RE-EXAMINING THE DORMANT COMMERCE
CLAUSE ANALYSIS IN JONES V. GALE AFTER
NATIONAL FEDERATION OF INDEPENDENT
BUSINESS V. SEBELIUS

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I. INTRODUCTION

The Commerce Clause of the United States Constitution states, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." Starting in the New Deal era, the United States Supreme Court gave Congress nearly unlimited discretion in regulating commerce. This discretion has been curtailed in the previous two decades by a number

1. U.S. Const. art. I, § 8, cl. 3.
of Supreme Court cases. The courts have also interpreted the Commerce Clause, despite its text, to include a dormant portion which allowed courts to find state laws which discriminated against interstate commerce unconstitutional.

In Jones v. Gale, the United States Court of Appeals for the Eighth Circuit concluded that Initiative 300 violated the dormant Commerce Clause of the United States Constitution. In 1982, Nebraska amended its state constitution by adding Initiative 300. Initiative 300 limited the corporations which could own farmland in Nebraska to corporations with the majority of the stock held by a family and with at least one member of the family either actively engaged in the daily management of the farm or who resided on the farm. In Jones, owners of Nebraska farms brought suit, claiming that Initiative 300 violated the Commerce Clause of the United States Constitution. The United States District Court for the District of Nebraska found the amendment facially discriminatory under the dormant Commerce Clause. The Eighth Circuit affirmed the judgment that the amendment violated the dormant Commerce Clause. The Eighth Circuit noted that the amendment was both facially discriminatory and was passed with discriminatory intent. The Eighth Circuit reasoned that the interests the State presented were the xenophobic interests the dormant Commerce Clause acted against.

The effect of Jones on Nebraska farms has resulted in less Nebraska farms and a corresponding increase in the average size of a Nebraska farm. In 2000, there were fifty-four thousand farms in

3. See Nat’l Fed. of Ind. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566, 2591 (2012) (deciding that Congress does not have the power under the Commerce Clause to force citizens to purchase a certain product); United States v. Morrison, 529 U.S. 598, 619 (2000) (concluding that Congress does not have the power under the Commerce Clause to regulate gender based violent crimes); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that Congress does not have power under the Commerce Clause to make criminal statutes for knowingly having a firearm in a school zone).

4. See W. William Hodes, Congressional Federalism and the Judicial Power: Horizontal and Vertical Tension Merge, 32 Ind. L. Rev. 155, 160 (1998) (noting that the Supreme Court has read into the Commerce Clause an implied restriction on certain state actions).

5. 470 F.3d 1261 (8th Cir. 2006).
6. Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006).
7. Jones, 470 F.3d at 1264.
11. Jones, 470 F.3d at 1264.
12. Id. at 1270.
13. Id.
14. See infra notes 23-324 and corresponding text.
Nebraska. In 2000, the average size of a farm in Nebraska was 859 acres. In 2012, just six years after the *Jones v. Gale* decision there were only 46,700 farms in Nebraska. In 2012, the average size of a farm in Nebraska had increased to 974 acres.

This Note will first review the facts and holding of *Jones*. This Note will discuss related United States Supreme Court decisions concerning both the Court's recent limitations placed upon Congress's power under the Commerce Clause and a disagreement over an existence of a dormant Commerce Clause. This Note will then establish the following: (A) the Supreme Court's recent limitation of Congress's power under the Commerce Clause represents a return to heightened state power; (B) the Eighth Circuit imprudently applied dormant Commerce Clause analysis that has no textual basis in the United States Constitution and requires the judiciary to act in a legislative role; and (C) the Eighth Circuit's decision cannot stand without the dormant Commerce Clause. This Note will conclude that the Eighth Circuit improperly determined that Nebraska's constitutional amendment which limits corporations which can own Nebraska farmland to those farms which have a majority owner residing in Nebraska violates the United States Constitution.

II. FACTS AND HOLDING

A. NEBRASKA VOTERS ADDED INITIATIVE 300 TO ITS CONSTITUTION IN 1982

In 1982, Nebraska voters adopted Initiative 300 as part of the state constitution. The initiative started as an amendment to the Nebraska constitution; it was proposed via the initiative process and, in 1982, appeared on the general election ballot as a ballot question. The Nebraska attorney general wrote a ballot title for Initiative 300 that asked whether a constitutional prohibition should be enacted

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16. Id. at 13.
18. Id.
19. See infra notes 23-55 and accompanying text.
20. See infra notes 56-202 and accompanying text.
21. See infra notes 203-312 and accompanying text.
22. See infra notes 313-24 and accompanying text.
23. *Jones v. Gale*, 470 F.3d 1261, 1264 (8th Cir. 2006).
24. *Jones*, 470 F.3d at 1265.
prohibiting ownership of Nebraska ranch or farm land by any corporation which is not a Nebraska family farm corporation.25

The ultimately enacted constitutional section stated that no syndicate or corporation shall acquire or obtain a legal, beneficial, or other interest in title to any real estate used for ranching or farming in Nebraska, or engage in ranching or farming.26 The section created a specific exception for family ranch or farm corporations.27 It defined a family ranch or farm corporation as a corporation engaged in ranching, farming, or owning agricultural land, in which: (A) members of a single family hold the majority of the voting stock, and (B) at least one member of that family is a person who either (1) actively engaged in the daily management and labor of the ranch or farm or (2) who resided on the ranch or farm.28

B. In Jones v. Gale, the Eighth Circuit Determined that Initiative 300 Violated the Dormant Commerce Clause

In Jones v. Gale,29 six owners of various interests in various Nebraska ranch and farm land operations brought suit in the United States District Court for the District of Nebraska against Nebraska’s attorney general and secretary of state, claiming that Initiative 300 violated the Commerce Clause of the United States Constitution.30 The plaintiffs sought injunctive and declaratory relief.31 The parties both moved for summary judgment on the issue of whether Initiative 300 violated the Commerce Clause.32

The district court first noted that Initiative 300 concerned activities which Congress could regulate under the Commerce Clause.33 The district court then noted that if a state is challenged on dormant

25. Id.

26. Neb. Const. art. XII, § 8, found unconstitutional by Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006).

27. Id.

28. Id. The section defined a single family as people being related to one another according to the rules of civil law within four degrees of kindred and their spouses; the section also exempted a former ranch or farm corporation for fifty years after ceasing to meet the specific requirements if the majority of the stock continues within the family. Id.

29. 470 F.3d 1261 (8th Cir. 2006).

30. Jones v. Gale, 470 F.3d 1261, 1264 (8th Cir. 2006). The plaintiffs also claimed that Initiative 300 violated the equal protection clause and the privileges and immunities clause of the United States Constitution, as well as the statutory Americans with Disabilities Act. Jones, 470 F.3d at 1264.


33. See id. at 1077-78 (noting that Congress can regulate interstate commerce channels, interstate commerce instrumentalities, and activities substantially affecting interstate commerce under the commerce clause, and that ranching and farming, as
Commerce Clause grounds the court first considers whether the law discriminates against interstate commerce.\textsuperscript{34} This occurs when the law provides differential treatment to in-state versus out-of-state economic interests in a manner that benefits in-state interests and burdens out-of-state interests.\textsuperscript{35} A law can be overtly discriminatory if it is facially discriminatory, if its purpose is discriminatory, or if its effect is discriminatory.\textsuperscript{36} The district court first stated that the language of Initiative 300, the ballot title, and the promotional material for the initiative evidenced that Initiative 300 was created in a protectionist fervor.\textsuperscript{37} Further, the district court found the language of the initiative had the effect of benefiting in-state economic interests and burdening out-of-state interests.\textsuperscript{38} This, the court found, rendered Initiative 300 facially discriminatory under the dormant Commerce Clause.\textsuperscript{39}

Finding that Initiative 300 facially discriminated against interstate commerce and had a discriminatory purpose, the district court subjected the initiative to strict scrutiny.\textsuperscript{40} Under strict scrutiny, the initiative would only be constitutional if Nebraska could establish that it had no alternative means to promote a legitimate local interest.\textsuperscript{41} Of the seven concerns advanced by Nebraska, the district court recognized that only the promotion of economic development in rural areas and the conservation of natural resources constituted legitimate local interests.\textsuperscript{42} The court declared that Nebraska had failed to make any effort to measure the probable effects of Initiative 300 or less drastic alternatives, and accordingly failed to prove that Initiative 300 was the only means of promoting the legitimate local interests.\textsuperscript{43}

The United States Court of Appeals for the Eighth Circuit affirmed the district court's ruling that Initiative 300 violated the dor-

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\textsuperscript{34} Id. at 1078.

\textsuperscript{35} \textit{Jones}, 470 F.3d at 1267.

\textsuperscript{36} Id.

\textsuperscript{37} \textit{See Jones}, 405 F. Supp. 2d at 1079-80 (noting that the language of Initiative 300 and the ballot title clearly indicated favorable treatment for people working and living in Nebraska and that radio broadcasts, speeches, and news articles preceding the ballot vote showed the purpose behind the initiative was to prevent Nebraska ranch and farm land from being purchased by rich out-of-state corporations and outside investors).

\textsuperscript{38} Id. at 1082.

\textsuperscript{39} Id. at 1080-81.

\textsuperscript{40} Id. at 1082.

\textsuperscript{41} Id.

