

# Environmental Law, Congress, and the Court's New Federalism Doctrine

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## I. INTRODUCTION

This Article examines the direct implications of the Supreme Court's recent Commerce Clause decisions on federal environmental policy.<sup>1</sup> It ignores effects outside of those that would be raised by Commerce Clause challenges to environmental statutes. This leaves to others questions such as the potential to substitute legislation under the spending power to compensate for reductions in commerce authority,<sup>2</sup> or the impacts of the Court's state sovereign immunity cases on environmental enforcement.<sup>3</sup>

There is a great deal potentially at stake in a clash between existing environmental legislation and a shrunken commerce power. In the past thirty years or so, federal legislation affecting the environment has grown from some modest research efforts and some cumbersome attempts at state-federal partnerships to the most substantial and

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\* Professor of Law and Public Policy Studies, Duke University. I thank Dawn Johnsen for inviting me to participate in a Symposium at the Indiana University School of Law on Congress's authority in light of the Court's recent federalism decisions, which prompted this Article. Thanks also to the other Symposium participants, as well as to my Duke colleagues, Jeff Powell and Bill Van Alstyne for conversations about these issues, and to Rob Mays, Duke Law School Class of 2003, for research assistance.

1. The major decisions discussed here are *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995).

2. See, e.g., the discussion of *South Dakota v. Dole*, 483 U.S. 203 (1987) in Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459 (2003). The Court might clamp down on the spending and taxing powers to reflect its narrowing of Commerce Clause authority, as Lynn Baker has urged, but so far it has not done so. See also Jesse H. Choper and John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 857, 859 (2000):

Given the broad sweep of the spending power as currently construed, the federal government would quite clearly have the ability to evade the direct limits on its Commerce Clause powers. . . . Even if the Court continues to place restrictions on the Commerce Clause, it is unclear whether it would attempt to impose corresponding limitations upon Congress' ability to enact taxes that went beyond commercial activity.

3. For discussion of these issues, see Stephen R. McAllister & Robert L. Glicksman, *Federal Environmental Regulation in the "New Federalism"*, 30 ENVTL. L. REP. 11,122 (Dec. 2000).

far-reaching of all the federal regulatory regimes. Environmental compliance costs billions of dollars a year and affects vast segments of the economy. Combined with high stakes, there is reason to worry. Many federal environmental statutes exhibit characteristics that raise federalism warning flags under the Court's revamped approach: (1) they are often defended by invoking Congress's authority to regulate intrastate activity that affects interstate commerce; (2) they regulate highly localized private conduct, such as the modification of critical habitat by single land owners on small pieces of property, conduct that has no discernible impact on any national market; (3) they impinge on the authority states would otherwise have to regulate land use, a traditional area of state concern. Each of these elements amounts to a tripwire for judicial scrutiny under the new standards: the "affects" doctrine is the only feature of Commerce Clause doctrine the Court has changed in its recent decisions,<sup>4</sup> and federal attempts to regulate local private conduct within an area of traditional state concern, remote from national markets, characterize the recent decisions.

The body of this Article argues four points. First, under a fair reading of the Court's work so far, the best prediction is that a majority of the Court is not prepared to shrink commerce authority further. Second, the changes to date do not significantly alter the authority of the federal government to solve environmental problems. Third, even if the Court were to make further changes in the "affects" doctrine,<sup>5</sup> another analytically distinct basis for the exercise of the commerce authority provides independent justification for extensive federal environmental authority. This is Congress's authority to sit astride the flow of interstate commerce and to impose conditions on the goods that can be in that flow. Much attention has understandably been given to the merits and implications of the Court's work in the "affects" area, but the distinctive features of this other basis of Commerce Clause authority should also be appreciated.

After these rather sanguine points, the fourth is more downbeat. Under present conditions, extremely modest changes in constitutional doctrine—or even changes in subconstitutional rules of construction—can have enormous practical implications on the ability of the federal government to address environmental concerns. The magnitude of constitutional change tells us almost nothing about the magnitude of these practical effects, which could be quite large.

## II. READING *LOPEZ* AND *MORRISON*

If we take *New York v. United States*<sup>6</sup> as the beginning of the line of cases in which the Court has been rewriting federalism doctrine, we see that almost all the cases in that line have been decided by the same five to four margin.<sup>7</sup> For those who

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4. I will sidestep any interpretive debate over whether the recent cases amount to revisions to or simply clarifications of Commerce Clause doctrine as it existed prior to them. The distinction is immaterial for purposes of assessing the scope of federal Commerce Clause authority as it presently exists.

5. This refers to Congress's ability to regulate even intrastate activities if those activities have a substantial affect on interstate commerce. See *infra* text accompanying notes 15-17.

6. 505 U.S. 144 (1992).

7. *New York v. United States* was a 6-3 decision, with Justice Souter joining Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas. To date, all the notable federalism decisions subsequent to *New York v. United States* have been 5-4, with Justice Souter

sympathize with the positions of the dissents in these cases, the bad news is that this position is being outvoted five to four. There is also good news, however, in the fact that the vote has been a consistent five to four. Because every vote for the majority is pivotal, the current composition of the Court will move doctrine no further than the willingness of the most cautious of the majority five to cut back on federal authority.

In the cases addressing the scope of the Commerce Clause, the cautious Justices are Justices O'Connor and Kennedy. In *Lopez*, these two spoke distinctively in a separate concurrence which intimates that the changes in doctrine accomplished there (a) are not understood by these two to cut back much federal authority and (b) are about as far as these two Justices intend to go. This alone would augur well for the ability of most environmental legislation to survive Commerce Clause challenge, but there is a further positive message in *Lopez* and *Morrison*: Chief Justice Rehnquist also sees the scope of federal authority under the Commerce Clause to be fulsome as it relates to the authority to address environmental problems, notwithstanding his opinion in *Solid Waste Agency of Northern Cook County* ("SWANCC").<sup>8</sup> Only Justice Thomas is on record as favoring a fundamental rethinking of Commerce Clause doctrine, but even he has expressed this thought only with regard to the "affects" doctrine, and because his stance on that doctrine seems fundamentally unsound,<sup>9</sup> he is not well positioned to attract other Justices to his views.<sup>10</sup>

This Part develops these and several other conclusions by taking a close look at the implications of *Lopez* and *Morrison* for Congress's constitutional authority to regulate environment quality.

The Constitution provides that Congress has the power to enact laws that "regulate Commerce . . . among the several States."<sup>11</sup> First in *Lopez* and then again in *Morrison*, Chief Justice Rehnquist described the scope of that authority as reaching three "broad categories of activity": (1) "the use of the channels of interstate commerce;" (2) "regulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "those activities that substantially affect interstate commerce."<sup>12</sup>

The Chief Justice presented this three-part scheme as but a summary of the Court's prior rulings with respect to congressional authority, as indeed it was.<sup>13</sup> Save for some doubt as to whether or not "substantially" should be part of the third category, his

dissenting, along with Justices Stevens, Ginsburg, and Breyer.

8. *Solid Waste Agency of N. Cook County v. Army Corp of Eng'rs*, 531 U.S. 159 (2001) [hereinafter SWANCC].

9. For discussion of the difficulties with Justice Thomas's position, see *infra* note 128.

10. Justice Scalia's Commerce Clause views are the least well exposed of the majority five. He has signed the opinions of the Chief Justice in both *Lopez* and *Morrison*, and did not join Justice Thomas's separate concurrence in *Lopez*. His views may be on all fours with those of the Chief Justice, or it may be that they lie somewhere between those views and the position of Justice Thomas.

11. U.S. CONST. art. 1, § 8, cl. 3.

12. *Lopez*, 514 U.S. at 558-59. See also *Morrison*, 529 U.S. at 608-09.

13. Substantially identical language can be found in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981) and *Perez v. United States*, 402 U.S. 146, 150 (1971), for example.

summation was as accurate after *Lopez* and *Morrison* as it was before. The bites that these two cases took out of the Commerce Clause authority lie hidden in the unstated details that fill out the general formulation.<sup>14</sup>

*Lopez* concluded that under the third category of authority Congress could reach only intrastate activity that was “economic” or “commercial” in nature.<sup>15</sup> “[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”<sup>16</sup> This holding prevents using the aggregation principle of *Wickard v. Filburn*<sup>17</sup> to justify regulating noncommercial/noneconomic intrastate activities. Under the aggregation principle, Congress may regulate intrastate activities even if the individual action being regulated has only de minimis impacts on interstate commerce, so long as the individual action is a member of a class of like actions whose regulation forms “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>18</sup> In *Filburn*’s case, this gave Congress the authority to regulate the wheat that farmer *Filburn* grew for home consumption as part of a national program to stabilize wheat prices at acceptable levels, because “[i]t can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.”<sup>19</sup> The aggregation principle has played an important role in sustaining regulation of environmentally harmful activities that individually may have no discernible effect on interstate commerce. After *Lopez* and *Morrison*, that principle is only available with regard to environmental regulatory authority when the activity being regulated is economic or commercial.<sup>20</sup>

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14. As just suggested—and less important—the Court did resolve an ambiguity in prior cases by holding that intrastate activities must “substantially affect” interstate commerce, rather than merely “affect” it, in order to be regulable by Congress under the Commerce Clause. *Lopez*, 514 U.S. at 559. The more restrictive interpretation has been the Chief Justice’s interpretation going back at least to his concurrence in *Hodel*, 452 U.S. at 307-13 (Rehnquist, J., concurring).

15. *Lopez*, 514 U.S. at 559-60.

16. *United States v. Morrison*, 529 U.S. 598, 613 (2000) (citing *Lopez*).

17. 317 U.S. 111 (1942).

18. *Lopez*, 514 U.S. at 560-61.

19. *Wickard*, 317 U.S. at 128. In *Wickard*, the government had presented evidence that homegrown wheat had accounted for more than twenty percent of annual wheat production and that it was by far “the most variable factor” in the fluctuating size of the wheat crop. *Id.* at 127. See Robert L. Stern, *The Commerce Clause and the National Economy 1933-1946* (pt. 2), 59 HARV. L. REV. 883, 901 (1946) (discussing the economics of wheat crops in the 1930s and 1940s). See also *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (citing to *Wickard* and *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 221-22 (1938)) (“[I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventive regulation.”).

20. See *infra* text accompanying notes 36-57. The Court was careful to say that it was not announcing a categorical rule limiting the use of the substantially affects rationale to commercial intrastate activities. At the same time, it observed that no opinion by the Court had ever extended that rationale to noncommercial activities. Nonetheless, it seems highly likely that this rule will end up being categorical in fact, and that the Court will continue to use it as a “limiting principle” to prevent Commerce Clause authority from extending too far into local affairs.

