackmun was generally

62 Ibid., 391-392.
63 Ibid., 392.
64 Ibid.
65 Ibid.
satisfied with Rehnquist’s opinion and joined it, but he sought to limit it by writing a concurring opinion to clarify federal intervention in areas like environmental cases. His clarification meant little, however, and Rehnquist’s opinion would carry precedential value when it was announced on June 24, 1976.

Rehnquist’s opinion reiterated his belief that the states had an affirmative defense against federal intrusion in issues of Commerce Clause jurisdiction. He began by reinforcing much of the Commerce Clause jurisprudence of the previous thirty years, most likely to calm any fears that he sought to return to the Lochner-era’s interpretation of the clause. Alluding to Chief Justice Marshall, he said, “It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress.” He again said that there was a difference between the federal government’s ability to interject itself into private endeavors — even if that meant preemption state law — and its relationship with the states themselves, citing *Heart of Atlanta*. To back up this claim, and his claim of states’ affirmative defense, he looked to the Tenth Amendment, which he said was not without significance, saying, “The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.” Channeling Fairman, he returned to the nineteenth century jurisprudence, quoting two opinions by Chief Justice Chase in 1869.

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66 Ibid., 393.


68 National League of Cities v. Usery.

69 Ibid.

70 Ibid.
Rehnquist then turned to what he viewed as the determining question of the case — did the amendment to the FLSA infringed on an essential function of a state’s sovereignty? He inquired, quoting *Lane County v. Oregon*, “The question we must resolve here, then, is whether these determinations are ‘functions essential to separate and independent existence.’” He then cited a series of examples, demonstrating the impact the revised law was having on state functions. It was here that he cleverly used the majority opinion in *Fry* to help him — and likely bring Blackmun and Stewart to his side — by quoting the seventh footnote in the *Fry* opinion:

> In so doing, Congress has sought to wield its power in a fashion that would impair the States’ “ability to function effectively in a federal system.” This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.  

Again, catering toward the block of Justices uncomfortable with overruling *Fry* just one year after it was decided, he emphasized that this ruling did not overrule *Fry* because the law in *Fry* only temporarily froze wages. *Wirtz*, however, was overruled, as was the bulk of the *California* decision, which he declared was “simply wrong.” Returning to the central theme of his argument in which states had a stronger standing than individuals in fighting federal Commerce Clause intervention, he said, “But we have reaffirmed today that the States, as States, stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce.” *League of Cities* offered a glimpse into the doctrine that Rehnquist would try to instill in the Court’s Commerce Clause jurisprudence.

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71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
Tactician on the Court

*League of Cities* was a clear victory for Rehnquist’s philosophy, but it was also a turning point in his time on the Court. Brennan’s fear that the case represented a test of Rehnquist’s influence was prescient. In his 1979 book, *The Brethren*, Bob Woodward reported that following *League of Cities*, Rehnquist hit “cruising speed.” He ceased to be the lone wolf, as he had been in *Fry*, and began to work to build a consensus around his ideas, often influencing Powell, Stewart, and White to join his cause. His role on the Court steadily increased as well, as he became a smarter Justice and a better consensus builder. Rehnquist knew how to bargain in opinions, and he would often take an extreme position on a constitutional matter only to give a concession to a colleague that would take him to his preferred position on the matter.\(^{75}\)

Despite his sharp wit and, at times, biting humor, Rehnquist had never had an issue building relationships on the Court. While Jackson had struggled in his relationship with the Justices and had two very contentious relationships with Black and Douglas, Rehnquist immediately became friendly with nearly the entire Court. In his first term he built a relationship with Douglas, despite the chasm in their philosophies.\(^{76}\) Stevens, who disagreed with Rehnquist on countless decisions, including *League of Cities*, said that the entire Court “regarded him as a friend.”\(^{77}\) He also built a relationship with Stewart, who viewed him as a team player. Despite Rehnquist’s and his clerks’ criticisms of Chief Justice Burger, Rehnquist even kept a warm relationship with him, both personally and professionally.\(^{78}\)


\(^{76}\) Jenkins, *The Partisan*, 166.


Where Jackson could often be cold — even an admirer like Prettyman thought so — Rehnquist had a genial relationship with almost everyone working at the Court. Woodward reported that Rehnquist had an “easy relationship” with clerks, who were free to criticize Chief Justice Burger to their boss. His affability extended to the Court’s staff as well, and Woodward tells of a time that Rehnquist personally intervened to get the chairs placed back at the posts of the security guards. While Jackson was often formal in his interaction, Rehnquist — who had once, as a clerk, showered in Jackson’s private shower on a Sunday only to emerge to the Justice and some friends in the office — could at times be very casual in his décor and demeanor. He is said to have once worn a softball shirt to conference — a break with norms — and, as an Associate Justice, he often drank apple juice at his desk, aware that many perceived it to be brandy.

Rehnquist’s relationships on the Court were in stark contrast to Jackson’s. Perhaps this was intentional, and Rehnquist learned from his time with Jackson and the disputes that Jackson had with colleagues. It is possible that his manner on the Court — while entirely consistent with his personality at all stages of his life — may have been intended to ensure that no clerk would bitterly write, as he did of Jackson, that he had reached the apex of his career prior to coming to the Court.

*Garcia v. San Antonio Metropolitan Transit Authority*

In a series of cases following *Usery*, Rehnquist and the Court upheld the reasoning in that case. It appeared as if Rehnquist’s affirmative defense had stopped the expansion of federal power and that the era of carte blanch federal power was over. Interestingly, Rehnquist never

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79 Ibid., 397.
80 Ibid.  
81 Ibid., 395
sought to use the momentum gained in *Usery* to reverse longstanding cases like *Wickard* or *Darby*. In fact, he explicitly reinforced those decisions. In *Hodel v. Virginia Surface Mining*, he upheld the cumulative effect test from the *Wickard* ruling, but said, “Despite the holdings of these cases, and the broad dicta often contained therein, there are constitutional limits on the power of Congress to regulate pursuant to the Commerce Clause.”

His opinions sought to put an outer-boundary on Commerce Clause jurisprudence. It is possible that Rehnquist believed that the reasoning in *Wickard* was correct, or he may have realized that the Court’s acceptance of his Commerce Clause jurisprudence was tenuous at best. President Ford’s replacement for Justice Douglas, John Paul Stevens, was a moderate, and Sandra Day O’Connor, chosen by President Ronald Reagan to be the first female Justice, replaced Potter Stewart, swapping a moderate-conservative for a conservative. The Court had seen six straight Republican appointees to the Court, but its makeup was not conservative enough to usher in a federalism revolution, a reality that would be all too clear in 1985.