\textsuperscript{42} \textit{See id.} at 1083 (listing the seven concerns raised by Nebraska and recognizing that only the promotion of economic development in rural areas and the conservation of natural resources constituted legitimate local interests).

\textsuperscript{43} Id.
m ent Commerce Clause. The Eighth Circuit first held that Initiative 300 was facially discriminatory. The Eighth Circuit concluded that Initiative 300 discriminated on its face because its ban against farming by syndicates and corporations did not apply to limited partnerships or family farm corporations with one or more family members engaging in the management and daily labor of the farm or residing on the farm. The court agreed with the lower court's holding that Initiative 300 facially favored Nebraska residents and others in proximity close enough to Nebraska ranchers and farmers that a daily commute would be economically and physically feasible. The court stated that the most obvious and natural meaning of the words of Initiative 300 required working or residing on a Nebraska ranch or farm. The court found this meaning buttressed by language that accompanied Initiative 300 on the ballot and the Nebraska Supreme Court's plain language interpretation of Initiative 300.

The Eighth Circuit also agreed that Initiative 300 had a discriminatory intent. The court asserted the manifest purpose, as revealed by the ballot title and the text, of the initiative was to discriminate between ranch and family farm corporations located in Nebraska and those located elsewhere. The court noted that the discriminatory intent was also bolstered by the history antedating the adoption of Initiative 300.

The Eighth Circuit concluded Initiative 300 was per se invalid because it was discriminatory and would be unconstitutional unless Nebraska could demonstrate that the initiative was the only means available to accomplish a legitimate local interest. The court noted that the xenophobia manifested as a desire to maintain a status quo is not a legitimate local interest and is exactly what the dormant Com-

44. Jones, 470 F.3d at 1264.
45. Id. at 1269.
46. Id. at 1267-68.
47. Id. at 1268.
48. Id.
49. See id. (noting that the ballot had stated the purpose of Initiative 300 was to prohibit purchased of agricultural land by corporations that were not a Nebraska family farm corporation and that the Nebraska Supreme Court, in Pig Pro Nonstock Co-op. v. Moore, 568 N.W.2d 217, 228 (Neb. 1997), had construed the plain language of the section to precluded absentee operation of ownership of ranch and farm land by corporations).
50. Jones, at 1269.
51. Id.
52. See id. at 1269-70 (citing as an example a television advertisement that advocated for Initiative 300 by asking voters to send a message to wealthy out-of-state corporations).
53. See id. at 1270 (noting that a discriminatory state constitutional amendment is invalid unless a state can pass strict scrutiny).
merce Clause attempts to correct. The court determined that Nebraska failed to show that it could not accomplish a legitimate local interest absent discrimination against out-of-state ranch and farm corporations and accordingly held Initiative 300 violated the dormant Commerce Clause.

III. BACKGROUND

A. THE UNITED STATES SUPREME COURT IN GIBBONS V. OGDEN
ANALYZED THE EFFECT OF A STATE LAW REGULATING COMMERCE IN COLLISION WITH A FEDERAL LAW

In Gibbons v. Ogden, Aaron Ogden filed suit against Thomas Gibbons requesting that the court grant an injunction restraining Gibbons from navigating certain waters. New York had granted Ogden the exclusive right to navigate the waters between Elizabethtown, the city of New York, and other places in New Jersey by use of boats moved by steam or fire. Gibbons had employed two steam-boats in running between Elizabethtown and New York. Gibbons claimed that his boats were duly enrolled and licensed, as well as being used under an act of Congress passed to further the coasting trade.

The United States Supreme Court noted that the New York laws and the act of Congress were in collision and that the congressional act, being made in pursuance to the Constitution, was supreme. The Supreme Court noted embarrassment to the general intercourse of a community would necessarily follow if each State should make repugnant and hostile regulations for water navigations between the States. By example, the Supreme Court noted that under New Jersey law, any citizen restrained by the New York law was entitled to treble damages in New Jersey court.

The Supreme Court noted that Gibbons did not contend that all regulations affecting commerce fell under Congress’s exclusive authority under the Commerce Clause, but that such power as had been ex-

54. Id.
55. Id.
56. 22 U.S. 1 (1824).
58. Id. at 2.
59. Id.
60. Id.
61. Id.
62. Id. at 4.
63. Id. at 4-5.
ercised deprived the States of authority.64 However, the Supreme Court dismissed the question as to whether a State retains the power to regulate commerce in the absence of a congressional act, or whether the Commerce Clause forces surrender of all such power to Commerce.65

Instead, the Supreme Court explained that although States may pass laws on subjects within their control and may adopt measures of the same character as Congress, this power does not stem from the Commerce Clause, but from a power retained by the States.66 The Supreme Court further noted that Congress may control State laws, to the extent necessary for the regulation of commerce.67 However, the Supreme Court noted the State may enact laws, in exercising the power of regulating internal State affairs, whose validity may depend on their interference or contradiction with congressional acts passed in pursuance of the United States Constitution.68 In these situations, the Supreme Court noted that it must determine whether the state law comes into collision with a congressional act, and if this collision exists, the State act must yield to congressional law.69 The Supreme Court noted in every such case, a congressional act reigns supreme and any State law, though enacted pursuant to the exercise of State powers, must yield.70

B. THE UNITED STATES SUPREME COURT HAS STARTED TO PLACE LIMITS ON CONGRESS’S POWER UNDER THE COMMERCE CLAUSE

1. The United States Supreme Court Limits Commerce Clause Jurisprudence in United States v. Lopez by Determining that Possessing a Firearm in a School Zone Is Not a Part of Interstate Commerce

In United States v. Lopez,71 the United States Supreme Court held that the Gun-Free School Zones Act of 199072 (the “Act”) ex-

64. Id. at 9.
65. See id. at 200 (noting that the question of the power retained by the States to regulate Commerce need not be addressed due to the fact that Congress had exercised its power in the case at bar).
66. Id. at 204. Most likely, the Supreme Court was referring to the tenth amendment. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
68. Id. at 209-10.
69. Id. at 210.
70. Id. at 211.
ceeded Congress’s authority under the Commerce Clause.73 Under the Act, Congress made it a federal criminal offense to knowingly possess a firearm in a school zone.74 On March 10, 1992, Alfonso Lopez, a high school senior arrived carrying a handgun and five bullets to Edison High School in San Antonio Texas.75 A grand jury indicted Lopez as being in violation of the Act, and the United States District Court for the Western District of Texas denied Lopez’s motion to dismiss the indictment as being beyond Congress’s power to legislate.76 Following a bench trial, the district court found Lopez guilty of violating the Act, sentencing Lopez to six months in prison and two years of supervised release.77 On appeal, the United States Court of Appeals for the Fifth Circuit reversed and held the Act was beyond Congress’s power under the Commerce Clause.78

The United States Supreme Court remarked that under the Commerce Clause, Congress may regulate three categories of activity: (1) the use of interstate commerce channels; (2) the interstate commerce instrumentalities, or things or people in interstate commerce; and (3) activities substantially affecting interstate commerce.79 The Supreme Court ultimately reasoned that possession of a gun in a school zone is not an economic activity which would substantially affect interstate commerce in the aggregate.80 The Supreme Court noted that the Act was a criminal statute that facially did not deal with commerce.81 Further, the Act was not an essential component part of an economic regulation, nor did it mandate inquiry into whether the firearm possessed affected interstate commerce.82

The Supreme Court acknowledged that Congress has broad authority under the Commerce Clause, but not a plenary police power to enact any type of legislation.83 If the Act were constitutional, Congress could regulate all activities that could lead to violent crime, regardless of the activities’ relation to interstate commerce.84 Congress

76. *Id.* at 551-52.
77. *Id.* at 552.
78. *Id.*
79. See *id.* at 558-59 (defining the contours of Congress’s Commerce Clause power and listing numerous Supreme Court cases establishing these limits). The Supreme Court noted that the Act was not a regulation of interstate commerce channels and did not prohibit interstate transportation of any commodity, nor did it protect an interstate commerce instrumentality or thing. *Id.* at 559.
80. *Id.* at 567.
81. *Id.* at 561.
82. *Id.*
83. *Id.* at 565-66.
84. *Id.* at 564.
could further regulate any activity which related to making individual citizens more economically productive.\textsuperscript{85} It could regulate our nation’s educational process by mandating a federal curriculum.\textsuperscript{86} In short, if the Act was constitutional, Congress could essentially regulate any activity.\textsuperscript{87} The Court explained that finding the Act constitutional would require piling inferences together in a manner that would convert the Commerce Clause into a general police power, like the police power retained by the States.\textsuperscript{88}

2. The United States Supreme Court Further Limited Congress’s Power under the Commerce Clause in United States v. Morrison by Determining that Gender-Motivated Violence Is Not a Part of Interstate Commerce

In United States v. Morrison,\textsuperscript{89} the United States Supreme Court concluded that Congress did not have authority under the Commerce Clause to enact the Violence Against Women Act of 1994\textsuperscript{90} (the “Act”).\textsuperscript{91} The Act stated that everyone in the United States shall be free of gender-motivated violent crimes.\textsuperscript{92} The Act declared that anyone who committed a gender based violent crime shall be liable to the victim for injunctive and declaratory relief, and compensatory and punitive damages.\textsuperscript{93}