*Lopez* and *Morrison* also signaled a change in “mood,” indicating that the Court was no longer going to look at Commerce Clause questions through the lens of highly deferential rational basis review, but would employ instead a style of review closer to what administrative lawyers will recognize as “hard look.”<sup>21</sup> Under hard look review, a court inquires whether or not an adequate explanation has been articulated by the original decisionmaker, including a demonstrated, rational connection between facts found and conclusions drawn.<sup>22</sup> In both *Lopez* and *Morrison*, the Court employed hard look tools to review carefully the factual justification for the belief that a connection existed between the regulated intrastate activity and interstate commerce. In *Lopez*, the Court noted the absence of congressional findings on the effects on interstate commerce of gun possession in a school zone, and refused simply to defer to Congress’s “accumulated institutional expertise regarding the regulation of firearms through previous enactments.”<sup>23</sup> In *Morrison*, Congress had made ample congressional findings, based on evidence from committee hearings and other documents, on the link between violence against women and commerce.<sup>24</sup> Striking down the civil rights remedy of the Violence Against Women Act (“VAWA”), notwithstanding Congress’s demonstration of an empirical connection between the two, the Court deployed a second hard look tactic.<sup>25</sup> The explanation offered to sustain the legislation could no longer be just any rational explanation at all. It had to be an adequate explanation, and ultimately it was for the Court to determine adequacy. Acts of Congress could not be upheld, the Court concluded, if the chain of reasoning that connected the regulation to interstate commerce disclosed no stopping point to the reach of Congress’s authority,<sup>26</sup> because accepting any such explanation would obliterate the distinction between “what is truly national and what is truly local.”<sup>27</sup>

Justice Kennedy, joined by Justice O’Connor, filed an extensive concurring opinion in *Lopez*, which sets out some boundaries on how far these two Justices see the

21. Cf. *Universal Camera Corp. v. NLRB* 340 U.S. 474, 487 (1951) (commenting on Congress’s enacting the Administrative Procedure Act as having expressed a mood in favor of greater judicial scrutiny of administrative decision making).

22. E.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. 29, 46-57 (1983); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97-98 (1983).

23. *Lopez*, 514 U.S. at 562-63.

24. *United States v. Morrison*, 529 U.S. 598, 614 (2000).

25. *Id.*

26. *Id.* at 615-17.

27. *Id.* at 617-18 (citing *Lopez*, 514 U.S. at 568 and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1936)). *SWANCC* exhibits indicia of hard look as well. The Solicitor General’s brief in *SWANCC* had focused on the “plainly . . . commercial nature” of the activity being regulated. *SWANCC*, 531 U.S. at 173 (omission added). The Court noted this as a shift from the argument below that the connection between the regulation of the wetland and interstate commerce consisted of the connection between habitat for migratory birds and over a billion dollars in annual expenditures on recreational pursuits relating to migratory birds. *Id.* To the Court, these shifting arguments made evaluating the “precise object or activity that, in the aggregate, substantially affects interstate commerce” quite difficult, and something the Court could avoid through an interpretation of the Clean Water Act that mooted the Commerce Clause issue. *Id.* A reluctance to entertain *post litem motam* explanations or rationalizations is yet another characteristic of hard look administrative review. *Id.*

commerce power revisions extend. While agreeing with the Chief Justice, as well as Justices Scalia and Thomas, that a court-enforceable line needs to be drawn, Justices Kennedy and O'Connor make clear that they do not anticipate that drawing this line will make deep inroads into the federal government's Commerce Clause authority.<sup>28</sup> At the same time as they join in *Lopez*'s "necessary though limited holding,"<sup>29</sup> they also stress the importance to the Court of "not . . . call[ing] in[to] question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature."<sup>30</sup>

Those essential principles rest on an unchanged and firm "commitment" to a "practical conception" of the Commerce Clause,<sup>31</sup> which was first signaled in *Jones & Laughlin*.<sup>32</sup> Subsequently, *Darby*,<sup>33</sup> *Wickard*,<sup>34</sup> *Heart of Atlanta Motel*,<sup>35</sup> *Katzenbach*,<sup>36</sup> and *Perez*<sup>37</sup> made clear that the commitment included a judicial posture of "deference . . . to Congress."<sup>38</sup> "These and like authorities," the concurrence states, "are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today."<sup>39</sup>

The cases cited in this remarkable paragraph from the concurrence are six of the most important decisions marking out a very broad latitude for Congress under the "affects" doctrine. Justice Kennedy did not cite them in order to reformulate or narrow their holdings in any way. He cited them to reaffirm a commitment to them and to testify that they have not at all been undermined by *Lopez*.<sup>40</sup> Lest the point of what is being affirmed and what is being rejected be lost or misunderstood, the concurrence also goes out of its way to embrace *Darby*'s overruling of *Hammer*,<sup>41</sup> *Wickard*'s disapproval of the direct-indirect and manufacture-production distinctions drawn in

28. *Lopez*, 514 U.S. at 568-83 (Kennedy, J., concurring).

29. *Id.* at 568.

30. *Id.* at 574. This phraseology, with its stress on the significance to the Court of faithfulness to the precedents establishing broad congressional power, rather than on the significance to the country of the power itself, seems a remarkable display of this Court's court-centered perspective on the issues that it confronts.

31. *Id.* at 573 (Kennedy, J., concurring).

32. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

33. *United States v. Darby*, 312 U.S. 100 (1941).

34. *Wickard v. Filburn*, 317 U.S. 111 (1942).

35. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

36. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

37. *Perez v. United States*, 402 U.S. 146 (1971).

38. *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring).

39. *Id.* at 573-74.

40. Favorable citation of *Katzenbach* notes particular mention. The holding that the federal commerce power extended to Ollie's Barbecue, a small, rather out-of-the-way restaurant in Birmingham, Alabama, *Katzenbach*, 379 U.S. 294 (1964), extends that power very deeply into intrastate affairs. The "grab-bag" of ways in which the Court thought Ollie's business sufficiently connected to interstate commerce makes satisfying its Commerce Clause doctrine extremely easy. See, e.g., Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 596-602 (1995) ("What [*Katzenbach*] is now relied on for is the general 'affecting commerce' doctrine and the idea that Congress can regulate whatever has crossed a state line.").

41. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

*E.C. Knight*<sup>42</sup> and other opinions, and *Jones & Laughlin's* sub silentio rejection of *Carter Coal*<sup>43</sup> and *Schechter*.<sup>44</sup>

While the *Lopez* concurrence may have been more explicit in stating the modest nature of the change in doctrine wrought by the case, it and the opinion for the Court overlap extensively with regard to the elements of existing doctrine that they ratify. The Chief Justice's opinion anchors category three jurisprudence in *Jones & Laughlin*, just as the concurrence does.<sup>45</sup> Similarly, the Chief Justice discusses *Wickard*, *Katzenbach*, *Perez* and *Heart of Atlanta*. The recitation of these cases is descriptive and reportorial, but the lack of any phraseology internal to that recital expressing approval of these opinions can be attributed more to the Chief Justice's writing style than to substantive disagreement with those decisions. In the end, he quite explicitly uses them as "examples" of a "pattern" that is "clear[:]" "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."<sup>46</sup> Notice that the "pattern" is not expressed in the negative, as it easily could have been. He might have written "the pattern is clear: we have never sustained the regulation of non-economic intrastate activity, even when it substantially affects interstate commerce." Instead, the Chief Justice affirmatively endorses a broad "affects" doctrine, as exemplified in the cases cited by both the opinion for the Court and the concurrence.

The two opinions do not reference an identical list of precedent. The concurrence endorses *Darby*, but that case is not mentioned by the Chief Justice. Far more significant for present purposes is a case that the Chief Justice does cite, but which the concurrence omits. This is *Hodel v. Virginia Surface Mining & Reclamation Association*.<sup>47</sup> *Hodel* sustained the Surface Mining Control and Reclamation Act ("SMCRA") against a Commerce Clause challenge. It is the only Commerce Clause decision squarely addressing an environmental statute,<sup>48</sup> and it employs the same practical conception/deference to Congress approach that Justices Kennedy and O'Connor embrace in their *Lopez* concurrence. Notably, the Chief Justice cites *Hodel* approvingly and without reservation, notwithstanding the fact that he failed to join in the opinion in that case, simply concurring in the judgment.<sup>49</sup> The fact that the Chief Justice cites it favorably sends a positive message regarding the constitutionality of environmental legislation—not merely because *Hodel* involved an environmental statute, but because *Hodel* and *Lopez* present statutes with similar connections to interstate commerce and similar intrusions into areas of traditional state concern.<sup>50</sup> The cases differ, however, in that *Hodel* involved a statute regulating a commercial or economic activity, whereas the Gun Free School Zone Act ("GFSZA") in *Lopez* did

42. *U.S. v. E.C. Knight, Co.*, 156 U.S. 1 (1895).

43. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

44. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

45. *Lopez*, 514 U.S. at 558-59.

46. *Id.*

47. 452 U.S. 264 (1981). *Lopez*, 514 U.S. at 559.

48. Actually, it is one of two decisions. *Hodel* was accompanied by *Hodel v. Indiana*, 452 U.S. 314 (1981). Each case involved SMCRA, but challenged different aspects of the statute. The first opinion contains more extensive treatment of the commerce power.

49. 452 U.S. 307 (1981) (Rehnquist, J., concurring in the judgment).

50. See *infra* text accompanying notes 52-61.

not. Because these cases come out oppositely, the favorable citation to *Hodel* seems to cement the conclusion that the economic/non-economic distinction developed in *Lopez* is the single significant change made in an otherwise extensive federal authority.<sup>51</sup>

*Morrison* further confirms a reading of *Lopez* that takes the commercial/non-commercial distinction to be pivotal. The flaw in the civil remedies provision in VAWA, like the GFSZA, was that it had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”<sup>52</sup> In making this point, the Chief Justice’s *Morrison* opinion quotes directly from *Lopez*, but not from the Chief’s own opinion in the earlier case. Instead, he quotes liberally from Justice Kennedy’s concurrence, a move perhaps designed to make it easier for Justices Kennedy and O’Connor to join the Court’s opinion without writing separately. Borrowing Justice Kennedy’s *Lopez* language, *Morrison* notes that a connection to commerce or economic enterprise was manifest in “neither the purposes nor the design of the statute.”<sup>53</sup> Nor did either “the actors or their conduct” have “a commercial character.”<sup>54</sup> Returning to his own voice, the Chief Justice concludes that these facts are keys to the analysis, because “the noneconomic, criminal nature of the conduct at issue was central to our decision in [*Lopez*].”<sup>55</sup>

The Chief Justice smoothes the way for Justices Kennedy and O’Connor further by adverting to a feature of *Morrison* that the concurers had thought significant back in *Lopez*, but which the opinion for the Court there had almost ignored. In *Morrison*, the Chief Justice points out that both the GFSZA and the VAWA constituted attempts by the federal government to regulate in an “an area of traditional state concern.”<sup>56</sup> The operational significance of this ingredient to future Commerce Clause cases remains undeveloped.<sup>57</sup> The Chief Justice may view the insertion as a harmless way to coax the two concurers into signing onto one opinion for the Court; after all, he decided *Lopez* with scarcely any mention of this feature of the case.<sup>58</sup> It is more readily apparent that Kennedy and O’Connor think the observation does have some independent significance. In fact, it probably explains why their *Lopez* concurrence omits mention of *Hodel*. *Hodel* had concluded that federal regulation in areas of traditional state concern, such as private land use, did not provide any basis for greater scrutiny by the

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51. *Id.*

52. *United States v. Morrison*, 529 U.S. 658, 610 (2000).

53. *Id.* at 611 (quoting *Lopez*, 514 U.S. at 580) (Kennedy, J. concurring).

54. *Id.*

55. *Id.* at 610. The statute involved in *Morrison* was VAWA’s civil remedy, which is not a criminal statute. Nonetheless, it provided a monetary remedy in the event a “crime of violence” motivated by gender bias had been committed, and the *Morrison* Court saw it as an attempt to “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Id.*

56. In *Lopez*, reference to “traditional state concern[s]” is absent from the opinion for the Court, and appears only in Justice Kennedy’s concurring opinion. *Lopez*, 514 U.S. at 577, 580, 583. In *Morrison*—and again in *SWANCC*—that aspect of the case is noted in the opinion for the Court. *Morrison*, 529 U.S. at 611, 615; *SWANCC*, 531 U.S. at 174.