Rehnquist’s *League of Cities* opinion, and his entire philosophy on the federal government’s ability to intervene against a state’s functions under the Commerce Clause, was called into question and repudiated by the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*. The case was a direct byproduct of *League of Cities*, as the San Antonio Metropolitan Transit Authority (SAMTA) used the *League of Cities* to justify no longer paying overtime to its employees. In 1979, however, the United States Department of Labor determined that SAMTA was required to follow the Fair Labor Standards Act because they were not a traditional state function. SAMTA filed suit, and a series of lower court rulings were decided in

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SAMTA’s favor, but the Department of Labor appealed the case to the Supreme Court, which heard arguments in March and October 1984.\textsuperscript{84}

Justice Blackmun’s opinion for the Court directly countered Rehnquist’s \textit{Usery} opinion, overturning it and challenging the framework of its “balancing test” between state and federal power. Blackmun opened by saying that the foundation of the \textit{Usery} opinion, the “function” standard of state activities, was “not only unworkable but is also inconsistent with established principles of federalism.”\textsuperscript{85} The issue, to Blackman, was that the Court could not define what government functions were essential to the states under \textit{Usery}. Beyond that, he used Jackson’s thesis from \textit{The Struggle for Judicial Supremacy}, saying that unelected judges should not be deciding such matters; it should be left to the political process. Blackmun’s criticism went beyond \textit{Usery} too, taking on language from Rehnquist’s \textit{Fry} dissent and calling the entire experience “a cautionary tale” of the difficulty in developing a judicial test on a case-by-case basis.\textsuperscript{86} Blackmun said that Rehnquist was wrong: the Commerce Clause did not place a “special limitation on Congress’ actions with respect to the States.”\textsuperscript{87}

Rehnquist, Powell, and O’Connor each filed a dissent, but Rehnquist’s dissent stood at under 200 words and only amounted to a clarification of the troubles with Powell’s and O’Connor’s opinions. Powell’s dissent questioned how the Court could preach the doctrine of \textit{stare decisis} while overturning \textit{Usery} and several opinions that had cited it and relied on its rationale, including \textit{Hodel}. Rehnquist’s dissent joined Powell and O’Connor, saying that while their tests were not identical to the one he put forth in \textit{Usery}, they were both sufficient to affirm

\textsuperscript{84} Ibid.

\textsuperscript{85} Ibid.

\textsuperscript{86} Ibid.

\textsuperscript{87} Ibid.
the lower court’s rulings and uphold Usery. He concluded by saying, “I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”

Rehnquist’s fourteen years on the Court had demonstrated his skill as a Justice and the vitality of his philosophy on federalism, but he was unable to reverse the Warren Court’s extension of federal power. His dissent in Fry had been followed with a resounding success in Usery, only to see his gains completely reversed in Garcia. There was reason for the optimism that Rehnquist cited in his Garcia dissent. One month after Garcia was argued, President Reagan won reelection in a landslide, winning 49 states. Republicans would control the White House and the judicial nominating process for another four years. For the first time since the “switch in time” in 1937, the Court would begin to drift to the right.

Chief Justice

Nomination

On June 17, 1986, President Reagan nominated Rehnquist to be the sixteenth Chief Justice in the United States’ history. Chief Justice Burger had decided earlier in the year that his role as the Chairman of the Bicentennial Constitutional Commission had taken up too much of his time and that he could no longer serve in both roles. Rehnquist’s nomination meant that once again he had to appear before the Senate Committee on the Judiciary, and once again his time as a clerk for Jackson became a focal point of his nomination. The Senate, in 1971, had limited time to review the controversy surrounding his segregation memos, but this time the Senate was prepared to pepper Rehnquist with questions. Unlike in 1971, when his clerkship largely served as a laurel

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88 Ibid., (Rehnquist, J. dissenting).

on his record, the clerkship and the memo controversy were a drain on his nomination. Senator Howard Metzenbaum summed up the criticism of Rehnquist and his 1971 letter declaring that the segregation memo was a reflection of Jackson’s views:

What concerns me is that thereafter you represented that it was not your position. You had a perfect right to have that position. Nobody would argue about that. What would concern me and others is that if that was your position, why did you indicate to the committee that it was the position of Justice Jackson? We have other memos where you marked as a section ‘your ideas,’ referring to Jackson.90

Much of the committee hearing was a quibble over semantics of whether Rehnquist had addressed his fellow clerks as colleagues or whether he ever had to advocate a position he opposed in a memo to Jackson. Metzenbaum, however, touched on an important point in the character of Rehnquist’s statements in 1971 and in his relationship with Jackson. From Cronson’s telegram in 1971, it was apparent that Rehnquist likely had to write a memo advocating one side of the issue, but why did he decide to lay the blame for the memo on Jackson? It is possible that he sought to protect his own views of the Fourteenth Amendment, which he inherited from Fairman, and felt that those views were close enough to Jackson’s to attribute them to him.

Jackson had expressed hesitancy on the issue and even consulted Fairman on the matter. In his testimony, he looked to The Struggle for Judicial Supremacy and said that the thesis of that work was generally in line with the memo’s content. This belief that Jackson was closer to sharing his views also would explain his disappointment with the Brown decision and Jackson’s role in it. Prettyman, however, maintained that the memo did not represent Jackson’s views on the matter. The truth likely lies at the intersection of Rehnquist’s belief that Jackson, in 1952, agreed with that memo, and his need, for the sake of his candidacy, to divert blame for the memo away from himself.

Somewhat surprisingly, the hearing spent little time on Rehnquist’s Commerce Clause views. *Garcia* had made much of Rehnquist’s opinions in *Fry* and *League of Cities* moot, and perhaps if the hearing had occurred before *Garcia* the questioning would have been different. The only major mention of his Commerce Clause views was in an exchange with Senator James Broyhill, a Republican from North Carolina. Broyhill inquired about the role of the federal government in enacting laws on matters that could be considered under state jurisdiction. Rehnquist’s response was a delineation in both his theory of federalism and his fear of the expansion of federal power:

I think I said some time earlier today that since the Supreme Court has so expansively construed Congress’ power under the Commerce Clause, that how power actually is divided between the States and Congress is now very much a matter for Congress to decide and no longer that much of a constitutional question. And as to how Congress exercises that power, certainly that is not a judicial question in the ordinary sense. But my personal preference has always been for the feeling that if it can be done at the local level, do it there. If it cannot be done at the local level, try it at the State level, and if it cannot be done at the State level, then you go to the national level.91

This belief in increased control at the state and local levels was a modification of his calls for increased reliance on the individual in his thesis. Douglas Kmiec felt that this preference of states’ rights was a byproduct of that document:

Rehnquist the jurist will moderate his anointment of the people as source of moral right by decentralizing as many of the value choices as possible, via various federalism doctrines, leaving them instead to the states. This will permit the states to acknowledge the human person as the source of objective value.92

He believed that power at the state and local levels was more responsive to individualism than federal power. Rehnquist respected precedent on the Commerce Clause to a degree, but he clearly was uncomfortable with the use of federal power where state power would suffice.

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91 Ibid.

The controversy over his memo as a clerk and questions about his time as an Associate Justice were not enough to stop his nomination. The Senate confirmed his nomination by a vote of 65-33. William Hubbs Rehnquist had achieved the aspiration of Justice Jackson, his former mentor, and had become the Chief Justice of the United States Supreme Court.

*The Rehnquist Court*

Following Rehnquist’s nomination, Reagan sought to fill the vacant seat left on the Court and only looked to two men on the Court of Appeals of the District of Columbia, Antonin Scalia and Robert Bork. Both men were experienced judges with strong conservative credentials. Reagan’s choice, Scalia, was extremely conservative and would become a subscriber to originalism, the view that the Constitution and its provisions should be interpreted as they were originally intended. Scalia’s nomination immediately followed Rehnquist’s, and with the Senate focused on Rehnquist’s nomination, he was confirmed by a vote of 98-0. John Paul Stevens would later say that the Senate “devoted relatively little attention to the far more important question of what kind of justice the new appointee, Antonin Scalia, would be.” Nonetheless, Scalia’s confirmation did little to change the Court, as a Republican President was once again filling the vacancy left by one of the Court’s conservative members.

Rehnquist’s tenure as Chief Justice marked an immediate transformation from the Burger years. Stevens recalled, “That the change in our chief would change the tenor of our deliberations

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95 Ibid.