In Morrison, Christy Brzonkala brought suit against Antonio Morrison and James Crawford for allegedly violating the Act.\textsuperscript{94} In September of 1994, Brzonkala alleged that Morrison and Crawford assaulted and raped her.\textsuperscript{95} The United States District Court for the Western District of Virginia dismissed the complaint, concluding that Congress lacked authority to enact the Act under the Commerce Clause.\textsuperscript{96} A divided panel of the United States Court of Appeals for the Fourth Circuit reversed and reinstated the claim; an en banc Fourth Circuit reheard the case and affirmed that Congress lacked

\textsuperscript{85} Id.
\textsuperscript{86} Id. at 565.
\textsuperscript{87} See id. at 564 (noting that under the theories presented to uphold the Act, it is difficult to imagine a limit on the federal power).
\textsuperscript{88} Id. at 567.
\textsuperscript{89} 529 U.S. 598 (2000).
\textsuperscript{91} See Morrison, 529 U.S. 598, 619 (2000).
\textsuperscript{92} 42 U.S.C. § 13981(b).
\textsuperscript{93} 42 U.S.C. § 13981(c).
\textsuperscript{94} Morrison, 529 U.S. at 604.
\textsuperscript{95} Id. at 602.
\textsuperscript{96} Id. at 604.
authority under the Commerce Clause to enact the Act’s civil remedy.97

The United States Supreme Court affirmed after granting certiorari.98 The Supreme Court noted that gender based violent crimes are not economic activities in any sense.99 Further, the Act contained no jurisdictional element showing that the cause of action was enacted pursuant to Congress exercising its power under the Commerce Clause.100 The Supreme Court noted that a contrary decision would allow congressional regulation of any crime whenever the aggregated impact of the crime nationwide had a substantial impact on production, employment, transit or consumption.101 This would allow Congress not only the ability to regulate violence but also the ability to regulate areas traditionally addressed by the States such as marriage, divorce, and childrearing.102

3. The United States Supreme Court Further Limited Congress’s Power under the Commerce Clause in National Federation of Independent Business v. Sebelius by Determining that the Commerce Clause Does Not Permit Congress to Force Individuals to Purchase a Product

In National Federation of Independent Business v. Sebelius,103 the United States Supreme Court found that the individual mandate of the Patient Protection and Affordable Care Act104 could not be sustained under the power granted to Congress under the Commerce Clause.105 In Sebelius, a number of States joined by the National Federation of Independent Business and several individuals filed suit in the United States District Court for the Northern District of Florida alleging that the individual mandate provision of the Patient Protection and Affordable Care Act exceeded Congress’s power.106 The individual mandate required non-exempt individuals not currently receiving health insurance to purchase private insurance or be forced to pay a penalty called the “shared responsibility payment.”107 The district court found that the individual mandate exceeded Congress’s

97. Id. at 604-05.
98. Id. at 602.
99. Id. at 613.
100. Id.
101. Id. at 615.
102. Id. at 615-16.
106. Sebelius, 132 S. Ct. at 2580.
107. Id.
power and that the individual mandate could not be severed; therefore, the court found the Act unconstitutional in its entirety. The United States Court of Appeals for the Eleventh Circuit affirmed that Congress did not have the power to enact the individual mandate but found that the individual mandate could be severed.

The Supreme Court observed that the power to regulate commerce means that there is a commercial activity being regulated. However, the individual mandate compels citizens, by forcing purchases of a product, to become active in commerce on the rationale that a failure to purchase a product affects interstate commerce. However, expansion of the Commerce Clause jurisprudence in this manner would erode any limitation on the jurisprudence. This could allow Congress to force citizens to purchase products to solve any problem. In effect, this would fundamentally alter the relations between the federal government and United States citizens. The Supreme Court remarked that the police power to regulate individual citizens is a power that remains vested in the States.

C. In Non-Majority Opinions Supreme Court Justices Showed Why the Dormant Commerce Clause Is Inappropriate and Unnecessary

1. In Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, Justice Scalia Argued that the Dormant Commerce Clause Has No Constitutional Basis

In Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, the United States Supreme Court consolidated two cases: in the first, seventy-one enterprises filed actions for refunds of business and occupation ("B & O") taxes paid to Washington; in the second, Tyler Pipe Industries, Inc. ("Tyler") asked for a refund of B & O taxes for wholesaling activities conducted in the state. Washington had been imposing a B & O tax for over half a century.

108. Id.
109. Id. at 2580-81. The D.C. Circuit and the Sixth Circuit found that Congress had the power to enact the individual mandate under the Commerce Clause in separate challenges to the individual mandate. Id. at 2581 (citing Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011); Seven Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011)).
110. Id. at 2586.
111. Id. at 2587.
112. Id. at 2589.
113. Id. at 2588.
114. Id. at 2589.
115. Id. at 2591.
118. Tyler Pipe, 438 U.S. at 234.
taxed business activities in the state entailing of raw materials extrac-
tion, manufacturing, wholesale sales, and retail sales.119 Before 1950,
Washington exempted persons from this tax liability if the materials
were manufactured or extracted in Washington.120 However, in Co-
lumbia Steel Co. v. State,121 the Washington Supreme Court found
this exemption discriminated against interstate commerce and vi-o-
lated the Commerce Clause in the U.S. Constitution.122

The Washington legislature responded by creating an exemption
from the manufacturing tax on the portion of the output subject to the
wholesale tax.123 In effect, local manufacturers paid manufacturing
taxes on interstate sales whereas out-of-state manufacturers paid
wholesale taxes on sales in Washington.124 The Thurston County Su-
perior Court upheld the B & O tax in both cases, and the Washington
Supreme Court affirmed.125

The United States Supreme Court reversed and concluded that a
manufacturing tax assessed on products made within Washington and
then sold to out-of-state purchasers violated the Commerce Clause of
the Constitution.126 The Supreme Court reasoned that the B & O tax
exposed selling and manufacturing outside of Washington to multiple
burdens from which those manufacturing and selling in Washington
would be exempt.127 The Supreme Court opined that Washington’s B
& O tax violated the Commerce Clause because it unfairly burdened
commerce by demanding a greater share from the interstate
activity.128

Justice Scalia dissented, arguing that the discrimination stan-
dard would drastically limit the discretion given to States’ ability to
structure their tax systems.129 He stated that the decision was not
mandated by prior Supreme Court decisions, nor did it have a consti-
tutional basis.130 He admitted that the tax failed an internal consis-
tency test; however, he argued such a test is not plainly required by
stare decisis, is nowhere in the Constitution, requires overruling a
number of prior decisions, and repudiates Supreme Court dicta in an-
other case.131

119. Id. at 235.
120. Id.
121. 192 P.2d 976 (Wash. 1948).
122. Tyler Pipe, 438 U.S. at 235.
123. Id. at 236.
124. Id.
125. Id. at 239.
126. Id. at 234.
127. Id. at 248.
128. Id. at 247.
129. Id. at 254 (Scalia, J., concurring in part and dissenting in part).
130. Id.
131. Id. at 254-55.
Justice Scalia further argued that the application of a dormant or negative aspect of the Commerce Clause made no sense.\textsuperscript{132} He asserted that the Privileges and Immunities Clause, and not the Commerce Clause, is the constitutional safeguard against rank discrimination by one State against citizens of another state.\textsuperscript{133} Further, he noted that the problems with prior dormant Commerce Clause jurisprudence stemmed largely from the lack of a clear theoretical underpinning allowing the Commerce Clause to be enforced by the judiciary.\textsuperscript{134} Facialy, the Commerce Clause grants Congress power, but does not allow the courts to mandate that trade be free from State interference.\textsuperscript{135} The language of the Commerce Clause provides no indication of an exclusive grant of power to Congress.\textsuperscript{136} Further, there can be no general assumption that the congressional powers enumerated in Article I are exclusive as many clearly coexist with States' concurrent authority, and the Commerce Clause contains no denial of state power.\textsuperscript{137}

Scalia further dismissed the need for regulation of subjects that are in their nature national, or admit of only one uniform system or regulation plan as a justification for allowing judicial enforcement of the Commerce Clause.\textsuperscript{138} He admitted this may be a wise rule, but found no conceivable textual basis for such a rule, because the text treats commerce as a unitary subject.\textsuperscript{139} He argued it even more implausible that the silence of Congress in certain interstate commerce fields should be interpreted as a prohibition on regulation.\textsuperscript{140} The only historical grounds for reading any dormant aspect into the Commerce Clause arises from a comment by James Madison at the Convention stating the extent of Congress's power to regulate commerce answers the question of whether States are restrained from laying tonnage.\textsuperscript{141} However, the fact that the Convention adopted a provision prohibiting a State from levying tonnage duties suggests that Madison's assumption of federal exclusivity over commerce powers was not widely shared.\textsuperscript{142}

\textsuperscript{132} Id. at 260.
\textsuperscript{133} Id. at 265.
\textsuperscript{134} Id. at 260.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 261.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 261-62.
\textsuperscript{139} Id at 262.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 263.
\textsuperscript{142} Id. at 263-64.
2. In American Trucking Ass'ns, Inc. v. Smith, Justice Scalia argued that the Dormant Commerce Clause Forces Courts to Act in a Legislative Manner

In American Trucking Ass'ns, Inc. v. Smith, petitioner brought suit alleging that the Arkansas Highway Use Equalization Tax Act ("HUE") violated the Commerce Clause of the United States Constitution. The HUE tax operated on trucks in a certain weight range and required the trucks to pay either a tax of five cents per mile traveled in Arkansas or an annual flat tax of $175. The petitioners argued that Arkansas trucks were likely to travel more miles on Arkansas highways than out-of-state trucks and therefore HUE discriminated against interstate commerce in favor of in-state truckers. An Arkansas Chancery Court found HUE constitutional, and the Arkansas Supreme Court affirmed.