57. See *infra* text accompanying notes 145-64 for the possible significance of this element.

58. In the course of criticizing the Government’s defense of the GFSZA because it relies upon reasoning that has no stopping point, the Chief Justice says that “it is difficult to perceive any limitation on federal power [under the Government’s theory], even in areas such as criminal law enforcement or education where States historically have been sovereign.” 514 U.S. at 564.



Court.<sup>59</sup> Justices Kennedy and O'Connor disagree, and it would appear they wanted to distance themselves from *Hodel* for that reason.

All this shows, however, is that the two concurers in *Lopez* would not have joined the opinion for the Court in *Hodel*. Would they nonetheless have concurred in the judgment? Their *Lopez* concurrence says that when a federal statute intrudes on an area of traditional state concern, it deserves a higher level of scrutiny in a Commerce Clause challenge. *Lopez*, though, involved a non-commercial regulation. Does a commercial regulation receive a scrutiny which demands a more direct, less attenuated connection between interstate commerce and the regulated intrastate activity, when the federal regulation at issue intrudes into areas of traditional state concern, than would otherwise be required? Is intrusion into areas of state concern more a makeweight or conclusion that can be applied to any such federal statute, because, broadly speaking, any noneconomic statute would almost certainly be directed toward activities that have traditionally fallen within the state's police powers?<sup>60</sup>

Although the concurrence says little about the role this element plays in their thinking, that opinion does reveal that the element is not outcome-determinative. The notable line of precedent that the opinion affirmatively embraces includes cases in which the federal statute intrudes on areas of traditional state concern no less than do those at issue in *Lopez* or *Morrison*. *Perez* involved a criminal statute extending to a local loan sharking transaction, and *Katzenbach* involved a statute regulating how local motels and restaurants conduct their business. Criminal law and rules of operation for local businesses, such as fire codes, hours of operation, sanitation conditions, and the like have been traditional areas of state regulation. *Perez* and *Katzenbach* differ from the two more recent cases only in that the statutes in these cases were directed at commercial activity. So even for the two concurers, the economic/noneconomic distinction seems the dominant concern, and the presence of an element of intrusion into areas of traditional local authority is not fatal.<sup>61</sup>

*Hodel* is like *Perez* and *Katzenbach* in that it sits on the commercial side of this divide. SMCRA regulates strip mining activity, and strip mining is only carried out by (large) commercial concerns that engage in the activity for economic reasons.<sup>62</sup> Otherwise it seems indistinguishable from *Lopez* and *Morrison*.<sup>63</sup> So a case like *Hodel*

59. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

60. Later, *SWANCC* puts the intrusion into areas of traditional state concern to work as justification for a substitutional clear statement rule. *SWANCC*, 531 U.S. at 172-73 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication of that result . . . [Our] concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."). For further discussion of *SWANCC*, see *infra* text accompanying notes 196-211.

61. In *Morrison* in particular, this encroachment feature does not seem to be doing any independent work, despite being mentioned by the Court. Rather, the economic/noneconomic distinction carries most of the justificatory weight. See *supra* text accompanying note 42.

62. William Funk, *The Court, The Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. 10,741, 10,764 (2001) (agreeing that the "Court regarded [surface mining] as economic activity").

63. *Lopez* and *Morrison* indicate that the chains of reasoning linking the statutes in those cases to interstate commerce were "too attenuated," but I do not believe that the concurers could find that feature dispositive were they deciding *Hodel*. The chain of reasoning in *Hodel* is

coming before the Court now would test how much weight the concurers do in fact place on the intrusion factor. However, the concurers will only face a case like *Hodel* in a legal environment in which *Hodel* is itself precedent. In that circumstance, the well-demonstrated commitment of the concurers to the principle of stare decisis could very well temper their ultimate judgment.<sup>64</sup>

In sum, *Hodel* was cited approvingly in the Court's opinion in *Lopez*; it falls on the commercial side of the economic/noneconomic divide; it relies on the same sort of connection between intrastate activities and interstate commerce found sufficient in precedent cited by all of the majority five and it is an established precedent entitled to some stare decisis respect. Cumulatively, these factors justify some optimism for the prospects of many elements of the federal environmental regulatory structure, because the vast bulk of that structure also regulates commercial activity that has a nexus to interstate commerce similar to *Perez*, *Katzenbach*, and *Hodel*. In ways that parallel the effects of surface mining activity on commerce, industrial activity that pollutes the air and water, chemical manufacturing activity that produces potential hazardous chemicals, and industrial and agricultural activity that results in pesticides being produced and used are all commercial activities that adversely alter one or more factors of production.<sup>65</sup>

These general conclusions can hardly substitute for a much more particularistic analysis of specific regulatory provisions. The Court's revamped approach involves careful scrutiny of arguments used to connect regulation to commerce under the emerging category three jurisprudence. Questions can be and have been raised about Congress's authority to regulate isolated wetlands,<sup>66</sup> or to protect endangered species that lack any known commercial value,<sup>67</sup> or to impose liability for the on-site disposal of hazardous substances by industrial concerns,<sup>68</sup> or to regulate the arsenic content of

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hardly short, but it seems no more attenuated than the one involved in *Katzenbach*, for example, and the majority opinion cites *Katzenbach* with approval. See *Hodel*, 452 U.S. at 276 (Court finds sufficient congressional findings that poorly managed surface mining causes surface "erosion and landslides, . . . contribut[es] to floods, . . . pollut[es] the water, . . . destroy[s] fish and wildlife habitats, . . . impair[s] natural beauty, . . . damage[s] the property of citizens, . . . creat[es] hazards dangerous to life in local communities, and . . . counteract[s] governmental programs and efforts to conserve soil, water, and other natural resources.").

64. That commitment is expressed in prior decisions and also in *Lopez* itself. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justices Kennedy and O'Connor (along with Justice Souter) placed a great deal of weight on stare decisis, in a case they might well have decided differently without the precedent of *Roe v. Wade*, 410 U.S. 113 (1973). In *Lopez*, the concurers emphasized that stare decisis "operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature."

65. But see Christy H. Dral & Jerry J. Phillips, *Commerce By Another Name: Lopez, Morrison, SWANCC, and Gibbs*, 31 ENVTL. L. REP. 10413, 10419 (April 2001) ("It is quite probable that environmental regulation will not be deemed an economic activity . . .").

66. SWANCC, 531 U.S. 159 (2001).

67. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), cert. denied sub nom. *Gibbs v. Norton*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

68. *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997) (upholding CERCLA against a Commerce Clause challenge).

drinking water.<sup>69</sup> To address any of these topics authoritatively, specific statutes and regulations must be individually analyzed.

A tremendous amount of scholarly commentary continues to evaluate federal environmental laws in light of the Court's revamped approach.<sup>70</sup> While the range of different opinions within this body of work suggests that there may be more to say about how the recent decisions have altered category three jurisprudence as regards the environment, relatively little has been said yet about the other two bases of federal Commerce Clause authority identified in the *Lopez* summary.<sup>71</sup> Even if the impact of the new category three jurisprudence on federal authority to respond to environmental problems is much greater than the preceding overview has argued, we know that the new Commerce Clause jurisprudence has left categories one and two entirely unchanged thus far. Federal authority over the "use of the channels of interstate commerce," and the authority to "regulate and protect . . . persons or things in interstate commerce" remain substantial.<sup>72</sup> Congress can use its ability to sit astride the flow of interstate commerce in ways that permit it to respond to a broad range of environmental concerns.

After analyzing the constitutional basis for and scope of the ability to sit astride the flow of interstate commerce, the next Part explores this ability in further detail.

69. *Nebraska v. EPA*, No. 01-01,101 (D.C. Cir.) oral argument scheduled April 15, 2003 (Safe Drinking Water Act Arsenic Regulation challenged as exceeding federal Commerce Clause authority).

70. See, e.g., Eric Brignac, *Recent Development, The Commerce Clause Justification of Federal Endangered Species Protection: Gibbs v. Babbitt*, 79 N.C. L. REV. 873 (2001); Dral & Phillips, *supra* note 65; Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 11079 (NEWS & ANALYSIS) (September 2001); Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. (ENVTL. L. INST.) 10,980 (NEWS & ANALYSIS) (December 2000); Funk, *supra* note 62; Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10,663 (NEWS & ANALYSIS) (June 2001); Stephen M. Johnson, *United States v. Lopez: A Misstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 66-67 (1996); David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723 (2002); EnMaya R. Moiseyev, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: The Clean Water Act Bypasses a Commerce Clause Act, but Can the Endangered Species Act?*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 191 (2001); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998); Jeanine A. Scalero, Case Note, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 318-21 (2000); Charles Tiefer, *SWANCC: Constitutional Swan Song for Environmental Laws or No More than a Swipe at Their Sweep?*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10413 (NEWS & ANALYSIS) (December 2001); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215, 217-18 (2000).

71. See *supra* text accompanying note 12.

72. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

## III. COMMERCE-AS-SUBJECT AND COMMERCE-AS-OBJECTIVE

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."<sup>73</sup> This sentiment has been a universally accepted part of our Commerce Clause coda, from the ratifying conventions down to the present day. All nine Justices currently on the Supreme Court accept the proposition that the Constitution assigns enumerated powers to the federal government, leaving others to the states, however violently they disagree in *Lopez* and *Morrison* as to where that line is to be drawn.<sup>74</sup> Prior to ratification, the anti-Federalists opposed adopting the Constitution on the ground that it created a central government without sufficient limitations on its powers, and the Constitution's supporters were fully aware that this objection carried weight with early Americans. To blunt the charge, they frequently invoked the claim that enumerating the federal government's powers in the document itself would adequately guard against the possibility of a tyrannical central government.<sup>75</sup>

After ratification, the scope of federal power was the most significant constitutional issue of the early Republic. Significant moments in the struggle over federal power are among the most familiar in the early history of our country. Madison first opposed, then acquiesced in, and finally drafted a bill of rights further to blunt the anti-Federalist argument that the Constitution did not seriously constrain federal power. Jefferson, Hamilton, and Randolph submitted sharply contrasting memoranda to President Washington regarding the constitutionality of the first Bank of the United States. The Alien and Sedition Acts were challenged as outside federal power.<sup>76</sup> On scope of power grounds, Madison vetoed an internal improvements bill of which he approved. And, of course, the Supreme Court had its say in *McCulloch v. Maryland*.<sup>77</sup>

This is all familiar history, and we recite it often without noticing something quite arresting about it. How could it be that one of the defining questions taken up in the debates prior to ratification, upon whose resolution the success or failure of the Constitution's ratification largely depended, would turn out immediately after ratification not to have been answered at all? Through all the rhetoric around the principle of enumerated powers uttered during the ratification debates, one can search in vain for an articulation of the limiting principles provided by the Constitution

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73. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed. 1961).

74. Justice Breyer's dissent in *Lopez* was joined by the other three dissenting Justices. In it, he responds to the argument that upholding the GFSZA would "obliterate" the "distinction between what is national and what is local" by arguing that it would not do so. *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting).

75. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 536-543 (1972) (summarizing debate between Antifederalists and Federalists, with Federalists arguing that the Constitution's limited powers adequately protect citizens, making a bill of rights unnecessary); JOHN P. KAMINSKI & RICHARD LEFFLER, FEDERALISTS AND ANTIFEDERALISTS 151-177 (1998) (collecting representative Federalist and Antifederalist speeches and articles arguing about whether the Constitution adequately limited federal powers).

76. See H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994).

77. 17 U.S. (4 Wheat.) 316, 421 (1819).

sufficiently specific so as to resolve definitively even the very fundamental and stark dispute joined by Hamilton and Jefferson in debating the Bank of the United States.