97 Stevens, *Five Chiefs*, 102. Stevens added that Scalia was qualified and would have been overwhelmingly confirmed.
was clear from the outset.” Burger’s tenure was low on expediency, but Rehnquist’s tenure was defined by expediency in almost all manners of the Court’s activities. He also managed to keep the cordial relationships he had with the other members of the Court. His correspondence with the members shows a relatively personal affection between the Justices and the Chief. Despite asking that they call him by his first name, the other members of the Court refused and called him by the more formal terms of “Mr. Chief Justice” or “Chief.” He also meticulously kept track of the positions of the Justices, a habit he carried over from his clerkship with Jackson. In assigning cases, Rehnquist’s system stressed egalitarianism, and no Justice would receive an opinion until the one that they were currently working on was complete. Stevens later recalled that it was in deciding cases as an equal among the Justices, and not their boss, that Rehnquist had the greatest impact.

Rehnquist had the Chief Justice position, but he still did not have the conservative majority he needed to enact his judicial agenda. In 1987, Reagan was able to fill another vacancy on the Court; but since the vacancy was due to Powell’s retirement, he was once again left nominating a conservative justice to fill the place vacated by another conservative. Rehnquist’s initial nominee, Robert Bork, was set to be the most conservative Justice on the Court, but the Senate vigorously opposed his nomination, eventually defeating it with a vote of 42-58. After

98 Stevens, *Five Chiefs*, 105.
99 Ibid.
100 Ibid., 108.
101 Ibid.
102 Ibid.
103 Ibid.
104 *Roll Call Vote no. 348*, 100th Cong., 1st sess., 1987, S. Doc. 348, serial 133, 29121.
another nominee, Douglas Ginsburg, was forced to withdraw his nomination, Reagan then turned to Anthony Kennedy, a judge from the Ninth Circuit Court of Appeals. Again, the nomination did little to change the makeup of the Court. The momentum was clearly on the side of Rehnquist and his conservative allies, but the strong majority would have to wait.

That wait came to an end in 1991, however, when Justice Thurgood Marshall retired from the Court after nearly twenty-five years on the Court. Marshall had led the fight to end segregation as the Chief Counsel for the National Association for the Advancement of Colored People (NAACP) and had been the first African American Supreme Court Justice. He had been a liberal bastion on the Court, but his retirement allowed President George H. W. Bush, a Republican, to finally nominate a conservative to replace a liberal member of the court. He did so, nominating Clarence Thomas, a recently confirmed judge from the Court of Appeals for the District of Columbia. Thomas was known for his conservative views on the Constitution, supporting the originalist philosophy of Scalia.

Stevens has remarked that “Thurgood’s retirement may well have been the most significant judicial event of Bill Rehnquist’s tenure as chief justice.” He reiterated that statement, saying, “The importance of the change in the Court’s jurisprudence that is directly attributable to the choice of Clarence Thomas to fill the vacancy . . . cannot be overstated.” Some analysts have even looked to 1991 as the true beginning of the Rehnquist Court. Jeffrey Toobin commented, “The scope and speed of the conservative success [after Thomas’s confirmation] was remarkable.” In the years immediately following his confirmation, the

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105 Stevens, Five Chiefs, 113.
106 Ibid., 114.
Court’s rightward turn was clear. From the 1991 term up to and including the *Lopez* term, the Court ruled in five hundred ninety-eight cases and issued a conservative ruling in three hundred forty-eight of them. In twenty cases dealing with the Commerce Clause during those years, they issued “conservative” rulings fifteen times versus just five liberal rulings. This was in contrast to fourteen liberal Commerce Clause rulings versus four conservative rulings in the first five years of the Rehnquist Court. Clearly, Thomas had a major impact on the Court, its jurisprudence, and on Rehnquist’s ability to implement the tenets of federalism that he had espoused as an Associate Justice.

**Conclusion**

Rehnquist’s time as an Associate Justices highlighted the ways in which his jurisprudence was a departure from the Court’s since the New Deal. His reasoning was not a complete departure from Jackson’s jurisprudence, however. Rehnquist upheld *Wickard* and its reasoning and sought to define the boundary of the aggregate effect doctrine, as it related to the states. Rehnquist’s opinions in *Fry* and *League of Cities* defined the relationship between the federal government and the states, but still left much of the federal government’s commerce power intact. Those opinions also marked the true beginning of Rehnquist’s presence and influence on the Court. Despite setbacks in *Garcia*, as the Court convened for the 1991 term it was clear that Rehnquist, now past the controversies from his clerkship and comfortable as the Chief Justice with a conservative majority behind him, was prepared to expand on his earlier opinions and define a limit to federal power under the Commerce Clause.

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109 Supreme Court Database, [http://scdb.wustl.edu/analysisOverview.php](http://scdb.wustl.edu/analysisOverview.php) (accessed March 4, 2013). The Database codes decisions based on a number of factors as either liberal, conservative or specified. Liberal and conservative classifications are determined based on orthodox voting outcomes from liberal and conservative voting blocks on the Court. For further information see: [http://scdb.wustl.edu/documentation.php?var=decisionDirection](http://scdb.wustl.edu/documentation.php?var=decisionDirection)

110 Ibid.
CHAPTER FOUR
AGGREGATE EFFECT
United States v. Lopez

Constitution in Exile

By the fall of 1994, Democrats controlled the presidency through Bill Clinton and held majorities in both the House and the Senate. Control of Congress allowed Clinton to replace Justices Byron White and Harry Blackmun, when they retired, with liberal jurists Ruth Bader Ginsburg and Stephen Breyer. With no openings on the Court anticipated in the coming years, the Court stood deadlocked 5-4, with Rehnquist, Thomas, and Scalia representing the conservatives; Breyer, Ginsburg, Stephens, and Souter representing the liberal faction; and O’Connor and Kennedy standing as the swing votes, who tended to vote with the conservative members.

The conservative revolution that had swept the Court had also gained momentum in prominent legal and policy circles, as well as at the grassroots level. The American Enterprise Institute, a prominent conservative think tank, and the Cato Institute, a libertarian policy organization, actively lobbied for a roll back of post-New Deal regulations and the burgeoning administrative state.¹ Conservative lawyers joined the chorus, believing that federal agencies had been delegated too much regulatory power and were in violation of the Constitution. Douglas Ginsburg, one of Reagan’s failed Supreme Court appointees and a prominent judge, would later define this sentiment in a 1995 article for the Cato Institute’s magazine Regulation, referring to it as a Constitution in exile:

So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts,

Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty-even if perhaps not in their own lifetimes.  

Conservatism was on the rise in the Courts, in legal circles, and, in the summer and fall of 1994, in Congress, where Republicans were on the verge of sweeping victories that would allow them take control of the House of Representatives for the first time since 1954. It was into this environment that Alonso Lopez, Jr. would inadvertently change the course of American federalism.

Lopez was a twelfth grade student at Edison High School in San Antonio, Texas. On March 10, 1992, Lopez entered Edison High School with a loaded and concealed .38-caliber handgun. An anonymous tip alerted authorities at the school, and the school officials confronted Lopez, who admitted to carrying the gun. Lopez was arrested and initially charged under Texas law with possessing a firearm on a school grounds. Federal agents then dismissed the state charges in favor of charging him with violating the Gun-Free School Zones Act of 1990. Lopez was convicted and would have only received probation, but that punishment would have interfered with his intentions of joining the Marine Corps. As a result, Lopez’s public defender appealed the ruling. The District Court denied his appeal, but he then appealed it to the Fifth Circuit Court of Appeals where his conviction was overturned. The case would then go to the Supreme Court.

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4 Ibid., 88.