The United States Supreme Court held the case pending the decision of American Trucking Ass'n, Inc. v. Scheiner, a case also involving a constitutional challenge to flat highway use taxes. In Scheiner, the Supreme Court applied the internal consistency test and concluded that unapportioned flat taxes penalized travel within a trade area among the States and deterred interstate commerce. The Arkansas Supreme Court, on remand, ruled the HUE tax unconstitutional in light of Scheiner. The United States Supreme Court then determined that the Scheiner decision should only apply prospectively. Accordingly, the United States Supreme Court remanded the case for the Arkansas Supreme Court to determine the nature and extent of relief the petitioners were entitled to for past HUE tax payments.

Justice Scalia concurred in the judgment, but continued to register disagreement with the negative or dormant Commerce Clause jurisprudence. He noted that his disagreement rested on his, and

145. Smith, 496 U.S. at 171-72.
146. Id. at 172.
147. Id.
149. Smith, 496 U.S. at 173.
150. Id.
151. Id. at 174.
152. Id. at 182.
153. Id. at 200.
154. Id. at 202 (Scalia, J., concurring). Justice Scalia concurred to uphold the taxes imposed after Scheiner on the basis of stare decisis, but would have affirmed the constitutionality of the pre-Scheiner taxes. See id. at 204-05 (stating that although he disagreed with the dormant Commerce Clause jurisprudence, the law in the case was indistinguishable from the law in Scheiner, and therefore the post-Scheiner taxes
others', view that the dormant Commerce Clause jurisprudence is a legal quagmire; that since its inception the jurisprudence has been conclusory, arbitrary, and irreconcilable with the actual language of the Constitution, and that this jurisprudence has only worsened with age.\textsuperscript{155} He argued that this area of jurisprudence is inherently unstable, and as a result, will continue to upset settled expectations.\textsuperscript{156}

Even further, Scalia noted, the dormant Commerce Clause jurisprudence takes the Supreme Court beyond the judicial role entrusted to it.\textsuperscript{157} He noted that the actual language of the Commerce Clause is nothing more than a grant of congressional power to regulate commerce, and not a grant of court power.\textsuperscript{158} This, he argued, is exemplified by the appeal of embracing a rule of prospective decision-making regarding Supreme Court decisions handed down under a dormant Commerce Clause framework.\textsuperscript{159} However, this approach to the dormant Commerce Clause allows the Supreme Court to make essentially legislative judgments, a mode of action fundamentally beyond the judicial power.\textsuperscript{160}

Justice Scalia asserted that the only sensible explanation for finding a state statute violates the Commerce Clause, while simultaneously finding that same statute would be constitutional if enacted by Congress, is courts may presume Congress’s silence in certain matters related to commercial regulation means a prohibition of state regulation in those matters.\textsuperscript{161} Again, this requires the Supreme Court to perform a task quite different from the normal judiciary role of interpreting text or determining common-law tradition.\textsuperscript{162} Essentially, the Supreme Court is asked to decide how a reasonable federal commerce regulator would decide a particular issue—the exact task that a legislator must decide.\textsuperscript{163} This role involves casting the Supreme Court into a legislative role of balancing States’ interests against the degree of impairment of interstate commerce.\textsuperscript{164} This task requires the Su-

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\item should be held unconstitutional on the basis of stare decisis, but holding the pre-\textit{Scheiner} taxes unconstitutional would upset the settled expectations of the state due to the fact that \textit{Scheiner} overruled prior law).
\item Id. at 202.
\item Id. at 203. Justice Scalia argued that the dormant Commerce Clause jurisprudence is the decisional body of law that changes most regularly, due to the fact that the national economy constantly changes. \textit{Id}.
\item Id. at 202.
\item Id.
\item Id.
\item See \textit{id.} at 203-04 (noting that fellow Supreme Court justices attempted to avoid the negative consequences of the inherent instability of dormant Commerce Clause cases by embracing a rule of prospective decision making regarding those cases).
\item Id. at 204.
\item Id. at 202-03.
\item Id. at 203.
\item Id.
\item Id.
\end{itemize}
preme Court to accommodate the shifting variable of a national economy and expound on a legislative, and not constitutional, area.\textsuperscript{165}

Even further, a casual comparison of other Article I provisions leads to the conclusion that the congressional grant of power cannot be read as excluding State power in the same area.\textsuperscript{166} Accordingly, Justice Scalia argued, the Commerce Clause may only prohibit state regulation of commerce under the Supremacy Clause of the Constitution to the extent that Congress had preempted the state legislation.\textsuperscript{167}

3. \textit{In Itel Containers International Corp. v. Huddleston, Justice Scalia Argued that the Dormant Commerce Clause Should Only Be Used for Stare Decisis Purposes}

In \textit{In Itel Containers International, Corp. v. Huddleston},\textsuperscript{168} Itel Containers International Corporation ("Itel") filed suit challenging the constitutionality under the Commerce Clause of a Tennessee tax.\textsuperscript{169} Itel paid under protest the $382,465 in sales tax, interest, and penalties assessed on proceeds Itel earned from leased containers, which were delivered to Tennessee.\textsuperscript{170} The Tennessee Chancery Court dismissed the constitutional challenges to the tax.\textsuperscript{171} On appeal, the Tennessee Supreme Court rejected the argument that the tax violated the foreign Commerce Clause principles because the tax was only imposed upon discrete transactions and therefore did not trigger the risk of multiple taxation nor did it impede foreign trade or federal regulation.\textsuperscript{172} The Tennessee Supreme Court noted that, absent conflict with federal policy or consistent international practice, the apportionment of a state tax on transactions done within the borders of a state do not create the risk of multiple taxation internationally, which would implicate foreign Commerce Clause concerns.\textsuperscript{173} Accordingly, the Supreme Court held that the sales tax did not violate the Commerce Clause.\textsuperscript{174}

Justice Scalia again concurred in the judgment, but continued to argue that the Commerce Clause contains no dormant or negative component that places self-operative prohibitions upon regulation of

\begin{itemize}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 202.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} 507 U.S. 60 (1993).
\item \textsuperscript{169} \textit{Itel Containers Intl Corp. v. Huddleston}, 607 U.S. 60, 63 (1993). Itel also claimed that the tax violated the Import-Export Clause and conflicted with two international conventions and federal regulations. \textit{Itel Containers Intl'}, 607 U.S. at 63.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} \textit{Id.} at 64.
\item \textsuperscript{173} \textit{Id.} at 74-75.
\item \textsuperscript{174} \textit{Id.} at 78.
\end{itemize}
commerce enacted by a state. He acknowledged that applying dormant Commerce Clause analysis would serve the stare decisis purposes of fostering stability in the law and protecting reliance interests in certain instances. To further these goals of stare decisis, he noted that the only times that he would be willing to enforce a self-executing dormant Commerce Clause would be (A) when a state law facially discriminated against interstate commerce, or (B) when a state law is indistinguishable from a law previously found unconstitutional by the Supreme Court. He noted that the sequence of dormant Commerce Clause tests have been so uncertain in application that they neither foster stability in the law nor engender reliance interests deserving of the protection provided by stare decisis. He did note that Supreme Court precedent has consistently prohibited rank discrimination against interstate commerce.

Justice Scalia also pointed out that all of the tests ask the Supreme Court to make policy decisions about whether a particular nondiscriminatory state regulation is worth the effect that regulation will have upon interstate or foreign commerce. However, there is no historical record on which to read the Commerce Clause as anything more than a grant of power to Congress to regulate commerce. Accordingly, Justice Scalia argued that although the President is better able to determine which state regulatory interest should be subordinated to national commerce interests, under the Constitution, only Congress has the power to make that decision.

175. Id. at 78 (Scalia, J., concurring).
176. Id. at 79.
177. Id. at 78-79.
178. See id. at 79-80 (noting that past dormant Commerce Clause tests such as original package doctrine from Leisy v. Hardin, 135 U.S. 100 (1890), the uniformity test from Cooley v. Bd. of Wardens of Port of Philadelphia ex rel. Soc'y for Relief of Distressed Pilots, 13 L. Ed. 996 (1852), the directness test of Hall v. DeCuir, 95 U.S. 485 (1878) and the privilege of doing interstate business rule from Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) have all been successfully discarded over the years and forecasting the same fate for the current open-ended, vague four factor test put forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) and the balancing test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).
179. Id. at 79.
180. Id. at 80.
181. Id. at 78.
182. Id. at 81.
4. In United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, Justice Thomas Argued for a Complete Abolition of the Dormant Commerce Clause

In United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, a trade organization composed of solid waste management companies and haulers brought suit, alleging that certain flow control laws discriminated against interstate commerce and therefore violated the Commerce Clause. The United States Supreme Court found that flow control ordinances that favored public businesses, but treated in-state and out-of-state private businesses the same, were constitutional. Two counties in New York had enacted flow control ordinances which required that all solid waste created within the counties be delivered to a public benefit corporation empowered to collect, process, and dispose of such waste.