One can also search in vain in the Constitution itself for these limiting principles. The debate over powers that continued after ratification exposed a great lack of clarity with which the Constitution describes what the federal government is not authorized to do. Notwithstanding the coda that the powers of the federal government are “few and defined,” they are defined in language that on a fair interpretation authorizes a very extensive scope of federal authority. This may seem surprising to someone inculcated in the coda of limited and enumerated powers. One substantial factor contributing to this state of affairs is the amazing vagueness of the very term “power” as used in reference to the authority of government to act. “Power” itself proves to be a very slippery term to define, and the Constitution did not succeed in defining the powers granted to the federal government in a way that results in narrow authority.

One way to think about ways to describe limits on the authority of a government to act is in terms of the instruments or means that the government can employ. Perhaps it can set prices, but not discriminatory prices. Or it can set prices, but it cannot control quality. A second way to describe such limits is in terms of the ends or objectives or purposes that a government can pursue. Perhaps it can act to protect public health, but it cannot have discrimination on the basis of race as an objective. In order fully to understand the historical basis of the federal “power” to sit astride the flow of commerce, we will need to explore both the idea of power as means and the idea of power as ends, first generally and then with specific reference to the commerce power.

Early constitutional debates over the scope of federal authority raised questions about both kinds of limits on power, about ends and means. One of the most familiar conclusions in all of constitutional interpretation speaks in terms of both government ends and means. “Let the end be legitimate,” Justice Marshall wrote in *McCulloch v. Maryland*, “let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>78</sup>

Jefferson, Madison, and other early Republicans had argued that the “necessary and proper” language of the Sweeping Clause restricted the means that the federal government could employ to accomplish its legitimate ends much more tightly than this, but they agreed with an underlying—and unassailable—premise of Marshall’s statement, which was that the ends of the federal government were not to be found in the Sweeping Clause. If they are to be found anywhere in the text, the Sweeping Clause itself points to the “foregoing powers” set forth earlier in Article I, Section 8 as the place to look.<sup>79</sup> Supporters of the Constitution had leaned heavily on the enumerated powers for the argument that the federal government’s powers were few and defined.<sup>80</sup> They were compelled to do so. The Constitution as presented to the country contained no provisions listing the powers that the federal government did not have, so to carry the weight of their argument, the enumerated powers themselves had to have widely acknowledged boundaries. The absence of express statements of powers denied made

78. *Id.*

79. Under the Sweeping Clause, Congress had authority to make any “laws which shall be necessary and proper for carrying into Execution the foregoing powers . . .” U.S. CONST. art. I, § 8, cl. 18.

80. See *supra* note 75.

this essential. If I give you the apple, the orange and a bunch of grapes out of a fruit basket containing a lemon, a lime, a grapefruit, an apple, an orange and a bunch of grapes, it is unnecessary for me to describe what I have not given you after I identify what I have given you. The Constitution's defenders prior to ratification had argued that it was the same with respect to governmental powers.

The Anti-Federalists were unpersuaded, however. They thought the powers of government were much more slippery, subject to the vagaries of construction, and not at all like a fully specified basket of fruit. To fend off their objections, supporters of the Constitution agreed to add a Bill of Rights to the document, a commitment honored in the First Congress. Of the first ten amendments, some read as statements of power that the government lacks—"Congress shall make no law respecting an establishment of Religion"—and others as statements of rights individuals have—"to a speedy and fair trial"—but all can be understood as statements of powers the federal government has not been given.

The Tenth Amendment, however, is of a different character than the first eight, as it states that "all the powers not delegated" to the federal government are retained by the states or the people.<sup>81</sup> This delphic remark reveals no more content regarding the limitations on federal power than had been supplied by the text without the Amendment, which is why *Darby* described it as a truism.<sup>82</sup> Accordingly, once one is outside areas where the individual rights in the Bill of Rights apply, limiting federal power relies heavily on the idea that the types of powers granted had clear boundaries separating the actions the government can take from those it cannot.

Because the enumerated powers are the place in the Constitution to which one might look for limitations on the *ends* of federal power, it is particularly important that the enumeration amount to a clear statement of those ends. In light of this, reading the text of Section 8 proves a remarkable experience. Nearly all of the powers enumerated there seem only to describe means or instruments of government, not ends or purposes. Only the Spending Clause, which states that Congress can "provide for the common defense and the general welfare,"<sup>83</sup> and the Patent and Copyright Clause, which gives Congress authority to "promote the Progress of Science and the useful Arts,"<sup>84</sup> make reference to goals or objectives of government. Otherwise, the powers enumerated in Article I, Section 8 identify actions Congress can take, thereby identifying the means or instruments that Congress can employ, but not the ends toward which those means can be deployed. Thus, Congress has the power to establish a uniform rule of naturalization and bankruptcy, to coin money, to establish post offices and post roads, to declare war, to regulate commerce, and so on. The deployment of these powers is not textually linked to accomplishing any particular purposes of government. Take the power to declare war as illustrative. That power can be read straightforwardly as a grant of authority to employ a means—a declaration of war. In and of itself, however, the grant of a power to declare war conveys no information regarding the ends toward which that instrument or means can be used.

In fact, the interpretation of the enumerated powers as imposing no particular limits

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81. The Ninth Amendment requires that the enumeration of rights in the Bill of Rights not be given an *expressio unius* interpretation later on. U.S. CONST. art. I § 8, cl. 18.

82. *United States v. Darby*, 312 U.S. 100 (1941).

83. U.S. CONST. Art. I, § 8, cl. 1.

84. U.S. CONST. Art. I, § 8, cl. 8.

on the ends of government was adopted by Federalists such as Hamilton.<sup>85</sup> They took the authorization to “provide for the common defense and general welfare” to mean that Congress’s enumerated powers could be directed at any purpose encompassed within the broad expanse of the common defense and national welfare. For the Federalists, these general governmental ends or purposes could be served by all the means enumerated in Section 8, including the Sweeping Clause.<sup>86</sup>

Jefferson, Madison, and the early Republicans saw things differently. Determined to cabin the reach of federal power, they took the view that the specific clauses of Section 8 imposed limits on the purposes the central government could pursue. They thought the enumerations were indeed enumerations of ends. Specifically, they argued that the general language, “common defense and general welfare,” was qualified and limited by the specific enumerations that followed. In a famous address to the House, opposing the creation of the first Bank of the United States, Madison argued that “[t]he power as to these general purposes, was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined.”<sup>87</sup> In this passage, Madison is not taking the enumerated powers to be statements of governmental instruments or means, whose use is conditioned by the requirement that such use be conducive to the common defense and general welfare. Had that been Madison’s intent, he would have done better to say that the general purposes limit and explain the specific enumerations. Instead, he flips the relationship: the specific enumerations limit and explain the general purposes.<sup>88</sup>

85. Prior to ratification, this was also the view of some Anti-Federalists—who used the amorphous and open-ended language of the enumerated powers as a reason to oppose ratification. See, e.g., *Essays of Brutus V*, N.Y. JOURNAL, Dec. 13, 1789, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 388, 388-89 (Herbert J. Storing ed., 1981):

It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution. The great objects [of the Constitution] then are declared in this preamble in general and indefinite terms to be to provide for the common defense . . . [and] general welfare . . . . The inference is natural that the legislature will have an authority to make all laws which they shall judge necessary for the common safety, and to promote the general welfare.

This amounts to a power to make laws at discretion. . . .

86. In addition to asking Hamilton and Jefferson for their opinions on the constitutionality of the Bank, President Washington also requested the views of his Attorney General, Edmund Randolph. Randolph agreed with Jefferson that the Bank was unconstitutional, although on narrower grounds than Jefferson. Even so, Randolph appears to have agreed with Hamilton that the federal government was charged with promoting the general welfare of the entire country, although it was limited in the tools or means it could use to do so. “While, on the one hand, it ought not to be denied that the federal government superintends the general welfare,” Randolph wrote, “it ought not to be forgotten, on the other, that it superintends it according to the dictates of the Constitution.” Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General’s First Constitutional Law Opinions*, 44 DUKE L.J. 110, 119 (1994) (reprinting Randolph’s bank opinion).

87. James Madison, *Speech on the Bank Bill (1791)*, in 13 THE PAPERS OF JAMES MADISON 372, 375 (Charles F. Hobson & Robert A. Rutland eds., 1981).

88. Republican opponents of renewing the bank’s charter in 1811 often invoked Madison’s speech, “that perspicuous and luminous argument that has been so justly celebrated as defining

Jefferson's writings reflect the same idea. In a letter to Albert Gallatin explaining why he was pleased that the internal improvements bill had been vetoed by President Madison, Jefferson argued that Congress's powers to provide for the general welfare were

restrained to those specifically enumerated; and that, as it was never meant they should provide for that welfare but by the exercise of the enumerated powers, so it could not have been meant they should raise money for purposes which the enumeration did not place under their action; consequently, that the *specification of powers is a limitation of the purposes* for which they may raise money.<sup>89</sup>

For Jefferson, Madison, and other Republicans, the enumerated powers identified specific ends of government. The federal government could provide for the country's defense and welfare only if it were promoting one of those specific ends.

Both Jefferson's letter to Gallatin and Madison's speech against the Bank, however, also reveal a subtler understanding of the concept of "powers" than can be captured by any simple conclusion that the concept must refer *either* to the means *or* to the ends of government. When Jefferson explains to Gallatin that the only way in which Congress is authorized to provide for the general welfare is through the exercise of the enumerated powers, Jefferson is speaking of the enumerated powers as means to the attainment of the general purposes. His letter thus takes a named power to describe *both* a means to an end *and* an end itself.<sup>90</sup> Likewise, when Madison argues that "[t]he power as to these general purposes [i.e., to provide for the common defense and general welfare], was limited to acts laying taxes for them," Madison takes laying taxes to be a means toward achieving the general purposes.<sup>91</sup> So he, too, thought a named

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and marking out the proper limits of power assigned to the General Government." 22 ANNALS OF CONG. 694, 696 (1853) (statement of Rep. William T. Barry, Jan. 18, 1811).

89. Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817) in 10 THE WORKS OF THOMAS JEFFERSON 71-73 (Paul Leicester Ford ed., 1904) (emphasis added).

90. Other ways of describing the grants of authority in the Constitution are similarly capable of referring to means or to ends. James Wilson often referred to "objects of government." More recently, David Engdahl has tried to clarify the "imprecise terminology" of powers by saying that the term "denotes legal competence to take governmental action concerning some subject matter." DAVID E. ENGDahl, CONSTITUTIONAL FEDERALISM 10 (2d ed. 1987). Government takes action concerning a subject matter, however, either when it seeks to advance some objective that is part of the subject matter (e.g., funding an army to prepare for war) or when it takes up some means that is part of the subject matter to further some other objective (e.g., declaring war to free Kuwaiti territory from an Iraqi invasion). Neither "object of government" nor "subject matter" distinguishes clearly between means and ends. *Id.*

91. See *supra* text accompanying note 86. *Federalist 44* also reflects the idea that "powers" can identify either means or ends. THE FEDERALIST NO. 44 at 299, 304 (James Madison) (Jacob E. Cooke ed., 1961). After defending each of the enumerated powers (which he refers to in the following passage as a general power), Madison argues against the view that the Sweeping Clause gave too much power to Congress by claiming that there was no other practical way to draft the Sweeping Clause. *Id.* He rejects the option of "a positive enumeration of the powers necessary and proper for carrying [the] other powers into effect," because it would be totally impracticable. For in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same. The first phrase



power described a means—the power to lay taxes in order to promote the general welfare—and an end—Congress could only enact legislation whose end or objective was enumerated.