By the time the case came to the Court, the conservative movement saw blood in the water. The Constitution in exile had a chance to return. The Cato Institute, misreading a request from the Court’s public affairs office to be a request from Rehnquist himself, offered the Chief Justice a copy of the Institute’s report on the *Lopez* case. Cato cited the increasing importance of the case:

*Lopez*, in our view, raises profoundly important questions about the current status of the doctrine of enumerated powers – the centerpiece of the Constitution’s system of legal restraints. I am taking the liberty of enclosing that study as well, which I expect you will find of some interest.6

The anticipation for the Lopez case was palpable, and while it did not deal with personal issues that had dominated the court — like abortion or privacy — it was a case that had the potential to redefine the federal-state relationship and allow Rehnquist to place an indelible mark on the constitutional law of the nation.

**Oral Arguments**

On November 8, 1994, the American population went to the polls and gave the Democratic Party its worst electoral defeat in the House of Representatives since 1954.7 That same day, while voters were at the polls, the Court paralleled this conservative momentum, hearing arguments in *United States v. Lopez* —initiating the legal retreat of fifty years of expansive federal power under the Commerce Clause. The oral arguments highlighted the skepticism the Court had about the constitutionality of the Gun-Free School Zones Act, but it also showed a striking continuity between Rehnquist’s questioning and Jackson’s views on the commerce power.

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6 Roger Pilon to Rehnquist, October 13, 1994, Rehnquist Papers, Box 308, folder 10.

Early on, it was clear that Justice O’Connor was opposed to the law. O’Connor, who had previously served as Assistant Attorney General of Arizona and as a member of the Arizona Senate, was one of the few Justices with first-hand experience with the legislative process.\(^8\) She commenced questioning, quickly asking Solicitor General Drew Days III, “Well, let’s do exactly that, and ask whether the simple possession of something at or near a school is commerce at all. Is it?\(^9\) After Days affirmed that it was, she replied, “I would have thought that it wasn’t, and I would have thought that it, moreover, is not interstate.”\(^10\) The question set off a flurry of queries on the issue, as Days, like Jackson years before, tried to broadly interpret the commerce power. After saying that case law showed that the Court simply needed to prove a rational basis for a regulation under the Commerce Clause, Rehnquist asked two poignant questions that demonstrated the concerns he — and Jackson — had expressed on an expansive federal commerce power. Rehnquist asked, “Well, what would be ... if this case is [an example of what] ... Congress can reach under the interstate commerce power, what would be an example of a case which you couldn’t reach?”\(^11\) This question directly mirrored Jackson’s concerns to his clerk during *Wickard* — namely that, if taken to its logical end, the aggregate effect test of the commerce power could potentially provide a plenary power to Congress over all matters.

Rehnquist was mostly silent for the rest of Days’ argument, only stopping once to ask a question that would be the centerpiece of his reasoning on the case. As Days tried to illustrate that possession of a gun on school grounds had an effect that Congress could regulate, Rehnquist interrupted him to ask how a gun in a school zone impacted commerce:


\(^10\) Ibid.

\(^11\) Ibid.
General Days, if Congress proscribes the possession of guns in schoolyards all across the country, it ought to have an even effect. It isn't going to improve people's reasons for traveling, is it, because everyone is equally affected. You're not going to... unless you're... are you saying that violence as a whole will be cut down and therefore people will feel freer to travel in interstate commerce?... That possession of a gun in a schoolyard contributes to that sort of violence?12

The exchange was poignant — first because, in referencing effects on travel, he implicitly was reiterating his support for the reasoning in Heart of Atlanta; secondly, he was implying that if there was an effect — like the impact the aggregate effect of wheat consumption on the farm would have on the interstate market — then the Court could judge the statute under a rational basis test. This case, however, was not like Wickard because there was not a directly identifiable link between guns and violence and commerce. This was an area Rehnquist would return to in his opinion.

**Majority Opinion**

Due to his position as Chief Justice and a member of the majority, Rehnquist left the task of writing the Court’s opinion to himself. His opinion was both a repudiation of the increasingly expansive federal power since 1937 as well as an articulation of the boundary of the commerce power. He began his opinion by looking to the history of the Commerce Clause and the debates that had defined its jurisprudence. When he came to the three cases that ushered in modern Commerce Clause jurisprudence — Jones & Laughlin Steel, Darby, and Wickard — he said that they “ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress . . . a recognition of the great changes that had occurred in the way business was carried on in this country.”13 He went on to say, “But the doctrinal change also

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12 Ibid.

reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce. “It was a sentiment that he had carried from his time at Stanford to his clerkship and to his position on the Supreme Court: the Lochner era’s interpretation of the clause was incorrect. Rehnquist believed in the rights of the states, but he felt the Lochner protection of individuals and businesses from regulation under an enumerated power of Congress was inherently flawed.

Rehnquist then defined the three areas of commercial activity that Congress could regulate. His list, which neglected to cite Wickard, reinforced the modern Commerce Clause interpretation:

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power . . . First, Congress may regulate the use of the channels of interstate commerce. See, e. g., Darby, Heart of Atlanta Motel ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, e. g., Shreveport Rate Cases. . . . Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, Jones & Laughlin Steel, those activities that substantially affect interstate commerce. 15

Rehnquist never sought to dispute the modern Commerce Clause jurisprudence, but he hoped to use the case law so that he could define its limits.

Rehnquist was also forced to confront Jackson’s Wickard opinion, which had been a central part of the government’s and the liberal Justices’ arguments in favor of the Gun-Free School Zones Act. He quoted Wickard several times over the course of his opinion and explicitly mentioned the case ten times. What he attempted to do was define Wickard as the most extreme boundary of Commerce Clause jurisprudence. Looking at the modern cases derived from

14 Ibid.

15 Ibid.
Wickard, from Hodel to Heart of Atlanta, he said, “These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” Referring to Jackson’s opinion, he said, “Even Wickard, which is perhaps the most far reaching example authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.”

This point is interesting for two reasons. First, the language he used to describe Wickard was almost identical to the language he used in his law school notebook, when he first characterized the opinion, saying, “Most extreme . . . whether right or wrong.” Second, it was clear that he was trying to set Wickard as the limit, or the extreme, of the federal commerce power. He may have done this out of respect for the wisdom of Jackson’s opinion; he may have felt that the majority was too tenuous to risk trying to overrule an opinion that had been sustained for fifty-one years; or he felt that it was impractical to overrule Wickard as it may have invalidated countless laws, like the civil rights legislation of the 1960s. Rehnquist may have weighed all of these factors and held that Congress’ enumerated commerce power included the right to regulate activities that impact interstate commerce.

Rehnquist spent the second half of his opinion outlining why the Gun-Free School Zones Act did not fit in with precedents, defining the limits to the commerce power. He noted, “But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.” First, using a tactic that

16 Ibid.
17 Ibid.
18 William H. Rehnquist Law School Notebook No. 1, Rehnquist Papers, Box 1.
19 United States v. Lopez.
was central to the oral arguments, he showed that the power granted by the Act, if taken to its logical extreme, would give Congress unlimited power:

The Government admits . . . that Congress could regulate not only all violent crime but all activities that might lead to violent crime, regardless of how tenuous they relate to interstate commerce. . . . If we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.\textsuperscript{20}

He then showed why it was important that an activity not only affected commerce but was commerce itself. He emphasized that all aspects of activity in the case were local, but then he said, “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”\textsuperscript{21} In Rehnquist’s reasoning, at least Roscoe Filburn’s activity — the consumption of wheat on the farm in excess of established production quotas — was related to commerce to some degree. He had found what he believed to be an activity whose connection to commerce, in Jackson’s words, could be “laughed out of Congress.”\textsuperscript{22} Finally, he concluded his opinion by answering Jackson’s comment to Costelloe a half century before when he said, “If we sustain this act, I don’t see how we can ever sustain states’ rights again as against a Congressional exercise of the commerce power. Perhaps we should not.”\textsuperscript{23} Rehnquist’s response was that Jackson’s sentiments were flawed and states’ rights still mattered:

To [uphold the Act] would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, cf. \textit{Gibbons v. Ogden}, and that there never will be a distinction between what is truly national and what is truly local, cf. \textit{Jones & Laughlin Steel}. This we are unwilling to do.\textsuperscript{24}

\textsuperscript{20} Ibid.