The federal district court enjoined enforcement of the flow control ordinances. The United States Court of Appeals for the Second Circuit reversed, finding that Supreme Court’s dormant Commerce Clause precedent made a distinction between laws favoring public, as opposed to private, facilities. At the United States Supreme Court, the Court determined that the law was constitutional after applying dormant Commerce Clause analysis. The Supreme Court noted that a contrary decision would require the Court to apply rigorous scrutiny to economic legislation, which it refused to do.

Justice Thomas filed a separate concurrence, but argued that the dormant Commerce Clause is both unworkable in practice and had no Constitutional basis. He noted that the application of the dormant Commerce Clause turned entirely on policy considerations, not on Constitutional analysis, and that the Supreme Court had no role in determining policy regulating interstate commerce. He acknowledged that the language of the Commerce Clause grants Congress power to regulate interstate commerce and also power to overrule state regulation of interstate commerce. However, Justice Thomas

185. United Haulers, 550 U.S. at 342.
186. Id. at 335.
187. Id. at 337.
188. Id.
189. See id. at 347 (noting that the public benefits exceeds any arguable burden imposed on interstate commerce by the ordinances).
190. Id.
191. Id. at 349 (Thomas, J., concurring).
192. Id.
193. Id.
explained there is no constitutional basis to use the Commerce Clause as a court tool to strike down state laws that a court believes inhibit interstate commerce.\textsuperscript{194}

Justice Thomas argued that the current rule prohibiting state laws that discriminate against interstate commerce on their face exists untethered from the Constitution and depends upon policy preferences of the Supreme Court majority.\textsuperscript{196} This is evidenced from the fact that many of the Supreme Court cases cited in support of a stare decisis appeal to the dormant Commerce Clause are premised on reasoning abandoned in subsequent cases.\textsuperscript{196} Further, policy preferences of the Supreme Court form an unsuitable basis for constitutional doctrine as evidenced due to the fact that these preferences shift over time.\textsuperscript{197} This uncertainty in the dormant Commerce Clause doctrine leaves the Supreme Court with no principled way to decide a case under the law.\textsuperscript{198}

Further, Justice Thomas identified the policy choice needed to choose between a free market and economic protectionism is a right that the Constitution vests as a legislative choice left to Congress.\textsuperscript{199} When Congress chooses not to exercise its power in making a choice, there is nothing in the Constitution limiting the States from regulating commerce.\textsuperscript{200} In other words, congressional silence should leave the States free to strike a balance between the free market and protectionism.\textsuperscript{201} Justice Thomase asserted that the Supreme Court should refuse to further tweak the dormant Commerce Clause analysis and instead should reject it outright.\textsuperscript{202}

IV. ANALYSIS

In \textit{Jones v. Gale},\textsuperscript{203} the United States Court of Appeals for the Eighth Circuit determined that an amendment to the Nebraska Constitution violated the dormant Commerce Clause.\textsuperscript{204} The constitut-

\textsuperscript{194} Id.
\textsuperscript{195} Id. at 351.
\textsuperscript{196} See id. at 350 (describing prior dormant Commerce Clause opinions were premised on an idea that in certain subject areas the Commerce Clause grants Congress an exclusive grant of power, but that modern dormant Commerce Clause cases have abandoned this analysis).
\textsuperscript{197} Id. at 351. Justice Thomas notes that the Supreme Court has used the dormant Commerce Clause to strike down state laws based on a preference for national unity, as well as to further anti-protectionist sentiment. Id. at 351-52.
\textsuperscript{198} Id. at 353.
\textsuperscript{199} Id. at 352.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 355.
\textsuperscript{203} 470 F.3d 1261 (8th Cir. 2006).
\textsuperscript{204} Jones v. Gale, 470 F.3d 1261, 1264 (8th Cir. 2006).
tional amendment, Initiative 300, stated no syndicate or corporation could acquire or obtain a legal, beneficial, or other interest in title to real estate used for ranching or farming in Nebraska.\textsuperscript{205} The amendment provided an exception for a corporation engaged in ranching, farming, or owning agricultural land, in which members of a single family held the majority of the voting stock and had at least one member of that family as a person who either actively engaged in the daily management and labor of the ranch or farm or actually resided on the ranch or farm.\textsuperscript{206} In Jones, owners of Nebraska ranch and farm land operations brought suit claiming that Initiative 300 violated the Commerce Clause of the United States Constitution.\textsuperscript{207} The United States District Court for the District of Nebraska found that Initiative 300 facially discriminated against interstate commerce and had a discriminatory purpose.\textsuperscript{208}

On appeal, the Eighth Circuit concluded that Initiative 300 had a discriminatory intent as revealed by the ballot title and text.\textsuperscript{209} The Eighth Circuit reasoned that Initiative 300 would violate the dormant Commerce Clause unless Nebraska could demonstrate that the amendment was the only means available to accomplish a legitimate state interest.\textsuperscript{210} The Eighth Circuit noted that the dormant Commerce Clause attempted to correct using xenophobia as a means to maintain a status quo and accordingly found Initiative 300 violated the dormant Commerce Clause.\textsuperscript{211}

This Analysis will argue that the Eighth Circuit incorrectly decided that the Commerce Clause of the United States Constitution limits a State's ability to amend its constitution concerning intrastate commerce that Congress has not regulated.\textsuperscript{212} This Analysis will demonstrate that recent Commerce Clause jurisprudence from the United States Supreme Court shows a willingness to place judicial limits on Congress's Commerce Clause powers, which expands the areas of which States are allowed to regulate.\textsuperscript{213} This Analysis will then show that the dormant Commerce Clause is an unwise constitutional doctrine with no textual support from the United States Constitu-

\textsuperscript{205} Neb. Const. art. XII, § 8, found unconstitutional by Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006).
\textsuperscript{206} Id.
\textsuperscript{207} Jones, 470 F.3d at 1264.
\textsuperscript{209} See Jones, 470 F.3d at 1268 (noting that facially, Initiative 300 favors Nebraska residents).
\textsuperscript{210} Id. at 1270.
\textsuperscript{211} Id.
\textsuperscript{212} See infra notes 216-313 and accompanying text.
\textsuperscript{213} See infra notes 216-39 and accompanying text.
Lastly, this Analysis will establish that the Eighth Circuit's decision would not survive the abolition of the dormant Commerce Clause jurisprudence.

A. THE SUPREME COURT'S RECENT COMMERCE CLAUSE JURISPRUDENCE NARROWS CONGRESS'S POWER TO REGULATE COMMERCE

During the twentieth century, the United States Supreme Court gave Congress nearly unlimited discretion in regulating commerce. However, in the past two decades, the Supreme Court has started to limit Congress's power under the Commerce Clause. Accordingly, if the Supreme Court continues to find that Congress has less power to regulate commerce under the Commerce Clause, this will increase the powers retained by the States to regulate commerce.

In United States v. Lopez, the United States Supreme Court held that Congress exceeded its authority under the Commerce Clause to make knowingly possessing a firearm in a school zone a federal criminal offense. The Supreme Court reasoned that gun possession in a school zone is not an economic activity which in the aggregate would affect interstate commerce. The Supreme Court noted that a contrary ruling would require piling inference on top of inference together and allow Congress to regulate nearly any activity. Ultimately, this type of reasoning would convert the Commerce Clause

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214. See infra notes 240-79 and accompanying text.
215. See infra notes 280-313 and accompanying text.
216. See Baker & Young, supra note 2, at 87 (noting how after 1937 the Supreme Court has refused to limit Congress's power under the Commerce Clause).
217. See Nat'l Fed. of Ind. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566, 2591 (2012) (deciding that Congress does not have the power under the Commerce Clause to force citizens to purchase a certain product); United States v. Morrison, 529 U.S. 598, 619 (2000) (concluding that Congress does not have the power under the Commerce Clause to regulate gender based violent crimes); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that Congress does not have power under the Commerce Clause to make criminal statutes for knowingly having a firearm in a school zone).
218. Compare Gibbons v. Ogden, 22 U.S. 1, 209-10 (1824) (noting that if a state law is in collision with a congressional act passed pursuant to Congress's power under the Commerce Clause the state law must yield to the congressional law), with Lopez, 514 U.S. at 551 (holding that Congress does not have power under the Commerce Clause to make criminal statutes for knowingly having a firearm in a school zone), Morrison, 529 U.S. at 619 (concluding that Congress does not have the power under the Commerce Clause to regulate gender based violent crimes), and Sebelius, 132 S. Ct. at 2591 (deciding that Congress does not have the power under the Commerce Clause to force citizens to purchase a certain product).
220. Lopez, 514 U.S. at 551.
221. Id. at 567.
222. Id. at 564, 567.
into a general police power akin to the police power retained by the States.\textsuperscript{223}

In \textit{United States v. Morrison},\textsuperscript{224} the United States Supreme Court concluded that under the Commerce Clause, Congress did not have the power to enact a federal civil remedy for victims of gender based violent crimes.\textsuperscript{225} The Supreme Court first noted that gender based violent crimes cannot be classified as economic activities.\textsuperscript{226} Further, allowing Congress to regulate these crimes under the Commerce Clause would allow Congress to regulate any crime which in the aggregate affected nationwide production, employment, transit, or consumption.\textsuperscript{227} Taking the argument further, this would allow Congress the power to regulate areas which had traditionally been exclusively regulated by the States.\textsuperscript{228}