This idea that a single enumerated power can represent both an end and a means lay at the heart of Madison's and Jefferson's strategy for limiting the scope of federal power.<sup>92</sup> It is hardly an incoherent view. A "power" can have this dual nature because the characteristic of being a means or an end is relational. It depends on a relationship one concept has with something else. When the (often implied) other half of that relationship changes, the description of a power or an action taken pursuant to that power as a means or an end can change. The Clean Air Act, for instance, imposes legal restrictions on plants emitting hazardous air pollutants, requiring them to install maximum available control technology ("MACT").<sup>93</sup> Installing MACT is a means to reduce toxic air emissions, thereby reducing human exposure to toxic air emissions, thereby reducing adverse human health effects, thereby improving public health, thereby contributing to the general welfare. Each of the actions or accomplishments in this chain is an end or purpose of the action preceding it, and each is also a means toward the end or purpose that follows it.<sup>94</sup>

As my colleague Jeff Powell has argued, the Republicans well understood that both the means Congress could employ and the purposes it could use those powers to advance had to be limited if the federal government were to remain a government of

contemplates a (particular) power functioning as a means to some end, namely the object or purpose of the general power. *Id.*

92. See *supra* text accompanying notes 71-74.

93. 42 U.S.C. § 7412(d)(2) (2000).

94. Chains of linked means and ends were familiar to both Madison and Jefferson, who ridiculed arguments that federal power could legitimately be based on them. In opposing a broad interpretation of the Sweeping Clause, Madison claimed that the argument in support of the Bank depended on just such a chain. James Madison, GAZETTE OF THE U.S., Feb. 23, 1791, reprinted in 13 THE PAPERS OF JAMES MADISON 372, 377-78 (Charles F. Hobson et al., 1981) (reporting James Madison's speech on the bank bill):

Mark the reasoning on which the validity of the bill depends. To borrow money is made the *end* and the accumulation of capitals, *implied* as the *means*. The accumulation of capitals is then the *end*, and a bank *implied* as the *means*. The bank is then the *end*, and a charter of incorporation, a monopoly, capital punishments, &c. *implied* as the *means*. If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.

*Id.* (emphasis in original). Jefferson's "House that Jack Built" argument against the proposal that the federal government had authority to incorporate a copper mining company is to the same effect:

Congress is authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built'? Under such a process of filiation of necessities the sweeping clause makes clean work.

Thomas Jefferson, in CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 501 (rev. ed. 1937). Ridicule frequently masks the inability to defeat an argument on its own terms.

limited powers.<sup>95</sup> The Republicans saw clearly that if either aspect of the central government were not tightly constrained, the sweep of federal power would be much larger than they desired.<sup>96</sup> Because an enumerated power can describe both means and ends, perhaps a simple list of enumerated powers could function to limit both ends and means.

Although this might be a theoretical possibility, closer inspection shows that the enumeration of powers was not by itself sufficient to limit both federal means and federal ends very much. To the contrary, the universally accepted coda that the "essential characteristic of the [federal] government" was its "limited and enumerated powers"<sup>97</sup> could be agreed to precisely because the enumeration of powers in Section 8 did not resolve the question of just how extensive federal powers were.<sup>98</sup> It simply deferred the question until after the Constitution had gone into effect. After ratification, the Madisonian/Jeffersonian interpretation was but one contentious position in an early argument over constitutional meaning.

First, consider the enumeration as a statements of ends. Under *McCulloch's* interpretation of the Sweeping Clause, even a limited set of ends enables considerable federal authority to select the means for their effectuation. This is what Madison and Jefferson understand so well, and why they bitterly opposed Hamilton's Bank Bill.<sup>99</sup> No one in today's debate is challenging *McCulloch's* interpretation of the Sweeping Clause, and that interpretation generously authorizes the use of appropriate means to meet the ends of government.<sup>100</sup>

Next, consider the enumeration as a statement of means. Now the problem is to define the legitimate ends toward which the enumerated powers may be deployed. The

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95. H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 661 (1995) ("Not only Congress's means but also its ends had to be construed as limited by the enumeration of powers.").

96. *Id.* Spencer Roane actually equated a government with limited ends but largely unlimited means to pursue them with a government authorized to pursue unlimited ends. Spencer Roane, *Rights of The States, and of The People*, RICHMOND ENQUIRER, June 11, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF M' CULLOCH V. MARYLAND 106 (Gerald Gunther ed., 1969) "That man must be a deplorable idiot who does not see that there is no earthly difference between an unlimited grant of power, and a grant limited in its terms, but accompanied with unlimited means of carrying it into execution." *Id.* at 110. Madison held similar beliefs. "[I]t must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers." 17 PAPERS OF JAMES MADISON 335 (David B. Mervin ed., 1991).

97. See GAZETTE OF THE U.S., *supra* note 94, at 376. Madison observed that proposed articles 11 and 12, which were the basis for the Tenth Amendment, provided a rule of construction that "exclud[ed] every source of power not within the constitution itself." *Id.* at 381.

98. There are three possibilities for understanding the handiwork of the Framers. (1) If the Framers had intended the enumeration of powers effectively to cabin both governmental ends and governmental means, they botched the job. However, if we entertain the usual assumption that the Framers were competent in composing the text of the Constitution, then we will need to conclude either (2) that they had opted for very broad federal powers (in other words, the Anti-Federalist position lost in drafting the document) or (3) that limitations on federal power were to come from elsewhere than from the text.

99. See *supra* text accompanying notes 73-78.

100. See *supra* text accompanying note 78.

Constitution itself does nothing to answer this question. Other than the enumeration in Section 8, there is no other statement of the ends of the federal government than the Preamble, which employs the broadest possible language to describe the purposes for which the Constitution was established. One might be tempted to say that the means of government found in an enumeration are limited to serving the ends of government found in that enumeration. Trying to read an enumerated power to be self-referential in this way makes no sense. What does it mean to say, for instance, that Congress may regulate commerce in order to regulate commerce? If this were taken to mean that there were no further purposes for which the regulation of commerce could serve as a means, then the Constitution would have created a government with formal powers but without the ability to exercise those powers in pursuit of aspects of the general welfare, because the general welfare would then be an end different from the regulation of commerce, which was being pursued by means of the regulation of commerce. That would be contrary to the limitation that regulating commerce can only serve the end of regulating commerce. If, on the other hand, purposes related to the general welfare were within the competence of the federal government when exercising the commerce power, as they must be, then the regulation of commerce is being done for some reason outside the enumeration itself, which only provides "regulat[ing] commerce" as an express end. Are those outside-the-text reasons limited? The text is silent. Beyond the statement of general purposes in the Taxing and Spending Clause, the document provides no limitations.<sup>101</sup>

The earlier example of the power to declare war illustrates the point. Interpreting the power to declare war as expressing an end, one can see any number of actions the federal government might take as means to that end. Sending emissaries to ensure the best understanding of some other nation's intentions, enacting legislation to create a defense intelligence capacity obligated to keep the Congress fully informed regarding a potential enemy's capabilities, expending money to build secure facilities outside of Washington where the government can move in times of peril can all be means of effectuating the end of declaring war. Eventually, though, the power to declare war must be viewed as a means in a means-end chain, a means exercised in pursuit of some end. At that point, one looks in vain in the Constitution for a limitation on the set of purposes for which Congress might exercise that power. This is true with respect to each and every power identified in Section 8, save the Patent and Copyright Clause (and even here, the Court has largely treated the limitation on purposes as toothless<sup>102</sup>).

At this point it might be objected that the power to declare war points to its own

101. This is scarcely an original point. *See, e.g.*, JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION § 1085 (1833), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 526 (Philip B. Kurland & Ralph Lerner, eds. (1987):

Now the motive of the grant of the [commerce] power is not even alluded to in the constitution. It is not even stated, that congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope.

102. *See generally* Kenneth J. Burchfiel, *The Constitutional Intellectual Property Power: Progress of Useful Arts and Legal Protection of Semiconductor Technology*, 28 SANTA CLARA L. REV. 473 (1988) (discussing Congress' erosion of limitations of the Patent & Copyright Clause by statutory enactment).

ends. A country declares war in order to protect itself against aggression, to expand secure borders, to gain economically valuable resources, and so forth. Some governmental entity has to have this broad authority on behalf of the United States, and it is the federal government in which the Constitution houses that power. The other enumerated powers might likewise be said to have certain inherent purposes. Although these enumerations do not explicitly name the ends toward which they may be used, the argument would proceed, they in fact point generally toward their own proper purposes.

This is not much of a rejoinder. First, the postulated purposes are not being derived from anything in the text, but from our shared understanding of the general reasons why such powers might be used by the federal government. When agreements as to the correct background assumptions break down, as they do with respect to the commerce power, this consensus-based strategy also breaks down.<sup>103</sup> Second, to the extent that a statement of purposes for each of the enumerated powers might gain broad agreement, it would most likely have to be stated as generally and open-endedly as was just the case with respect to the power to declare war, amounting to something not much short of the idea that Congress has discretion to use the powers in a manner appropriate to advance the aims of the country. This amounts to very little limitation.

The problems in determining the boundaries of federal power from the spare enumeration of the power to declare war apply with equal force up and down the list of powers in Section 8, including the commerce power. The grant of that authority includes a grant of the power to "regulate commerce . . . among the several states. . . ."<sup>104</sup> The language of this particular grant of power expresses a second textual ambiguity, in addition to the ambiguities of whether "power" refers to means or ends. A law written to regulate something can accomplish its task in two different ways. On the one hand, a law or instruction can regulate an activity, "X", by imposing a restriction directly on that activity. A parent, for example, can regulate a child's television watching by instructing her child not to watch television after 10 P.M. The imposition of a direct constraint on the activity of television watching is a means, presumably in the service of some end such as ensuring a good night's sleep or an opportunity to complete homework. The regulation exerts its operative force directly on the activity that the regulator seeks to change. On the other hand, an instruction can regulate X in a different fashion. An instruction that changes the conditions under which X occurs also can regulate X. A parent could regulate her child's television watching by instructing the babysitter to turn the television off at 10 P.M. or by setting a timer that would shut down the electricity into the family room at 10 P.M. In these cases the instruction or the timer setting are means toward the objective of regulating television watching which, as before, is then a means to reaching some further

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103. This is not to say that the Framers failed to share certain paradigm cases that all agreed illustrated appropriate uses of the commerce power, but only that neither the text of the Constitution nor any shared understanding picks out a *limited* set of ends toward which the power might be used. Some scholars have, however, argued that the specific reasons most frequently cited as justifying the commerce power—the reasons implicated by the paradigm cases—exhaust the legitimate purposes for which the power can be used, and thus supply a limited set of ends. For further discussion of paradigm Commerce Clause cases and of this argument, see *supra* text accompanying notes 116-128.

104. U.S. CONST. art. 1, § 8, cl.3.

objective. Regulating the child's television watching is the instruction's immediate objective, but it does not direct the operative force of its restrictions at that activity, but rather at something that influences the conditions within which that activity takes place.

Now replace "X" with "commerce." The power to regulate commerce might grant authority to issue instructions directed expressly at commerce or those who engage in commerce, like the parent's instructions to the child to turn off the television. It might also grant authority to issue instructions expressly directed at some other activity or person that are not parts of commerce, but which affect the conditions under which commerce occurs, and thereby regulate commerce, like the timer which shuts off the electricity. The first kind of instruction is phrased in terms that have commerce as the immediate subject of instruction. This we will call commerce-as-subject regulation. It has generated a distinct set of doctrinal issues and judicial decisions, of which *Hammer v. Dagenhart*<sup>105</sup> and *Champion v. Ames*<sup>106</sup> are examples. The second kind of instruction is phrased in terms that have something outside of interstate commerce as their subject, but which will have affecting the conditions under which commerce operates as their objective. This is commerce-as-objective regulation, and it has generated a second set of doctrines and judicial decisions, of which the *Shreveport Cases*<sup>107</sup> and *Wickard v. Filburn*<sup>108</sup> are examples.