\textsuperscript{21} Ibid.

\textsuperscript{22} Wickard v. Filburn.

\textsuperscript{23} Jackson, “Memo for Mr. Costelloe” June 19, 1942, Jackson Papers, Box 125, no. 59.

\textsuperscript{24} United States v. Lopez.
Rehnquist’s conclusion was a clear attempt to define a limit on the Commerce Clause and answer a question that had dominated the Court’s jurisprudence for over a century.

Rehnquist’s opinion also utilized the legislative history of the Gun-Free School Zones Act to buoy his argument, similar to Fairman’s extensive use of legislative history to define the Fourteenth Amendment. Rehnquist noted that there was no evidence that Congress, when enacting the law, considered its effect on commerce:

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce . . . [and] the Government concedes that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.”

He then argued against importing other findings about the impact of guns on schools and commerce, deeming it “especially inappropriate here because the prior federal enactments or Congressional findings [do not] speak to the subject matter . . . or its relationship to interstate commerce.” The use of legislative history, while not uncommon on the Court, particularly among liberal Justices, did demonstrate a lesson Rehnquist may have learned from Fairman.

It is apparent from the Lopez opinion that Rehnquist subscribed to the reasoning in the Wickard opinion, for either practical or philosophical reasons. It is somewhat ironic that Jackson’s former clerk, with whom he had clashed on numerous occasions, would be the one to clarify many of the questions the late Justice had about the limit to the commerce power.

Rehnquist’s opinion built on Wickard in three ways. First, he offered a full-throated acceptance of Wickard, despite calling it the “most far reaching” case of Commerce Clause jurisprudence. Second, he drew a distinction between Wickard and Lopez — that one involved commercial

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25 Ibid.

26 Ibid.
activity and the other did not—that reinforced Wickard’s reasoning while contrasting it with what he saw as the government’s flawed logic in Lopez. Third, he used the occasion to articulate a limit to the commerce power. For nearly sixty years, the Court had granted Congress an almost unchecked authority over any matter that remotely affected commerce, even if that meant preempting state power. Rehnquist sought to define the limit and answer the questions of Jackson, who wondered if it was possible or even worth it to stop the increasingly plenary nature of the power. He also set a fairly clean precedent by which the Court could apply to future cases, perhaps leaning from the failure of his “essential function test” from his League of Cities opinion. Rehnquist’s opinion provided a level of symbiosis between him and his former Justice as he clarified aspects of Jackson’s Wickard opinion, limiting the commerce power.

Concurring and Dissenting Opinion

The concurring and dissenting opinions in the case also offer insight into some of the considerations that Rehnquist had to be cognizant of in his opinion. In the concurrences, there is a glimpse of the two sides to the majority that Rehnquist had to balance: the moderate, which included Kennedy and O’Connor, and the conservative, Thomas. The dissent, meanwhile, employed much of the same reasoning that had dominated the Court’s jurisprudence over the course of the previous fifty years.

Kennedy’s concurrence, which O’Connor joined, sought to ensure that Rehnquist’s opinion didn’t go too far by overturning precedent. They saw two critical lessons in the case. First, content-based distinctions, like those between “commerce” and “manufacture,” were problematic. The second lesson, he wrote, was “that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence
as it has evolved to this point.” They then cited stare decisis, noting that it was important for the Court to remain consistent:

[The] fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy. . . . It also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system.

Their opinion was likely a response to Thomas’s concurrence, which will be examined below. It also likely attempted to moderate Rehnquist’s opinion to ensure that stability in Commerce Clause jurisprudence remained and the previous fifty years of case law was not overturned. Their opinion, when compared with Thomas’s, sheds some light on Rehnquist’s need to moderate his opinion lest he lose the majority.

Thomas’s concurrence offered a glimpse of what Rehnquist’s could have been had he decided to take a more conservative route and had he had the votes. Thomas’s concurrence, keeping with his originalist philosophy, called for a revision of modern Commerce Clause jurisprudence. He said that he only agreed with the Court’s discussion of the history of the Commerce Clause and early case law. He wrote, “I believe that we must further reconsider our ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.” With an eye towards critics, the dissent, and potentially towards future decisions, he added, “My goal is simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means ‘radical.’”

27 United States v. Lopez (Kennedy, J., concurring).
28 Ibid.
29 United States v. Lopez (Thomas, J., concurring).
30 Ibid.
rest of the opinion focused on the history of the original understanding of the Commerce Clause, from which, he felt, the modern Court had completely broken free. He also added, “Even though the boundary between commerce and other matters may ignore ‘economic reality’ and thus seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.” Thomas’s opinion was more extreme than Rehnquist’s and his opinion ran counter to the stable Commerce Clause jurisprudence that Kennedy and O’Connor advocated. There was little chance, therefore, that Rehnquist would join or write such an opinion like that, which excessively called into question considerable precedents.

The dissents, however, looked at whether Congress had rationally-based reason for enacting legislation on guns — which they felt it did. The newest Justice, Stephen Breyer, wrote a dissent that encompassed nearly all the arguments put forth by the minority. Breyer took more of the tone that Jackson did in 1942, writing, “The Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. . . . Congress could have found that gun-related violence near the classroom poses a serious economic threat.” Breyer went on to look at the implications of the Court’s opinion, saying that it ran counter to modern jurisprudence and that it created disarray in Commerce Clause jurisprudence for the first time in decades. He wrote, “The third legal problem created by the Court’s holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled.” Breyer’s opinion basically accused Rehnquist of creating uncertainty not seen since the Lochner era and generally running counter to the lesson of The Struggle for Judicial Supremacy.

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31 Ibid.
32 United States v. Lopez (Breyer, J., dissenting).
33 Ibid.
Lopez’s Impact

The Court’s holding in Lopez set off speculation in academic and policy circles that the federalism revolution had arrived. It was the first time since before Jackson joined the Court that a federal law had been completely invalidated under the Commerce Clause. In several instances the Court invalidated provisions of laws, but not since the time of Schechter had the Court completely overturned a law under the commerce power. Jesse H. Choper wrote a 1995 paper titled, “Did Last Term Reveal ‘A Revolutionary States’ Rights Movement within the Supreme Court?” summing up much of the contemporary sentiment about the case.\footnote{Jesse H. Choper, “Did Last Term Reveal a Revolutionary States’ Rights Movement within the Supreme Court,” Case Western Reserve Law Review 46 (1995): 663-670, http://scholarship.law.berkeley.edu/facpubs/1033 (accessed March 12, 2013).} In testimony before the House of Representatives’ Committee on Government Reform and Oversight weeks after the Lopez decision was handed down, Roger Pilon, director of the Cato Institute’s Center for Constitutional Studies, said, “The Court’s opinion in United States v. Lopez sent shock waves through official Washington, not least because Washington had simply assumed, since the era of the New Deal, that its regulatory powers were plenary.”\footnote{House Committee on Government Reform and Oversight. The Federalism Debate: Why Doesn’t Washington Trust the States?, 104th Cong., 1st sess., 1995, 131.} The succeeding years would further clarify Rehnquist and the Court’s positions on federalism and whether Rehnquist’s jurisprudence was a repudiation of Jackson’s philosophy or a logical resolution of it.

Federalism Revolution?