In \textit{National Federation of Independent Businesses v. Sebelius},\textsuperscript{229} the United States Supreme Court determined that forcing individuals not currently receiving health insurance to purchase private insurance exceeded Congress's power under the Commerce Clause.\textsuperscript{230} The Supreme Court cautioned that to force purchasers to become active in commerce would erode any limit on Congress's power under the Commerce Clause.\textsuperscript{231} The Supreme Court noted that the police power to regulate individual citizens is a state power and that granting this power to Congress would fundamentally alter relationships between the federal government and American citizens.\textsuperscript{232}

In \textit{Jones v. Gale},\textsuperscript{233} the United States Court of Appeals for the Eighth Circuit failed to recognize that the Supreme Court's recent jurisprudence limiting Congress's power under the Commerce Clause impliedly leaves more discretion to the States when regulating areas of commerce traditionally regulated by the States.\textsuperscript{234} The Supreme

\begin{itemize}
\item \textsuperscript{223} \textit{Id.} at 567.
\item \textsuperscript{224} 529 U.S. 598 (2000).
\item \textsuperscript{225} \textit{Morrison}, 529 U.S. at 619.
\item \textsuperscript{226} \textit{Id.} at 613.
\item \textsuperscript{227} \textit{Id.} at 615.
\item \textsuperscript{228} \textit{See id.} at 615-16 (noting a slippery slope argument that an expansion of the areas Congress could regulate under the Commerce Clause would allow Congressional regulation of family matters such as marriage, divorce, and childrearing).
\item \textsuperscript{229} 567 U.S. \textit{___}, 132 S. Ct. 2566 (2012).
\item \textsuperscript{230} \textit{Sebelius}, 132 S. Ct. at 2591.
\item \textsuperscript{231} \textit{Id.} at 2589.
\item \textsuperscript{232} \textit{Id.} at 2589, 2591.
\item \textsuperscript{233} 470 F.3d 1261 (2006).
\item \textsuperscript{234} \textit{Compare Jones v. Gale}, 470 F.3d 1261, 1270 (holding that Nebraska's constitutional amendment violated the dormant Commerce Clause), \textit{with Lopez}, 514 U.S. at 551 (holding that Congress does not have power under the Commerce Clause to make criminal statutes for knowingly having a firearm in a school zone), \textit{Morrison}, 529 U.S. at 619 (concluding that Congress does not have the power under the Commerce Clause to regulate gender based violent crimes), and \textit{Sebelius}, 132 S. Ct. at 2591 (deciding that Cong-}
\end{itemize}
Court’s original interpretation of the Commerce Clause found that a state law regulating commerce was only unconstitutional if the state law acted in direct collision with a law passed by Congress.\textsuperscript{235} However, the Supreme Court thereafter read into the Commerce Clause a dormant aspect which limited State’s abilities to regulate commerce in certain areas, even when Congress was silent on the issue.\textsuperscript{236} This required courts to interpret congressional silence as preemption in certain areas of commerce.\textsuperscript{237} This dormant aspect also accords with the great deference the Supreme Court has given to Congress’s discretion when acting under its Commerce Clause powers after 1937.\textsuperscript{238} The recent limitations the Supreme Court has placed on Congress’s power under the Commerce Clause, however, impliedly grants the States greater powers to regulate commerce and makes unnecessary a dormant Commerce Clause analysis.\textsuperscript{239}

B. THE EIGHTH CIRCUIT INCORRECTLY DECIDED JONES V. GALE BY RELYING ON THE DORMANT COMMERCE CLAUSE, WHICH HAS NO TEXTUAL SUPPORT IN THE CONSTITUTION

The Commerce Clause of the United States Constitution states, “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”\textsuperscript{240} On its face, the Commerce Clause grants Congress power to regulate interstate commerce, but does not grant courts the power

\begin{itemize}
  \item \textsuperscript{235} See Gibbons, 22 U.S. at 209-10 (noting that if a state law is in collision with a congressional act passed pursuant to Congress’s power under the Commerce Clause the state law must yield to the congressional law).
  \item \textsuperscript{236} See Hodes, supra note 4, at 160 (noting that the Supreme Court has read into the Commerce Clause an implied restriction on certain state actions).
  \item \textsuperscript{237} See Am. Trucking Ass’n, Inc. v. Smith, 496 U.S. 167, 202-03 (1990) (Scalia, J., concurring) (noting that interpreting congressional silence in certain areas of commerce to be a prohibition of state regulation in that area is the only sensible way to find that a state law could violate the Commerce Clause in the absence of conflict with a federal law).
  \item \textsuperscript{238} See Baker & Young, supra note 2, at 87 (noting how after 1937 the Supreme Court has refused to limit Congress’s power under the Commerce Clause).
  \item \textsuperscript{239} Compare Gibbons, 22 U.S. at 209-10 (1824) (noting that if a state law is in collision with a congressional act passed pursuant to Congress’s power under the Commerce Clause the state law must yield to the congressional law), and United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348 (2007) (Scalia, J., concurring) (noting that local commerce regulation is traditionally left to state legislatures), with Lopez, 514 U.S. at 551 (holding that Congress does not have power under the Commerce Clause to make criminal statutes for knowingly having a firearm in a school zone), Morrison, 529 U.S. at 619 (concluding that Congress does not have the power under the Commerce Clause to regulate gender based violent crimes), and Sebelius, 132 S. Ct. at 2591 (deciding that Congress does not have the power under the Commerce Clause to force citizens to purchase a certain product).
  \item \textsuperscript{240} U.S. Const. art. I, § 8, cl. 3.
\end{itemize}
to ensure interstate trade is free from state interference. The language of the Commerce Clause does not provide any indication that the power to regulate commerce is exclusively within the province of Congress, nor does it contain any denial of concurrent state power. Further, any general assumption that congressional powers enumerated in Article I are exclusive is wrong as many of the powers clearly co-exist with a State’s concurrent authority. An attempt to create a dormant Commerce Clause jurisprudence resulted in a legal quagmire with conclusory and arbitrary decisions, and this has worsened with age. The dormant Commerce Clause has failed to create reliance interest by having a sequence of different tests and decisions resulting in uncertain applications. The policy preferences of the Supreme Court serve a poor basis for a constitutional doctrine due to the inevitable shift over time of justices’ policy choices. This shifting of values creates an uncertain doctrine with no principle way to decide each case. The stare decisis appeal of the dormant Commerce Clause is therefore non-existent, because the precedent presumably relied upon would be premised on reasoning subsequently abandoned. Accordingly, in Jones v. Gale, the United States Court of Appeals for the Eighth Circuit erroneously used the dormant Commerce Clause to strike down an amendment to Nebraska’s constitution by making policy decisions.

243. Id. at 261.
245. See Itel Containers, Int’l Corp. v. Huddleston, 607 U.S. 60, 79-80 (1993) (Scalia, J., concurring) (noting that past dormant Commerce Clause tests such as original package doctrine from Leisy v. Hardin, 135 U.S. 100 (1890), the uniformity test from Cooley v. Bd. of Wardens of Port of Philadelphia ex rel. Soc’y for Relief of Distressed Pilots, 13 L. Ed. 996 (1852), the directness test of Hall v. DeCuir, 95 U.S. 485 (1878) and the privilege of doing interstate business rule from Spector Motor Serv., Inc. v. O’Connor, 340 U.S. 602 (1951) have all been successfully discarded over the years and forecasting the same fate for the current open-ended, vague four factor test put forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) and the balancing test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).
246. See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 351 (2007) (Thomas, J., concurring) (noting that dormant Commerce Clause analysis rests on the ever-shifting policy choices of the judicial branch).
247. United Haulers, 550 U.S. at 353.
248. See id. at 350-51 (noting the shifting tests for the dormant Commerce Clause).
250. Compare Jones v. Gale, 470 F.3d 1261, 1270 (2006) (weighing policy considerations without noting a congressional act in conflict), with United Haulers, 550 U.S at 348 (Scalia, J., concurring) (noting that local commerce regulation is traditionally left to the State legislature), and United Haulers, 550 U.S. at 352 (Thomas, J., concurring) (noting that these policy choices are constitutionally delegated to Congress and congressional silence should allow States to make their own policy choices).
In *Jones*, the Eighth Circuit erred by reading into a constitutional grant of power to Congress a dormant aspect that prohibited certain state regulations of commerce. In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, Justice Scalia argued that a test analyzing whether a state law regulating taxation discriminates against interstate commerce would drastically limit a State’s discretion in structuring its tax system. Although allowing judicial enforcement of the Commerce Clause to regulate subjects that are national in nature or which admit only one uniform system (or regulation plan) may be a wise policy choice, there is no conceivable textual basis in the Constitution to establishing such a rule. To interpret congressional silence in certain areas of interstate commerce as a prohibition on state regulation is also implausible. Thus, in *Jones*, the Eighth Circuit erred by interpreting the Commerce Clause as containing a dormant provision that prohibits States from passing laws which burden or discriminate against interstate commerce.