Each type of commerce doctrine poses its own interpretation issues.<sup>109</sup> In commerce-as-subject cases, by hypothesis, a federal regulation is indisputably aiming its coercive authority at something called "commerce," so the crucial limiting issue is whether there are any restrictions on the ends for which that regulation of commerce can be employed. Commerce-by-objective cases focus on different limiting issues. In these cases, again by hypothesis, a federal regulation seeks to alter the conditions within which interstate commerce operates, say by imposing wheat quotas on farmers that extend even to wheat grown for home consumption. Here we enter the realm of the "affects" doctrine, where the crucial limiting issue is which of the conditions within which commerce operates can be federally regulated.

Early Supreme Court precedent repeatedly uses phraseology to describe the commerce power that encompasses both of these types of regulation. The first occasion in which the Supreme Court had to confront the meaning of the Commerce Clause was *Gibbons v. Ogden*.<sup>110</sup> In *Gibbons*, Chief Justice Marshall's opinion establishes many points of departure for all subsequent treatments of the commerce power, but it does not choose between seeing the commerce power as uniquely channeled into the

105. 247 U.S. 251 (1918).

106. 188 U.S. 321 (1903).

107. *Houston, E. & W. Tex. R.R. Co. v. United States*, 234 U.S. 342, 351 (1914) (The *Shreveport Cases*).

108. 317 U.S. 111 (1942).

109. Many Commerce Clause analyses have not made a clear distinction between these two bases of Commerce Clause authority. Lino Graglia's is among those which have. See Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 727-738 (1996) (referring to the commerce-as-subject doctrine as involving the "bar" doctrine and commerce-as-object doctrine as involving the "affects" doctrine.).

110. 22 U.S. (9 Wheat.) 1 (1824).

commerce-as-subject or commerce-as-objective category.<sup>111</sup> *Gibbons* finds that commerce power “is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”<sup>112</sup> “Govern” possesses the same equivocal character that we found in “regulation.” A law can govern commerce by imposing direct restrictions on commerce, but it can also govern commerce by controlling the conditions in which commerce operates.<sup>113</sup>

Later decisions elaborate on the commerce power, but continue the same equivocation. Consider the railroad rate case mentioned earlier. In the *Shreveport Cases*, the Court says that “Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce, to enact ‘all appropriate legislation’ for its ‘protection and advancement’ . . . to adopt measures ‘to promote its growth and insure its safety,’ to ‘foster, protect, control and restrain’ . . .”<sup>114</sup> This language continues to point in two directions. Many of the verb forms are consistent with commerce-as-objective regulations, because they refer to purposes that Commerce Clause legislation can aim to achieve—protect, advance, promote, or insure the safety of interstate commerce—without identifying the direct subject of the restriction. Some of the verb forms, however, point to restricting commerce without signaling the purposes for which that restriction might be made. A law prohibiting the movement of lottery tickets in interstate commerce is a law that “control[s] and restrain[s]” commerce for example, but the fact that it targets commerce as its subject matter gives no indication of the purpose for which the targeting is to occur. One can easily imagine that such a law was in fact enacted for moral reasons, rather than to accomplish any purpose that could easily be called commercial.<sup>115</sup> Thus, the language from the *Shreveport Cases* quoted above is just as consistent with such commerce-as-subject laws as it is with commerce-as-objective laws.

The paradigmatic cases that the Founders undoubtedly thought the clause covered also make room for both types of regulation of commerce.<sup>116</sup> The Constitutional Convention was in large part motivated by frustration with the inability of the central government under the Articles of Confederation to prevent individual states from dealing with goods and services from other states in a discriminatory manner.<sup>117</sup> Taxes

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111. *Id.*

112. *Id.* at 196.

113. A law that regulates intrastate rail rates in order to ensure that interstate commerce does not function in a rate environment in which intrastate rates are discriminatorily low is a law governing commerce, for example, one which has commerce-as-objective. The *Shreveport Cases*, 234 U.S. 342, 351 (1914).

114. *Id.*

115. *See* *Champion v. Ames*, 188 U.S. 321 (1903).

116. Jed Rubenfeld, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 182 (2001) (The paradigmatic case approach to constitutional meaning is advocated by Jed Rubenfeld, who argues that provisions of the Constitution have their meanings anchored to paradigm cases, cases with the characteristic that “whatever disagreements there might be over general principles or other specific applications [of a provision], all understood” that the provision covered *this* instance.)

117. The history of discriminatory state laws was reviewed by Justice Jackson in *H.P. Hood & Sons v. Du Mond*,

When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. . . .

and duties, the chief instruments of such discrimination under the Articles, presented such obvious concern that the authority of the states to tax and lay duties was dealt with explicitly by the Constitution.<sup>118</sup> In giving Congress the further authority to regulate commerce, the Framers undoubtedly had in mind providing the means to prevent one state from establishing preferences for domestic industry that would damage intercourse among the states.<sup>119</sup>

As many of the dormant Commerce Clause cases make clear, discrimination can occur through regulations that establish preferential conditions for local products just as they can through regulations aimed directly at interstate commerce. Protecting interstate commerce from discrimination can therefore entail regulating the conditions within which such commerce operates. The *Shreveport Cases* are exemplary.<sup>120</sup> There, without the ability to ensure that Texas's rate commission did not establish local haul rates that undercut interstate haul rates, the federal government would be without authority to ensure a nondiscriminatory environment for interstate commerce.<sup>121</sup> In general, protecting or enhancing or promoting interstate commerce were objectives firmly planted in the minds of the Framers, and paradigm cases of such government actions fit within the commerce-as-objective category.

Other paradigm examples of commerce regulation on the minds of the Framers are consistent with thinking of such regulation in commerce-as-subject terms. In *The Daniel Ball*, the Court was simply restating something widely understood when it said that "whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."<sup>122</sup> This movement brings the commerce squarely within the scope of federal regulatory authority. In fact, the idea that commerce was exclusively limited to such traffic, and hence that the federal government could only regulate such interstate traffic, was advanced by the respondents in *Gibbons*.<sup>123</sup> Marshall rejected their argument as to this

"[E]ach state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." . . . [The result was] "to threaten at once the peace and safety of the Union."

336 U.S. 525, 533 (1949) (quoting STORY, *supra* note 101, §§ 259, 260). See also Letter from James Madison to George Washington (Apr. 16, 1787) in 2 THE WRITINGS OF JAMES MADISON 344-45 (1900-1910) (contending that the federal government must have "complete authority in all cases which require uniformity, such as the regulation of trade . . .").

118. U.S. CONST. art. I § 9, cl. 5. ("No Tax or Duty shall be laid on Articles exported from any State.")

119. The authority to regulate interstate commerce was also seen as essential to the ability of the federal government effectively to regulate foreign commerce. By imposing their own conditions on goods entering their jurisdiction from other states, states with ports could interfere with the nation's ability to engage in foreign commerce. *E.g.*, THE FEDERALIST NO. 42, at 279, 293 (James Madison) (Jacob E. Cooke ed. 1961) ("[W]ithout [the authority to regulate interstate commerce], the great and essential power of regulating foreign commerce would have been incomplete and ineffectual.")

120. 234 U.S. 342 (1914).

121. *Id.*

122. *The Daniel Ball*, 77 U.S. 557, 565 (1870).

123. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

being the exclusive meaning of the term.<sup>124</sup> At the same time, however, he acknowledged that it was a paradigmatic meaning of the term, just not its sole meaning.<sup>125</sup> “Commerce,” Marshall wrote, “undoubtedly, is traffic, but it is something more. . . .”<sup>126</sup> Equally without doubt, establishing the legal rules and regulations that people engaging in interstate traffic must meet counts as a regulation of commerce. Indeed, *Gibbons* was just such a case, involving as it did the primacy of a federal law regulating who would pilot a boat in navigable waters.<sup>127</sup> So ensuring fair treatment by the states was not the exclusive focus of the Commerce Clause, and although federal regulation by virtue of the Supremacy Clause very often establishes a uniformity of treatment, it need not be motivated by an equal treatment concern. Ensuring the safety of goods being shipped in interstate commerce by regulating the goods themselves is a paradigm case in the commerce-as-subject category.

In sum, text, context, early constitutional history, and foundational constitutional precedent all support an interpretation of the enumerated Commerce Clause as encompassing the authority to regulate conditions under which interstate commerce occurs, limited only by *McCulloch*'s understanding of the Sweeping Clause, as well as the authority to impose legal restraints directly on commerce itself, limited only by the most general statement of governmental ends that such authority can pursue. The first grant of authority spawns the commerce-as-objective branch of doctrine, of which the “affects” doctrine is a part.<sup>128</sup> The second grant of authority spawns the commerce-as-subject branch. So far, the Supreme Court's commerce power revisions have left this second branch untouched. The remainder of this Part examines the nature of commerce-as-subject authority in some further detail. A summary of the conclusions to this point can serve as a springboard to more concentrated focus on this second branch of doctrine.

The previous discussion supports the following conclusions:

While there may have been consensus at the time of the Founding that the federal government is one of powers limited and enumerated, the enumeration found in the Constitution fails to define those limits;

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124. *Id.*

125. *Id.*

126. *Id.* at 189.

127. *Id.*

128. Among other things, this suggests that Justice Thomas' claim in *Lopez* that the “affects” doctrine is an “innovation of the [twentieth] century,” is not sound. *United States v. Lopez*, 514 U.S. 549, 596 (1995) (Thomas, J., concurring). The “affects” doctrine is an inexorable consequence of combining the view that the commerce power authorizes Congress to control the conditions under which commerce is conducted (the type of Commerce Clause action to which the commerce-as-objective doctrines apply) together with *McCulloch*'s interpretation of the Sweeping Clause. Indeed, under the interpretation of just the enumerated commerce power itself that has been offered here, the regulation of at least some intrastate activity that significantly affects the conditions of commerce can be justified even without the supplemental aid of the Sweeping Clause. As cases like *Wickard* and the *Shreveport Cases* attest, regulating local activities can be indispensable in managing the conditions of commerce, and thus “necessary” even under a Jeffersonian interpretation of necessity. See Graglia, *supra* note 109, at 728 (“Affects” authority is “an essential element of the [commerce] power if it is to be effective or even meaningful.”).



In particular, the concepts of “power” generally and “regulate commerce” specifically can refer either to a description of means, or a description of ends, or both;

Insofar as the enumeration of the power to “regulate commerce” refers to the ends that the power may be used to pursue (thus producing commerce-as-objective doctrine), *McCulloch* provides generous scope for the means that Congress can use to pursue them;

Insofar as the enumeration of the power to “regulate commerce” refers to placing legal restrictions on commerce directly as a means to some end (thus producing commerce-as-subject doctrine), the enumeration does not impose a limitation on what ends Congress may pursue via these means.