Change in Trajectory

In the terms immediately following the Lopez opinion, a dramatic change occurred in the Court’s jurisprudence. It was clear that the Court would no longer grant carte blanche power to
the federal government under the Commerce Clause. In the last ten terms of the Rehnquist Court, the Justices heard arguments for and delivered opinions on fifteen cases dealing with the Commerce Clause. In those cases, the Court issued seven conservative holdings and eight liberal holdings, a number that would have been higher but for Justice Scalia twice breaking with the Lopez majority during the 2004 term, the last of the Rehnquist era. While the number of conservative rulings is not a complete departure from the first half of the Rehnquist Court, in several major cases the Court overturned federal laws and reinforced the Lopez decision’s reasoning.

From 1995-2001, the Court overturned eight cases on federalism grounds — this included cases not dealing with the commerce power, but it should be noted that they only overturned two precedents. In Printz v. United States, the Court struck down provisions of the Brady Handgun Violence Prevention Act under the Tenth Amendment. In Seminole Tribe of Florida v. Florida, the Court held that the Commerce Clause did not give the federal government power to abrogate a state’s sovereign immunity from suits. And in Halden v. Maine, the Court held that the Commerce Clause did not provide Congress with the ability to subject nonconsenting states to private suits for damages in their own courts. It was clear that the states now had an edge when dealing with federal power that they did not have in the preceding decades. Three notable cases would show just how much had changed.

36 Supreme Court Data Base, Search Reference Code: 1201-LONGJOHN-8328, http://scdb.wustl.edu/analysisOverview.php?sid=1201-LONGJOHN-8328 (accessed March 12, 2013). The database defined liberal holdings as those that either preserved or expanded federal power, while conservative holdings were categorized as those that limited federal power.

37 Joondeph, “Federalism, the Rehnquist Court.”


United States v. Morrison

In the 2000 case, United States v. Morrison, Rehnquist reinforced his Lopez opinion and offered a glimpse into the influence that both Fairman and Jackson had on him. The case dealt with the Violence Against Women Act of 1994, which used the commerce power and the Fourteenth Amendment to prosecute gender-related violence. Christy Brzonkala accused Antonio Morrison and James Crawford of sexually assaulting her, but neither man was initially charged with a crime. Brzonkala then filed a civil suit under the Violence Against Women Act, the first civil suit under the law.41 After a series of lower court rulings which held that Congress did not have the authority to enact the law, the case went to the Supreme Court.

Mirroring the Lopez decision, Rehnquist again wrote the opinion for a 5-4 majority, with Kennedy, O’Connor, Scalia, and Thomas joining his opinion. After reviewing the contents of the Lopez decision he wrote, “Thus far in our Nation’s history our cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature.”42 He then countered critics that said he was practicing judicial activism, quoting Heart of Atlanta, “whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”43

On the Act’s constitutionality under the Fourteenth Amendment, Rehnquist looked back to case law from the nineteenth century, perhaps an ode to Fairman. Rehnquist said that the amendment only protected against state actions, not individual action:

42 Ibid.
43 Ibid.
However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government. . . . Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.\textsuperscript{44}

He cited two cases from 1893 and one from 1890, looking to the legislative history of the amendment and the post-Reconstruction period in which it was formed and defined.\textsuperscript{45} He then noted how intimately aware the Justices in those Reconstruction cases were with the Amendment, writing, “Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.” Rehnquist’s use of nineteenth century case law was a clear example of Fairman’s influence on his judicial process and philosophy, and his examination of the context in which those cases were decided was likely based on Fairman’s history of the Fourteenth Amendment.\textsuperscript{46}

\textit{Morrison} eventually had limited practical impact, but it did reinforce the \textit{Lopez} decision, invalidating a major piece of federal legislation. The foundation that \textit{Lopez} had rested upon seemed secure. A year after \textit{Morrison}, renowned conservative lawyer, Erwin Chemerinsky, said, “I have no doubt that when the constitutional historians look back at the Rehnquist Court, they will say that the greatest changes in constitutional law were with regard to federalism.”\textsuperscript{47} After three decades on the Court, it seemed that Rehnquist’s federalism revolution had succeeded.

\textsuperscript{44}Ibid.

\textsuperscript{45}Ibid. See United States v. Harris, 106 U.S. 629 (1883) and Civil Rights Cases, 109 U.S. 3 (1883).

\textsuperscript{46}Fairman, “Does the Fourteenth Amendment Incorporate the Bill of Rights?”

Revolution in Question

While the Rehnquist Court went on the offensive on the issue of the Commerce Clause, there were still cracks in the so called, “federalism revolution.” A 2003 case, Gonzalez v. Raich, that involved the regulation of two individuals growing and using marijuana for personal use, echoed Wickard and reversed what many perceived as the promise of the Lopez and Morrison decisions.

In Raich, the Court upheld, under the Commerce Clause, Congress’ power to criminalize the production and consumption of medical marijuana, even in states that permitted the use of marijuana for medical purposes, under the Controlled Substances Act (CSA). The majority opinion relied on much of the modern case law saying that Congress had the power to regulate commerce despite instances where state regulations persisted. 48 The Court relied on Wickard, believing that the production and consumption of marijuana affected the interstate market for that product that the CSA was designed to prevent against:

Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself “commercial,” in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. 49

The majority still upheld Lopez, but ignored its implications in this instance — much to Rehnquist’s chagrin — instead relying on Wickard for its reasoning.

Rehnquist joined O’Connor’s dissent, which said that the state should be allowed flexibility in how it regulated the use of marijuana. Her opinion rested on the belief that states were laboratories of democracy. She said that the Court’s ruling would uphold a law that extinguished a state’s latitude, “without any proof that the personal cultivation, possession, and

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48 Gonzales v. Raich, 545 U.S. 1 (2005).
49 Ibid.
use of marijuana for medicinal purposes if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.”

She also questioned whether the Court was repudiating *Lopez*, saying, “If the Court is right, then *Lopez* stands for nothing more than a drafting guide.”

O’Connor then sought to distinguish the case from *Wickard*. She wrote, “There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernible, let alone substantial, impact on the national illicit drug market or otherwise to threaten the CSA regime.”

She examined legislative language — a favored tactic of Rehnquist and Fairman — to again draw a distinction between *Wickard* and *Raich*, citing the legislative history of the controlled substances act. She wrote, “These bare declarations cannot be compared to the record before the Court in *Wickard*. They amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute.”

O’Connor’s opinion reflected Rehnquist’s philosophy on Commerce Clause jurisprudence. The dissent hoped to secure *Lopez*’s place as the boundary line for Commerce Clause jurisprudence, upholding the *Wickard* opinion while overturning the CSA. The opinion showed the consistency in Rehnquist’s philosophy, as he was willing to discard his inclination to side with law enforcement in favor of his views on federalism. Many commentators would ask if the *Raich* decision had sacrificed the federalism revolution of the previous decades, but Rehnquist’s personal philosophy on the matter remained steady.

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50 Gonzalez v. Raich (O’Connor, J. dissenting).
51 Ibid.
52 Ibid.
53 Ibid.
last major federalism case that Rehnquist faced, as he succumbed to cancer on September 3, 2005, becoming the first Justice since his former mentor, Robert Jackson, to die while still a member of the Court.

The 2012 Supreme Court case, *National Federation of Independent Business v. Sebelius*, examining the constitutionality of the Affordable Care Act, largely vindicated Rehnquist’s philosophy. That case looked at whether the minimum coverage provision, mandating individuals obtain insurance, could be upheld under the commerce power. Written by Rehnquist’s former law clerk and successor as Chief Justice, John Roberts, the opinion upheld the law’s constitutionality but maintained the limited Commerce Clause defined in *Lopez*. Citing that case, Roberts wrote, “As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching ‘activity.’ It is nearly impossible to avoid the word when quoting them.”\(^{55}\) Rehnquist’s efforts, from *Fry* to *Lopez*, created a foundation that Roberts, his former protégé, could utilize in limiting the expansion of the federal government through the Commerce Clause.