Maintaining its adherence to the dormant Commerce Clause, the Eighth Circuit in *Jones* erroneously engaged in balancing the State’s interest in the State’s constitutional amendment against the amendment’s impact on interstate commerce. In *American Trucking Ass’ns, Inc. v. Smith*, Justice Scalia argued that the dormant Commerce Clause forced courts beyond the judicial role. By interpreting congressional silence in certain areas of interstate commerce as an implicit prohibition of state regulation of those areas the Supreme Court is cast into the legislative role by deciding how a reasonable federal commerce regulator would decide a particular issue. This is

251. *Compare Jones*, 470 F.3d at 1267 (noting that a State discriminating against interstate commerce violates the dormant Commerce Clause), with U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce), and *Tyler Pipe Indus.*, 483 U.S. at 262 (noting that a dormant Commerce Clause analysis is not supported by the text of the Constitution).


254. Id. at 261-62.

255. Id. at 262.

256. *Compare Jones*, 470 F.3d at 1267 (noting that a State discriminating against interstate commerce violates the dormant Commerce Clause), with U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce), and *Tyler Pipe Indus.*, 483 U.S. at 262 (noting that a dormant Commerce Clause analysis is not supported by the text of the Constitution).

257. *Compare Jones*, 470 F.3d at 1270 (forcing Nebraska to demonstrate a legitimate local interest), with U.S. CONST. art. I, § 8, cl. 3 (textually granting only Congress the power to regulate commerce), and *Am. Trucking Ass’n*, 496 U.S. at 202-04 (noting that a dormant Commerce Clause analysis requires courts to perform a legislative task).


260. See id. at 202-03 (explaining how a dormant Commerce Clause forces the judiciary to make legislative decisions).
not a judicial task, and it requires courts to engage in the legislative task of balancing state interests against the degree of impairment of interstate commerce under the shifting variable of our national economy.261 Thus, in *Jones*, the Eighth Circuit erred by engaging in the legislative task of balancing the State's interest in the regulation against the regulation's impact on interstate commerce.262

Continuing to step outside the purview of the judiciary, the Eighth Circuit in *Jones* erroneously used the dormant Commerce Clause as a mechanism to make policy decisions, despite the other two branches of government being better suited to make these decisions.263 In *Itel Containers International Corp. v. Huddleston*,264 Justice Scalia argued that determining what effect a nondiscriminatory state regulation will have upon foreign commerce is a policy consideration.265 Justice Scalia recognized that the President is better able to determine which state interests should be subordinated to national interests regarding commerce and that, constitutionally, only Congress has the power to enact such regulations.266 Thus, in *Jones*, the Eighth Circuit erred by making policy determinations better performed by a non-judiciary branch of the government.267

In addition, the Eighth Circuit in *Jones* erroneously interpreted congressional silence as a judicial opportunity to overturn policy decisions made by States that did not conflict with any federal laws.268 In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,269 Justice Scalia contended that the dormant Commerce Clause is an unjustified judicial intervention which intrudes

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261. *See id. at 203* (noting how dormant Commerce Clause framework require courts to engage in a legislative act).

262. *Compare Jones, 470 F.3d at 1270* (forcing Nebraska to demonstrate a legitimate local interest), *with U.S. Const. art. I, § 8, cl. 3* (textually granting only Congress the power to regulate commerce), and *Am. Trucking Ass'ns, 496 U.S. at 202-04* (noting that a dormant Commerce Clause analysis requires courts to perform a legislative task).

263. *Compare Jones, 470 F.3d at 1270* (engaging in a balancing of policy values), *with Itel Containers, 607 U.S. at 81* (noting that a non-judiciary branch is better suited to make policy decisions concerning commerce).


265. *Itel Containers, 607 U.S. at 80*.

266. *Id. at 81*.

267. *Compare Jones, 470 F.3d at 1270* (engaging in a balancing of policy values), *with Itel Containers, 607 U.S. at 81* (noting that a non-judiciary branch is better suited to make policy decisions concerning commerce).

268. *Compare Jones, 470 F.3d at 1270* (noting that the State's purported interests were unclear and failed to constitute a legitimate local interest), *with United Haulers, 550 U.S. at 348* (Scalia, J., concurring) (noting that local commerce regulation is traditionally left to the State legislature), and *United Haulers, 550 U.S. at 352* (Thomas, J., concurring) (noting that these policy choices are constitutionally delegated to Congress and congressional silence should allow States to make their own policy choices).

upon an area of regulation traditionally occupied by the States. Justice Thomas also filed a concurring opinion, but called for an outright rejection of the dormant Commerce Clause. The dormant Commerce Clause rests entirely on courts determining policy regulating interstate commerce. The policy choice between a free market and economic protectionism is a legislative choice vested by the Constitution to Congress. Congressional silence on an area of commerce should leave each State free to strike its own balance between these competing forces. Therefore, the Eighth Circuit, in Jones, erring by questioning the policy decisions of the State of Nebraska and intruding upon an area of regulation traditionally occupied by the States and not currently being regulated by Congress.

The Eighth Circuit in Jones continued to step outside its constitutional purview in applying a dormant Commerce Clause analysis, a judicial invention which contains no support from the text of the Constitution. The Eighth Circuit erred by engaging in a legislative balancing act. The court failed to recognize policy considerations are better handled by, and constitutionally delegated to, non-judiciary branches of the government. The Eighth Circuit erred by refusing to recognize that congressional silence should leave each State free to adopt its own regulation on areas of commerce traditionally regulated by the States.

270. United Haulers, 550 U.S. at 348 (Scalia, J., concurring).
271. Id. at 355 (Thomas, J., concurring).
272. Id. at 349.
273. Id. at 352.
274. Id.
275. Compare Jones, 470 F.3d at 1270 (noting that the State’s purported interests were unclear and failed to constitute a legitimate local interest), with United Haulers, 550 U.S. at 348 (Scalia, J., concurring) (noting that local commerce regulation is traditionally left to state legislatures), and United Haulers, 550 U.S. at 352 (Thomas, J., concurring) (noting that these policy choices are constitutionally delegated to Congress and congressional silence should allow States to make their own policy choices).
276. Compare Jones, 470 F.3d at 1267 (applying a dormant Commerce Clause analysis), with U.S. Const. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce), and Tyler Pipe Indus., 489 U.S. at 262 (noting that a dormant Commerce Clause analysis is not supported by the text of the Constitution).
277. Compare Jones, 470 F.3d at 1270 (forcing Nebraska to demonstrate a legitimate local interest), with U.S. Const. art. I, § 8, cl. 3 (textually granting only Congress the power to regulate commerce), and Am. Trucking Ass'ns, 496 U.S. at 202-04 (noting that a dormant Commerce Clause analysis requires courts to perform a legislative task).
278. Compare Jones, 470 F.3d at 1270 (undergoing a balancing of policies), with U.S. Const. art. I, § 8, cl. 3 (textually granting only Congress the power to regulate commerce), and Int'l Containers, 607 U.S. at 81 (noting that a non-judiciary branch is better suited to make policy decisions concerning commerce).
279. Compare Jones, 470 F.3d at 1270 (weighing policy considerations without noting a congressional act in conflict), with United Haulers, 550 U.S. at 348 (Scalia, J., concurring) (noting that local commerce regulation is traditionally left to the State legislature), and United Haulers, 550 U.S. at 352 (Thomas, J., concurring) (noting that these
C. *Jones v. Gale* Should Be Overruled Because It Would Not Survive an Abolition of the Dormant Commerce Clause

In *Jones v. Gale*, the United States Court of Appeals for the Eighth Circuit held that an amendment to the Nebraska Constitution violated the dormant Commerce Clause. The amendment to the Nebraska Constitution, Initiative 300, stated no syndicate or corporation shall acquire or obtain a legal, beneficial, or other interest in title to real estate used for ranching or farming in Nebraska. However, the statute allowed an exception for a corporation engaged in ranching, farming, or owning agricultural land, in which members of a single family held the majority of the voting stock and had at least one member of that family be a person who either actively engaged in the daily management and labor of the ranch or farm or actually resided on the ranch or farm.

In *Jones*, the Eighth Circuit erroneously used the Commerce Clause to invalidate an amendment to a State constitution without a conflicting federal law. In *Gibbons v. Ogden*, the United States Supreme Court noted that in situations where States enact laws regulating internal state affairs, the Supreme Court must determine whether the state law comes into collision with a congressional act. However, the United States Supreme Court dismissed the question as to whether in the absence of a congressional act the States retain the power to regulate commerce, or whether the Commerce Clause forces surrender of all such power to Congress. The Supreme Court noted that a State’s power to pass laws on subjects within its control and adopt measures regulating those subjects do not stem from the Commerce Clause, but from a separate state retained power. Thus, in *Jones*, the Eighth Circuit erred by finding a state law violated the Constitution, despite there being no federal law in conflict.

Policy choices are constitutionally delegated to Congress and congressional silence should allow States to make their own policy choices.