This last point generates considerable debate in academic circles, although it has been Supreme Court orthodoxy since *Darby* overruled *Hammer*. When it did so, *Darby* effectively converted Justice Holmes’s *Hammer* dissent into prevailing law. In *Hammer*, Holmes had concluded that

Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid.<sup>129</sup>

The idea that Congress is nonetheless somehow restricted in the purposes it can pursue in subjecting commerce to regulation has not died, and in fairness it must be said that a more restrictively defined commerce power is quite imaginable. The Framers might have written the Constitution worded more like Article 14(2) of the European Community Treaty, for example. That article acknowledges the European market as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”<sup>130</sup> The function of the treaty is quite explicitly to promote the free movement of goods and services within the European Union. Analogously, the Constitution might have granted Congress the power to “insure and promote the free movement of goods, etc. . . . among the States.” With such a Commerce Clause, it might well be that federal authority would be limited to measures that keep the flow of commerce unclogged, without obstacles, or which affirmatively promote the flow of commerce in some way. The majority in *Hammer* gestured toward a version of this interpretation when it

129. *Hammer v. Dagenhart*, 247 U.S. 251, 277-278 (1918) (Holmes, J., dissenting). *Darby* quite explicitly adopts Justice Holmes’s view. *United States v. Darby*, 312 U.S. 100, 113 (1941) (“While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power ‘to prescribe the rule by which commerce is governed.’”) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, at 196).

130. EUROPEAN COMMUNITIES, CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION AND THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY 47 (Luxemburg: Office for Official Publication of the European Communities, 1997).

declared that the “[commerce] power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities.”<sup>131</sup>

The enumerated power that the Framers included in the Constitution, however, is not worded in the revised fashion offered above. The enumerated commerce power as actually worded cannot reasonably be read to forbid prohibitions as a form of regulation. To begin with, the argument has its own internal weaknesses, noted by Justice Holmes when he observed that “regulation” means “prohibition of something.”<sup>132</sup> Additionally, no one has ever doubted that federal authority exists to prohibit the shipment of dangerous goods, for example, goods that impose risks on other goods traveling in interstate commerce. Not even the *Hammer* majority doubted this.<sup>133</sup> Furthermore, the meaning of “regulate commerce” quite obviously encompasses prohibition when the prepositional phrase following it is “with foreign nations,” rather than “among the several States.”<sup>134</sup> At the time of the founding, as well as at times prior and subsequent to that event, the authority of sovereign states regarding commerce with foreign nations encompassed the power to prohibit, impose high tariffs upon, or in other ways discourage or prevent commerce, often as a tool of foreign diplomacy.<sup>135</sup> Finally, the great bulk of Supreme Court precedent from all eras

131. *Hammer*, 247 U.S. at 269-270. When I have taught comparative constitutional law to Europeans, they often express surprise that this is NOT the prevailing understanding of the commerce power.

132. See *supra* text accompanying note 129.

133. *Hammer* acknowledges that items can be kept out of interstate commerce when the goods cause harm. In the *Hammer* Court’s view, the goods produced by child labor were themselves harmless. 247 U.S. at 272. However satisfactorily this explains why lottery tickets can be banned in interstate commerce, see *Champion v. Ames*, 188 U.S. 321 (1903), while goods produced from child labor cannot (and I think the explanation is weak), the pertinent point for current purposes is that even the *Hammer* majority acknowledged some authority to ban goods in interstate commerce.

134. See, e.g., STORY, *supra* note 101, § 1079 (1833), reprinted in 2 THE FOUNDERS’ CONSTITUTION 525 (Philip B. Kurland & Ralph Lerner eds., 1987):

The terms, then, of the constitution are sufficiently large to embrace the power [to restrict commerce in order to aid domestic manufacture]; the practice of other nations, and especially of Great-Britain and of the American states, has been to use it in this manner; and this exercise of it was one of the very grounds, upon which the establishment of the constitution was urged and vindicated.

See also Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL’Y 849, 870 (2002):

[I]t was understood that future Congresses might have an interest in limiting or prohibiting foreign commerce in order to advance foreign policy or budding American industry. The power granted Congress to regulate foreign commerce thus unquestionably included the power to prohibit some commerce through the imposition of tariffs or preferential trade policies.

135. See, e.g., *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (Congress enacted law forbidding the importation of goods from Britain or France upon a Presidential determination that they had failed to cease violating the neutral status of the United States). See also Justice Johnson’s separate opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 227 (1924) (Johnson, J., concurring):

The states were, unquestionably, supreme [prior to the grants of power in the

extending from *Gibbons v. Ogden* forward shows the *Hammer* majority to have been something of a lark, by repeatedly declining to adopt such a restrictive view.

Even granting the point that regulation includes prohibition, the concern lingers that Congress ought to be restricted as to the reasons it can have for prohibiting commerce (or regulating it in any way). Holmes expressed his opinion on this point, as well. In *Hammer*, he wrote,

[I]f an act is within the powers specifically conferred upon Congress it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.<sup>136</sup>

Combined with his belief that Congress can “prohibit any part of such commerce that Congress sees fit to forbid,”<sup>137</sup> Holmes thus endorsed the position that Congress can prohibit the flow of some commerce for any reason, and that the regulation was not rendered invalid by virtue of any ancillary purposes or effects it might have.

With regard to Congress’s power to sit astride the flow of commerce and regulate it directly—Congress’s commerce-as-subject authority—Holmes thus rejected one version of the pretext doctrine that traces its lineage in Supreme Court decisions back to *McCulloch*. In the course of articulating an otherwise expansive understanding of the Sweeping Clause, Justice Marshall had observed that

[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it to say, that such an act was not the law of the land.<sup>138</sup>

In one nonproblematic sense, such a pretext doctrine must be part of our constitutional system if there are any limits at all to the purposes Congress can pursue or the effects its laws can have, and there surely are. Most obviously, there are the limitations in the Bill of Rights. The Constitution affirmatively bars accomplishing certain purposes, such as discriminating against citizens on the basis of race or religion, abridging the right of free speech, and denying individuals due process of law. The federal government cannot use one of the instruments of governing provided by the Constitution, such as the power to tax or to regulate commerce, to accomplish one of those forbidden purposes.

While any legal regime that imposes real limits on government ends must have some doctrine of pretext, that doctrine proves difficult to operationalize. Such a

Constitution]; and each possessed that power over commerce, which is acknowledged to reside in every sovereign state. . . . The law of nations . . . pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure.

136. 247 U.S. at 277 (Holmes, J., dissenting).

137. *Id.* at 278.

138. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

doctrine must pick out laws that are otherwise valid in form, that have some legitimate effect but which are nonetheless invalid because of how the law relates to some end the government must not pursue.<sup>139</sup> Some cases may be mixed motive cases in which the Congress actively seeks both a legitimate and an illegitimate objective. Others can be cases of benign motive and impermissible effect, or of benign motive and an effect that would be impermissible if it were intended. In such cases, the difficulties of proving intent also come into play. The problems here are not unique to constitutional analysis. They are not even unique to law. The doctrine of double effect permits an action which produces two effects, one permissible and the other impermissible were it the sole effect of the action, finding if and only if one does not intend the prohibited result.<sup>140</sup>

The law has developed a menu of different doctrinal approaches for these mixed cases. The compelling-interest/least-restrictive-alternative approach outlaws such actions unless the legitimate end is compelling and the means selected to reach it minimizes the encroachment into the forbidden area.<sup>141</sup> The intentionality approach upholds the action so long as it was not the intention of the decisionmaker to encroach on the forbidden area.<sup>142</sup> The bona fide reason approach upholds the action unless the legitimate reason offered for the action proves unlikely to be the real reason.<sup>143</sup> The but-for approach upholds the action if the decisionmaker can show that the action would have been the same had the decisionmaker not known that it was encroaching into a forbidden area.<sup>144</sup> The fundamental point is simply this: wherever limitations

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139. Any theory of government as limited in the ends it can pursue necessarily generates a question about the validity of concededly legitimate means being used (arguably) to pursue excluded ends, which is the question that the various versions of pretext doctrine attempt to address. Thomas Jefferson saw this clearly, and thought that the principle that pretextual action was prohibited extended to government officials generally, whether or not judicial review of those actions could ever be obtained. Arguing that the Senate could not participate in presidential decisions regarding what rank of officer the United States might send to represent its interests in foreign capitals, Jefferson had to meet an objection to his position that the Senate could effectively determine such rank through the exercise of its advice and consent power on the appointment of the officer, even if it had no constitutional role to play in setting the rank. Jefferson thought such an action would be a breach of trust by the Senators. "Where the Constitution does not directly grant a power," he wrote, "that power cannot legitimately be exercised 'thro the abuse of another.'" H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 46 (2002) (summarizing Jefferson's exchange with Gallatin). Commerce-as-subject doctrine avoids needing to answer this question as regards unenumerated spheres of state autonomy because there are no such spheres in relation to Congress's exercise of the authority to sit astride the flow of commerce.

140. See *A DICTIONARY OF PHILOSOPHY* 91 (Antony Flew ed., 1979).

141. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

142. *E.g.*, *Washington v. Davis*, 426 U.S. 229, 239-45 (1976); *Persounel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (contending that the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences).

143. *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973) (holding that in Title VII case, complainant "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

144. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

have been placed on the ends or objectives a decisionmaker can pursue and the courts are seized with the responsibility for policing encroachment into those forbidden areas, they must adopt some approach to mixed motive or mixed motive-and-effect situations.

It is not necessary here to work out whether one of these approaches, or some other approach, best accommodates the positive reach of the commerce power to the reality that some uses of that power are off-limits because of a countervailing individual protection in the Bill of Rights. The pertinent point here is that *McCulloch's* pretext doctrine nonproblematically pertains to such cases. The harder and more problematic issue is whether such infringements into protected individual rights exhaust the scope of the pretext doctrine, or whether it has some application to situations in which individual rights are not directly at issue, but intrusions into state prerogatives are. Justice Holmes's position in *Hammer* is that when the Congress is employing its power to sit astride the flow of commerce, the answer is no. Examining that answer further will require us to be clear about the nature of the claim that is being made by those who think that the pretext doctrine does extend to intrusions into state prerogatives.

Without a doctrine of pretext, the sole basis for maintaining the distinction between "what is truly national and what is truly local"<sup>145</sup> would be to determine what Congress can do under the authority to regulate commerce, unfettered by any consideration other than whether a law or regulation can fairly be described as "regulating commerce," or as a necessary and proper means for doing so. That exercise reveals that commerce-as-objective and commerce-as-subject authority provide ample justification for Congress to regulate a wide expanse of activities;<sup>146</sup> whatever comes within the ambit of either type of regulatory action would come within Congress's authority. This is what *Gibbons* meant when it said that the commerce authority is "complete."<sup>147</sup> The Tenth Amendment does not change this conclusion; it only reiterates the proposition that such prerogatives as have been retained by the states ought to be protected. Anyone who wishes to justify greater limits on federal authority must look beyond the enumerated power and beyond the Tenth Amendment. In other words, while it may be true that "the starting point [for federalism analysis] must be the doctrine of enumerated powers,"<sup>148</sup> analysis of the enumerated power cannot provide the brakes on federal authority that advocates of greater state autonomy seek. Some further constraint must do much of the work. In the case of commerce regulation that infringes free speech, another provision of the Constitution itself grounds the constraint. In the case of state autonomy, however, if there is to be any further constraint, it is entirely extratextual in nature.<sup>149</sup>

145. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

146. See *supra* text accompanying notes 128-29 (summarizing scope of commerce authority).

147. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

148. See ENGBAHL, *supra* note 90, at 9.

149. An analogy may make the point. An automobile's top speed can be governed by installing an engine of a certain horsepower, coupled with a transmission with a certain set of gear ratios. Given the automobile's weight, the automobile can be designed to produce a top speed of 100 MPH. We might then say that the limitation on its top speed is a function internal to the engineering of the automobile. Alternatively, we could install a larger engine. Now the internal engineering of the car might be capable of producing a top speed of 140 MPH. We could then introduce something external to the automobile as previously and fully constituted,

The notion of “traditional areas of state concern” is a prime candidate to provide content for such an external constraint; this casts new light on the emphasis of Justices O’Connor and Kennedy on that idea in their *Lopez* concurrence.<sup>150</sup> If the commerce power is “complete,” extending to everything that a fair interpretation of the power to regulate commerce entails, as well as to the means to regulate effectively, finding an overriding counterforce must come from such an independent and opposing idea. If it can be found, that opposing idea then supplies pretext doctrine with what it needs to get off of the ground—a set of purposes related to state autonomy that the federal government many not seek to advise.