It is hard to imagine the Court before Rehnquist joined in 1971 employing the kind of reasoning used in *NFIB v. Sebelius*, but after the steady drumbeat of federalism in the 1970s and 1980s and the *Lopez* and *Morrison* decisions, it was possible for Roberts to strike down a regulation of a large segment of the United States economy. In that regard, the ruling was a contest between Jackson’s opinion in *Wickard* and Rehnquist’s *Lopez* opinion, even if the two were not necessarily counter to each other. *National Federation of Independent Business* emphasized that the *Wickard* reasoning was defunct to a degree, and Roberts used the opinion to further define the boundary created by *Lopez*. If Jackson had any doubts about *Wickard* and the scope of federal power, his law clerk, Rehnquist, largely sought to answer them in *Lopez*. In turn,

Rehnquist’s law clerk went further, clearly articulating that the AAA in 1942 could be sustained, while still upholding states’ rights and the enumerated powers in the Constitution.

**Rehnquist’s Influences: An Assessment**

*Charles Fairman*

Charles Fairman was perhaps the most influential player in Rehnquist’s formative years at Stanford. John Q. Barrett is correct when he says that Fairman was Rehnquist’s “very influential role model and teacher as an undergraduate.” We see the influence of Fairman throughout Rehnquist’s time with Jackson and later as a Justice on the Supreme Court. Through Fairman, Rehnquist learned to examine legislative history in cases, to practice judicial restraint, and, through his teachings on the Fourteenth Amendment, instilled in Rehnquist a belief in the sovereignty of the states. These were lessons that were manifested throughout Rehnquist’s time on the Court.

Rehnquist did not necessarily utilize legislative history more than his colleagues, but he used it effectively on a number of major issues — a clear example of Fairman’s influence. As a clerk for Jackson, he employed the use of legislative history, writing to the judge, “In these cases now before the Court, the Court is, as [John W.] Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history.” This tendency would stay with him as a Justice, where he utilized legislative history in twenty-six percent of all majority opinions he wrote and thirty-three

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56 Lane, “Head of the Class.”

57 Rehnquist, “A Random Thought on the Segregation Cases,” Jackson Papers, Box 184, folder 5.
percent of opinions written as Chief Justice. His use of legislative history was less frequent than the liberal members of the Court, but it was much more frequent than his conservative colleagues — Kennedy, Scalia and Thomas. Justice Kennedy would attribute this appreciation for original sources to Fairman. The use of original sources, through legislative history, would play a major role in Rehnquist’s *Lopez* decision and can likely be linked back to his former Stanford professor.

Fairman also had an impact on Rehnquist’s theories of judicial restraint and state sovereignty, which would be a major part of his time with Jackson and on the Court. Fairman’s 1949 work, “Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding,” preached that the Fourteenth Amendment did not apply to the states. While Rehnquist would come to accept the incorporation doctrine that applied the Bill of Rights to the states, he always was a strong proponent of state sovereignty. He favored the doctrine of judicial restraint that Fairman and Jackson subscribed to, but as a Justice, he increasingly voted to overturn federal legislation, practicing judicial activism in the hopes of persevering federalism. Fairman’s views on the Commerce Clause are not as clear — he did refer to it and the Fourteenth Amendment as the two most important passages in the Constitution — and it is less likely that Rehnquist inherited his Commerce Clause doctrine from his former professor. Fairman’s Fourteenth Amendment teaching and his belief in judicial restraint and legislative history would play an important role in Rehnquist’s development as a jurist and they certainly played a role in Rehnquist’s Fourteenth Amendment jurisprudence; however their impact was not as distinct on his interpretation of federal power under the Commerce Clause.

Fairman’s role in shaping the man who would become the Chief Justice cannot be understated. Fairman gave Rehnquist his first glimpse into constitutional law and would help

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59 Ibid.
mold many of the views he took to the Court. The fact that Rehnquist dedicated his book, *Centennial Crisis: The Disputed election of 1876*, to Fairman demonstrates that despite their political differences — Fairman was a lifelong Democrat — Rehnquist held Fairman in high esteem. Fairman’s influence is apparent throughout Rehnquist’s time with Jackson and in his *Lopez* and *Morrison* opinions, illustrating what an important role his former mentor played in his development as a jurist.

*Robert H. Jackson*

Ascertaining the influence that Jackson had on Rehnquist is much more difficult due to their strained relationship and Rehnquist’s less than enthusiastic appraisals of Jackson later in life. Yet, it is hard to think that Rehnquist did not take away several lessons from those two crucial terms on the Supreme Court. No Justice-clerk relationship has ever been aired in public in the way that theirs was, and in many ways, Rehnquist owes a large part of his appointment to the Court to Jackson. From Rehnquist’s speeches, his opinions, and Jackson’s work, we can put together a sketch of how their philosophies compared to one another and how Jackson influenced Rehnquist.

In some ways Rehnquist’s views on the Commerce Clause were not radically different from Jackson’s, particularly at the end of the latter’s life. By the time Rehnquist joined Jackson in 1952, he was a largely different Justice from the one who wrote *Wickard*. Rehnquist admits as much in his book, *The Supreme Court*, and in a speech to Albany Law School on Jackson. In his book, he tells of Jackson’s apprehension with Washington in the years after he lost the Chief Justiceship.\(^\text{60}\) In his speech to Albany Law School, Rehnquist emphasizes that *The Struggle for Judicial Supremacy* and its calls for an expansive government were largely outdated. He wrote,

\(^{60}\) Rehnquist, *The Supreme Court*, 185.
“But I think that Justice Jackson, at least by the time that I was his law clerk, would have been the first to admit that the book was ‘curiously dated’ in many respects.”61 Rehnquist believed, and many commentators agree, that, later in his life, Jackson had spurned the calls for expansive federal power that had defined his first decade in Washington.

Jackson’s case law also demonstrates that he may not have been as far from Rehnquist’s jurisprudence as one may think. As we noted, in United States v. Southeastern Underwriters Association, Jackson dissented, saying that states had traditionally regulated insurance, and there was no reason for the federal government to subsume that authority at that time. While Jackson’s reasoning was more passive — he thought that the Court should leave it to Congress to decide whether it wanted to regulate insurance — his opinion still echoes some of Rehnquist’s reasoning in cases like, Fry and Lopez, where he questioned the wisdom of federal power. In the Steel Seizure Case, which Rehnquist repeatedly mentioned, Jackson rebuffed a federal power grab.62 That case did not deal with the Commerce Clause, but it was an example of how much his philosophy had changed by the time Rehnquist joined the Court. This change indicates that there were similarities between Jackson’s and Rehnquist’s philosophies that may not be readily apparent.

Jackson’s view on federalism mirrored Rehnquist’s to a degree. Near the end of his life, he told Harlan Phillips that he favored federalism and generally favored the states on issues that were not interstate commerce. Rehnquist echoed this in his testimony before the Senate Judiciary Committee in 1971, when he said that he believed that if a local and state power could govern an issue, then it was desirable that those authorities would be able to do so. This belief was an adaptation of his thesis, but it largely echoed Jackson’s views, even if Jackson was a little more


62 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), (Jackson, J., concurring).
inclined to favor federal control over commerce. The similarities in their thoughts lead one to believe that perhaps Rehnquist’s conception of the Commerce Clause was a more nuanced version of Jackson’s. In his opinions, Rehnquist did not return to the Lochner-era jurisprudence, and he even upheld Wickard, but he also sought to protect the federalism that Jackson desired and did so through opinions like Lopez.