280. 470 F.3d 1261 (8th Cir. 2006).
281. Jones v. Gale 470 F.3d 1261, 1270 (8th Cir. 2006).
282. Neb. Const. art. XII, § 8, found unconstitutional by Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006).
283. Id.
284. *Compare Jones*, 470 F.3d at 1270 (holding that Nebraska’s constitutional amendment violated the dormant Commerce Clause), *with Gibbons v. Ogden*, 22 U.S. 1, 209-10 (1824) (noting that if a state law is in collision with a congressional act passed pursuant to Congress’s power under the Commerce Clause the state law must yield to the congressional law).
285. 22 U.S. 1 (1824).
287. Id. at 200.
288. Id. at 204.
289. *Compare Jones*, 470 F.3d at 1270 (holding that Nebraska’s constitutional amendment violated the dormant Commerce Clause), *with Gibbons*, 22 U.S. at 209-10.
Further, the Eighth Circuit erred by making its own policy decision in an area of commerce in which Congress was silent. In *American Trucking Ass'ns, Inc. v. Smith*, Justice Scalia claimed that the only sensible argument to explain why a state law violates the Constitution under the dormant Commerce Clause would be to presume that congressional silence in certain areas of commerce should be interpreted as a prohibition of state regulation in that area. However, this approach forces the courts to make legislative judgments. Accordingly, state regulation of commerce only violates the Commerce Clause to the extent that Congress has preempted the state legislation. Thus, in *Jones*, the Eighth Circuit erred by analyzing an area of commerce in which Congress has been silent and making policy considerations, instead of allowing Nebraska to make its own policy considerations.

In *Jones*, the Eighth Circuit erred when it used the dormant Commerce Clause in a manner inconsistent with stare decisis rationales. In *Itel Containers International Corp. v. Huddleston*, Justice Scalia continued to argue against a dormant Commerce Clause jurisprudence. He noted, however, that in two instances application of the dormant Commerce Clause would serve stare decisis goals. To serve the stare decisis goals of fostering stability in the law and protecting reliance interests, the dormant Commerce Clause can be used to prohibit (A) a state law which facially discriminates against interstate commerce or (B) a state law indistinguishable from a law previously found to be unconstitutional by the United States

(noting that if a state law is in collision with a congressional act passed pursuant to Congress's power under the Commerce Clause the state law must yield to the congressional law).

290. *Compare Jones*, 470 F.3d at 1270 (analyzing the state interests put forth), *with* *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 202 (Scalia J., concurring) (noting that state regulation of commerce only violates the Commerce Clause if Congress has preempted the state legislation).


292. *Am. Trucking Ass'ns*, 496 U.S. at 202-03.

293. *Id.* at 203-04.

294. *Id.* at 202.

295. *Compare Jones*, 470 F.3d at 1270 (analyzing the state interests put forth), *with Am. Trucking Ass'ns*, 496 U.S. at 203 (noting that state regulation of commerce only violates the Commerce Clause if Congress has preempted the state legislation).

296. *Compare Jones*, 470 F.3d at 1267-71 (noting reliance on other Eighth Circuit cases and policy considerations of the Eighth Circuit), *with* *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78-79 (1993) (Scalia, J., concurring) (referring to two stare decisis reasons for maintaining a limited dormant Commerce Clause jurisprudence).


298. *See Itel Containers*, 507 U.S. at 78 (arguing that the Commerce Clause contains no dormant component that prohibits state regulation of commerce).

299. *Id.* at 78-79.
Thus, in Jones, the Eighth Circuit erred in striking down an amendment to Nebraska's constitution under the dormant Commerce Clause that did not facially discriminate against interstate commerce and was not indistinguishable from a law previously found to be unconstitutional by the United States Supreme Court.

In Jones, the Eighth Circuit erred by prohibiting an amendment to a state constitution regulating an area of commerce typically regulated by the States. In United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, the United States Supreme Court found that a State ordinance which favors public businesses, but treats in-state and out-of-state business in an even-handed manner does not violate the dormant Commerce Clause. Justice Thomas concurred, but also expressed a view that the dormant Commerce Clause analysis should be rejected outright. Broadening the dormant Commerce Clause intrudes upon an area of regulation traditionally occupied by the States. The use of the Commerce Clause as a judicial tool to prohibit State laws in any situations untethers the Commerce Clause from its constitutional language. Thus, in Jones, the Eighth Circuit erred by using the dormant Commerce Clause as a tool to prohibit a State amendment, and intruded upon an area of regulation traditionally occupied by the States.

A state law regulating commerce should only be found unconstitutional if it is in conflict with a federal law regulating the same area. In Jones, the Eighth Circuit erred when it found an amendment to Nebraska's constitution violated the Constitution of the United States

300. Id.
301. Compare Jones, 470 F.3d at 1267-71 (noting reliance on other Eighth Circuit cases and policy considerations of the Eighth Circuit), with Istel Containers, 507 U.S. at 79-79 (noting two stare decisis reasons to maintain a limited dormant Commerce Clause jurisprudence).
302. Compare Jones, 470 F.3d at 1270 (holding that Nebraska's constitutional amendment violated the dormant Commerce Clause), with United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348 (2007) (Scalia, J., concurring) (noting that the dormant Commerce Clause forces the judiciary to intrude upon an area of regulation traditionally occupied by the States).
304. United Haulers, 550 U.S. at 345 (majority opinion).
305. Id. at 355 (Thomas, J., concurring).
306. Id. at 348 (Scalia, J., concurring).
307. Id. at 351 (Thomas, J., concurring).
308. Compare Jones, 470 F.3d at 1270 (holding that Nebraska's constitutional amendment violated the dormant Commerce Clause), with United Haulers, 550 U.S. at 348 (Scalia, J., concurring) (noting that the dormant Commerce Clause forces the judiciary to intrude upon an area of regulation traditionally occupied by the States).
309. See Gibbons, 22 U.S. at 209-10 (1824) (noting that if a state law is in collision with a congressional act passed pursuant to Congress's power under the Commerce Clause the state law must yield to the congressional law).
despite Nebraska’s amendment not being in conflict with any federal law. The Eighth Circuit further erred by making policy decisions better left to the other branches of government. Although stare decisis considerations may urge maintaining a limited dormant Commerce Clause jurisprudence, the Eighth Circuit did not rely on any Supreme Court cases in finding Nebraska’s amendment unconstitutional.

V. CONCLUSION

In Jones v. Gale, the United States Court of Appeals for the Eighth Circuit determined that a State amendment which precluded a corporation that did not have a majority shareholder who resided in Nebraska from owning Nebraska farmland violated the dormant Commerce Clause. The Eighth Circuit concluded that the amendment was both facially discriminatory and was passed with discriminatory intent. The Eighth Circuit noted that the interests the State presented were xenophobic in nature and opposed to the values the dormant Commerce Clause protected. Accordingly, the Eighth Circuit opined that the amendment violated the dormant Commerce Clause.

The Jones v. Gale decision has affected both the number of Nebraska farms and the average size of each of these farms. For example, in 2000, there were fifty-four thousand Nebraska farms. However, in 2012, the number of Nebraska farms had decreased to

310. Compare Jones, 470 F.3d at 1270 (holding that Nebraska’s constitutional amendment violated the dormant Commerce Clause, but failing to find a conflicting federal law), with Gibbons, 22 U.S. at 209-10 (1824) (noting that if a state law is in collision with a congressional act passed pursuant to Congress’s power under the Commerce Clause the state law must yield to the congressional law).

311. Compare Jones, 470 F.3d at 1270 (engaging in a balancing of policy values), with Am. Trucking Ass’ns, 496 U.S. at 202-04 (noting that a dormant Commerce Clause analysis requires courts to perform a legislative task), and Iter Containers, 607 U.S. at 81 (noting that a non-judiciary branch is better suited to make policy decisions concerning commerce).

312. Compare Jones, 470 F.3d at 1267-71 (noting reliance on other Eighth Circuit cases and policy considerations of the Eighth Circuit), with Iter Containers, 507 U.S. at 78-79 (noting two stare decisis reasons to maintain a limited dormant Commerce Clause jurisprudence).

313. 470 F.3d 1261 (8th Cir. 2006).

314. See Jones v. Gale, 470 F.3d 1261, 1264 (8th Cir. 2006) (noting that Initiative 300 violated the dormant Commerce Clause).

315. Jones, 470 F.3d at 1270.

316. See id. (noting that Nebraska’s amendment to its constitution exhibited the xenophobia the dormant Commerce Clause protects against).

317. Id. at 1264.

47,700. In 2000, the average size of a farm in Nebraska was 859 acres. In 2012, just six years after the Jones v. Gale, the average size of a farm in Nebraska had increased to 974 acres.

The Eighth Circuit improperly applied a dormant Commerce Clause analysis to the determination of the constitutionality of a state act, an approach that does not have textual support in the Constitution and forces the judiciary to make legislative decisions. Further, the United States Supreme Court's recent Commerce Clause decisions have limited Congress's power under the Commerce Clause, which in turn returns power to regulate commerce to the States. Finally, the Eighth Circuit's opinion is untenable without resort to the dormant Commerce Clause and therefore erroneously decided.

A faithful reading of the text of the Constitution would mandate an outright abolition of the dormant Commerce Clause. Even if the dormant Commerce Clause jurisprudence is retained in limited cases for stare decisis purposes, the courts should be constrained in making legislative decisions. Moreover, the recent cases analyzing the Commerce Clause before the Supreme Court reveal an unwillingness to grant Congress unfettered power under the Commerce Clause, and therefore heightened powers for the States to regulate commerce. As the Supreme Court limits the power of Congress to regulate commerce and the judiciary ceases to act as a super-legislative branch, states will regain freedom to regulate commerce within its borders as each state's legislature finds appropriate.

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322. See supra notes 240–79 and accompanying text.
323. See supra notes 216–39 and accompanying text.
324. See supra notes 280–313 and accompanying text.