Despite their apparent agreement on a few judicial issues, Rehnquist’s strained relationship with Jackson and the subsequent Brown decision were the defining point in his clerkship. Despite the fact that his clerkship was one of the main reasons he was nominated and confirmed to the Supreme Court, he rarely spoke fondly of that time until later in his life. It is quite possible that Jackson’s attachment to the Brown decision reinforced Rehnquist’s sense that the Court had become too liberal and hardened his conservatism. From his memos it is somewhat apparent that he thought Jackson held similar views to his own on the issue of judicial restraint, so Jackson’s role in Brown may have crushed Rehnquist, as Barrett posits. This likely added to Rehnquist’s principled stands as the lone dissenter early in his career, as he wanted to ensure that he never “succumbed” to liberalism in the way that Jackson did.

Later in life, Rehnquist gave two speeches on Jackson, and each time his remarks were fairly brief and cursory. In 1980, he spoke to Albany Law School, where he said, “I freely concede that I begin with a handicap in making this attempt.” As Laura Ray notes, the talk “is an oddly muted tribute for one Supreme Court Justice to pay another.” He would give another speech, this time at the dedication of the Robert Jackson Center in 2003, and again the tone was

63 Barrett and Snyder, “Rehnquist’s Missing Letter.”
odd. By that time, he was the Chief Justice of the United States, entering his final years on the bench. He echoed many of the themes from his 1980 talk, namely about the Steel Seizure Case and his time at Nuremburg. Rehnquist called his clerkship “one of the most rewarding experiences of my life” and praised Jackson’s role in the Nuremburg trial, but he also added in mentions of Chief Justice Stone’s criticism of his participation at Nuremburg. When Rehnquist’s remembrance of Jackson is compared to Chief Justice Roberts’s 2007 remembrance of Rehnquist, we can see the stark differences. Roberts tells intimate details and whimsical stories about Rehnquist’s early life, facts he learned from Rehnquist himself. The strained relationship between Jackson and Rehnquist clearly never fully healed, as Rehnquist never truly embraced his former mentor, and their relationship may have been an important influence on his time as a Justice.

Rehnquist also learned a lot about being a Justice from Jackson’s example. It was Jackson who told an impressionable Rehnquist to get out of Washington, leading the clerk to settle in Phoenix, where he was able to become a major player in the Republican Party. When Rehnquist joined the Court, he no doubt remembered his own clerkship experience with Jackson when dealing with clerks. Woodward discussed his easy nature with clerks, and Justice Sandra Day O’Connor also noted how he instituted the annual “parody” show at the end of each term, in

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67 Ibid.


which clerks put on a brief performance making light of the Justices. Rehnquist may have
sought to ensure that his interactions with clerks were of a more collegial nature than he felt his
relationship with Jackson had been. This also may have carried over into his interactions with the
Justices. While Jackson’s tenure was partly defined by his disputes with Black and Douglas,
Rehnquist, despite his penchant for dissents and practical jokes, was a conciliator on the Court,
largely getting along with the other Justices.

Assessment

Rehnquist’s judicial philosophy and his Commerce Clause jurisprudence was likely the
result of a number of influences, including Charles Fairman and possibly even Robert Jackson.
Fairman shaped much of Rehnquist’s early understanding of and approach to the Constitution.
Fairman taught him about judicial restraint, state sovereignty, and the use of original sources.
These three factors would have a major impact on Rehnquist’s time as a clerk and a judge, and
the latter two had a direct impact on his Lopez decision and the so-called federalism revolution.
Jackson, meanwhile, may have had less of a direct impact on Rehnquist, but Rehnquist still took
several lessons from Jackson. While they had a strained relationship by the end of Rehnquist’s
clerkship, the two men shared an appreciation for federalism and an understanding that a fairly
broad interpretation of the Commerce Clause over private commerce was justified. This may
explain to some degree why Rehnquist explicitly upheld Wickard in the Lopez decision, placing a
holding, which even Jackson knew was extreme, as the boundary between a constitutional and an
unconstitutional application of the Commerce Power. Rehnquist also likely took lessons from his
time with Jackson that he employed in his interaction on the Court. Rehnquist’s clerkship with

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Jackson helped him get nominated and confirmed to the Court and then served him while he was a Justice. Rehnquist took the lessons from both Fairman and Jackson and applied them while on the Court, an aggregate effect of the impact of two mentors on the career of one of the most important Justices in the history of the United States.

**Conclusion**

Rehnquist’s opinion in *Lopez* was a major event in the Court’s history and ushered in what many thought to be a federalism revolution. Rehnquist’s opinion did not break with precedent, however, and he aimed to define *Wickard* as the most extreme example of Commerce Clause jurisprudence that was acceptable. His opinion upheld Jackson’s from 1942 and in many ways answered the late Justice’s question about whether the Court could ever uphold states’ rights. Rehnquist’s subsequent opinion in *Morrison* once again demonstrated his views on federalism and also showed ways in which Jackson and Fairman influenced him. His *Lopez* and *Morrison* opinions created the foundation that Roberts’s *NFIB* opinion’s Commerce Clause reasoning rested on, and it is difficult to imagine that opinion without the precedents set by *Lopez* and *Morrison*. Rehnquist’s jurisprudence and his time on the Court illustrate the impact that both Jackson and Fairman had on him. Fairman impacted Rehnquist’s views on judicial restraint, state sovereignty, and his use of original sources, while Jackson may have reinforced Rehnquist’s conservatism and taught him lessons about how to handle himself on the Court. Rehnquist’s and Jackson’s philosophies were similar, however, and it is entirely possible, though difficult to fully ascertain, that Jackson’s philosophy later in life had an impact on Rehnquist’s Commerce Clause jurisprudence and his tendency to favor state power. In that regard, Rehnquist’s decision in *Lopez* was not a repudiation of *Wickard*, but an opportunity for a clerk to complete the work of his Justice, defining the extreme limit of Commerce Clause jurisprudence.
CONCLUSION

Political scientists frequently try to examine the influences that affect a Supreme Court Justice’s jurisprudence and performance on the Court. Robert H. Jackson, for instance, is generally believed to have changed as a Justice after his experience as the Chief Prosecutor to the International Military Tribunal at Nuremburg.¹ The current Chief Justice, John Roberts, is thought by many to have been influenced by the man he clerked for, Chief Justice Rehnquist.²

When examining Rehnquist and his views on the Commerce Clause and federalism, there are three distinct influences: Rehnquist’s personally developed conservative philosophy, his undergraduate mentor, Charles Fairman, and Robert Jackson. These three influences converged to mold a judicial philosophy that was in some ways radical, even while largely upholding precedent.

Rehnquist’s conservative philosophy is an adaptation of his own study of political theory espoused in his thesis. A young Rehnquist attempted to balance individual rights with majority rule in his thesis, and as a Judge, he applied those lessons by favoring state and local power over federal power because he felt that those authorities were more likely to respect the individual and be accountable to that individualism. Fairman instilled in Rehnquist an understanding of the Reconstruction period, the belief in a restrained judiciary, and respect for the state sovereignty. Rehnquist’s experience with Jackson reinforced his conservatism due to the Court’s liberalism and Rehnquist’s feelings of isolation. The relationship between Jackson and Rehnquist was strained, and this, along with Jackson’s Brown decision, also strengthened Rehnquist’s belief in

¹ Schubert, Dispassionate Justice, 89.
conservatism. His experience with Jackson did create an acceptance of modern Commerce Clause
doctrine and an appreciation for the need for a strong commerce power in partnership with a
respect for states’ rights and the role of federalism in the American system of government.
Rehnquist’s jurisprudence was influence by all three of these factors, and as a result, so was the
United States governmental system.
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