The best defense of the need to invigorate the pretext doctrine in Commerce Clause doctrine has been provided by my Duke colleague, William Van Alstyne.<sup>151</sup> His argument reflects the structure we have just reviewed. First, he shows that “regulating commerce” by itself can take the federal government quite far into areas of regulation historically occupied exclusively or primarily by the states, all the way to sustaining a law regulating rules of marriage and divorce.<sup>152</sup> This suggests that durable restrictions on the commerce power come not from working out the meaning of the concept of regulating commerce, but rather by determining what “matters [have] not [been] entrusted to Congress’ will.”<sup>153</sup> Professor Van Alstyne develops several examples of regulating areas in which different states may well have different policies, such as policies dealing with permitting or criminalizing sodomy, and the requirements of marriage and divorce, and the rules governing intestate succession. These subject matters, he argues, are exclusively matters within the purview of the states. “[T]he power to say which is the more moral position on such matters (criminalizing sodomy, or, in contrast, protecting private choice of sexual intimacy) was not given to Congress at all.”<sup>154</sup> “[W]ho is getting married and on what grounds others are getting divorced [are] matters not entrusted to Congress’s will.”<sup>155</sup> The essence of federalism, he writes, is that it “describes the division of political power by subject matter between the national government and the fifty states.”<sup>156</sup> As to subjects within the competence of

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like a governor on the air and fuel intake, to limit the fuel mixture the car can receive so that its top speed is limited to 100 MPH. Like the car that can hit 140 MPH, we have found nothing in the concept of the commerce power or in the text of the Constitution that limits the commerce power to anything less than its top speed. If the power is to be slowed down, it must be because some external governor has been placed on it, holding it back from where the practical logic of regulating commerce would enable it to go. We have exhausted the possible governors provided by the text of the constitution, so we must go outside it.

150. See *supra* text accompanying notes 56-60.

151. William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE. L.J. 769; see also William Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

152. See Van Alstyne, *Adrift in the Cellophane Sea*, *supra* note 151, at 783-789 (showing how a hypothetical law entitled “The Commerce Clause Regulation of Marital Standards Act” might well be sustained under Commerce Clause precedent as it stood in 1987). Because the case for sustaining the statute rests on the commerce-as-subject doctrine, the example is just as good today as it was in 1987.

153. *Id.* at 795.

154. *Id.* at 776-77.

155. *Id.* at 795.

156. *Id.* at 770.

the states, Congress cannot “choose sides.”<sup>157</sup>

Defining a group of ends or subject matter that is out of bounds for federal regulation, such as land use planning, the law of descents, education, and so on, give pretext doctrine a vantage point from which to review federal action. The doctrinal version that Professor Van Alstyne advocates is the bona fide purpose approach.<sup>158</sup> “When,” he asks, “is a regulation of commerce not a regulation of ‘commerce’? When, *functionally* speaking, it is plain that Congress is indifferent to commerce and concerned, rather, with who is getting married and on what grounds others are getting divorced—matters not entrusted to Congress’ will.”<sup>159</sup>

As we have already discussed, an obviously crucial question for this approach is the content of the list of prohibited subject matter. Deriving constitutional standards from entirely extratextual evidence—and without any textual anchor at all—is notoriously slippery business. Even if it be conceded that the people of the Founding Era expected some subjects to be off limits, agreeing on the list of such subjects is another question entirely. In addition, expectations are not necessarily positive law; those expectations might simply be that—an expression of how people expected the division of authority to go, but without binding decision makers as a matter of enforceable limitation.

With respect to many subjects that some might advocate to be on any such list of expectations, it will often be impossible to conclude that those expectations encompassed preventing federal authority from reaching them in the context of modern problems. Because we cannot know *all* the relevant background assumptions of the times were, we can never be certain about the implications of a broad consensus in the 1780s. Some in the 1780s might have thought that all land use decisions ought to be made locally, because they could not see such decisions ever having important implications for interstate commerce. In that case, the assumption that land use decisions were to be local would not be dispositive of whether they should be when local decisions clash with commerce-related decisions. Even more pertinent to the present inquiry, the view that land use decisions ought to be local may not carry through to land use decisions that involve environmental problems as to which a consensus exists that such problems are encompassed by a national environmental interest.

The deeper problem with the idea that federalism “describes the division of political power by subject matter between the national government and the fifty states”<sup>160</sup> is that as stated, it is not a valid understanding of our constitutional system. Although there are particular activities that the federal government cannot directly control, the subject matters that it can consider in exercising the authorities that it does possess are not so limited, and clearly include subject matter commonly found on lists of “areas of traditional state concern.” Take the example of marriage policy in the context of the power to regulate foreign commerce. The federal government lacks the capacity directly to control another country’s marriage policy, but it unquestionably has the constitutional capacity to place restrictions on trade with countries that have marriage

157. *Id.* at 778.

158. *See supra* text accompanying notes 141-44 (describing different types of pretext doctrine).

159. Van Alstyne, *Adrift in the Cellophane Sea*, *supra* note 151, at 778 (emphasis in original).

160. *See id.* at 770.

policies to which we strongly object. If it has the power to act in this way, a fortiori it has the power to consider the subject matter of marriage in deciding whether or not to act. The same is true with respect to land use, domestic criminal law, public education, and anything else on the list of traditional state concerns.<sup>161</sup> The federal government likewise has the constitutional capacity to consider these subject matters when exercising the spending power. Whenever the government decides that it should exercise a power in response to considerations such as these, it will potentially be “choosing sides” with one state or another, depending on whether or not there is a division of state policy on the question at issue.

Similarly, in the interstate commerce context, assume that marriage policy is one of the areas where consensus exists that direct control rests exclusively with the states. States of the United States and foreign countries are then on par with each other vis-à-vis the government in Washington: Washington lacks capacity to control their marriage policy. This is not because the federal government is prohibited from having a viewpoint on the subject of marriage, however. The federal government can unquestionably exercise the foreign commerce power in ways that reflect judgments regarding marriage policy. The position of Holmes in *Hammer* is simply that the federal government can exercise the interstate commerce power in the same fashion.

This result seems appropriate in light of the Constitution’s assigning the entire responsibility for the interstate commerce system to the federal government. Use of that system provides a considerable benefit to the commerce that uses it, by expanding available markets and making more sources of inputs available. That system is not in any sense neutral with respect to the goods that flow in interstate commerce—the whole point of creating one national market is to stimulate and promote trade and economic growth. A smoothly functioning interstate commerce system is a national public good which lowers the costs of, and expands the markets for, any commercial activity in any part of the country which chooses to take advantage of it. In effect, it provides a subsidy for commercial and economic activity throughout the country. However, there is no reason that national taxpayers and national legislators have to permit goods and services that have an adverse impact on the subject matters that are within their competence, and hence about which they can legitimately claim a concern to benefit from the subsidy that the interstate commerce system provides. When Congress acts to prohibit goods from flowing in interstate commerce, it is determining what goods should enjoy the benefits and fruits of an interstate commerce system over which it has plenary authority. The case for prohibitory authority based on adverse impacts would be much weaker if, as Professor Van Alstyne argues, Congress were itself prohibited from taking into account, and forming an opinion about, certain of the subject matters that make up the general welfare or contribute to the common defense. Then Congress would be blinkered from evaluating the consequences of the flow of interstate commerce for those subject matters. However, the preceding discussion has

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161. The power of the federal government over the District of Columbia and other federal lands is also plenary with respect to subject matters Congress can deal with legislatively. The Constitution’s grant of the power to “exercise Exclusive Legislation” in all such cases, U.S. CONST. art. I, § 8, cl. 16, might provide a textual basis for Congress exercising power over marriage and land use in such instances. The presence of a textual basis does not detract from this being another instance of Congress having competence over “subject matters” that might otherwise be considered state concerns.



argued that the Constitution does not create this kind of subject matter blindness at the national level.

If the federal government can exercise its commerce-as-subject authority after taking into account the impact of land use decisions on the environment, for example, it might institute a rule that conditioned shipment of chemicals in interstate commerce on the safe disposal of those chemicals. This—and many other policies that condition use of the interstate system on compliance with federal standards—would predictably make compliance with state policies taking a more lenient view of society more expensive, by eliminating access to the national market for companies that comply with the state policy. Raising the costs of compliance interferes with that state's ability to implement its policy in an area of traditional state concern. At some point, should such interference be impermissible? Should the Constitution be found to support, in other words, a vertical separation of powers principle similar to the horizontal separation of powers principle articulated in cases like *Morrison v. Olson*?<sup>162</sup> In *Morrison*, after concluding that none of the formal arguments justified finding a separation of powers violation in the Ethics in Government Act of 1978 (the act creating the office of independent counsel), the Court reviewed the Act to determine whether it nonetheless “unduly interfer[ed]” with or “impermissibly undermin[e]d” the power of the President.<sup>163</sup> Although the Court acknowledged that the power of the President to control the activities of the independent counsel was “clearly diminished” compared to control over U.S. Attorneys, it nonetheless found that the Act did not violate the separation of powers.<sup>164</sup> The Act cut into authority that the President otherwise possessed, but it did not do so “unduly” or “impermissibly.”

Transplanting such a methodology into the area of vertical federalism would confront some formidable obstacles. The idea first stated in *Gibbons*, and oft-repeated since, that the commerce power is “complete,” as well as the Supremacy Clause upon which the idea rests, counsel against any view that a statute determined to be a genuine exercise of the commerce power is nonetheless invalid simply because it has effects that impinge on state regulatory authority. As between such an impermissible effects approach to such federal-state frictions and a bona fide reason approach, the latter is preferable. The bona fide reason approach asks whether the Congress is “really” exercising an enumerated power, however difficult that question is to answer, and respects the supremacy of the federal action if the answer is affirmative, regardless of the consequences with regard to state authority.

We are now in a position to consider the possible impact of Professor Van Alstyne's pretext proposal on commerce-as-subject authority. First, in light of the plenary competence of the federal government as to subject matter, the proposal needs to be rephrased to speak of impermissible attempts to control areas of traditional state concern rather than of attempts to address subject matter not entrusted to Congress's will. Thus, rephrased, the proposal is now that a regulation of commerce is not a regulation of “commerce” when, functionally speaking, it is plain that Congress is indifferent to commerce and concerned, rather, with controlling activity in an area of traditional state concern.<sup>165</sup>

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162. 487 U.S. 654 (1988).

163. *Id.* at 693, 695.

164. *Id.* at 696 n.34.

165. See Van Alstyne, *Adrift in the Cellophane Sea*, *supra* note 151, at 795 (emphasis in

Now, assume for the sake of the argument that a list of such areas can be identified and that such an approach to pretext were adopted by the Court. That doctrine would have very little impact, if any, on the exercise of commerce-as-subject authority, because whenever Congress controls the flow of goods in interstate commerce, it is difficult to see how they could be indifferent to commerce at the same time. In every case in which Congress bars the use of interstate commerce to some good, it is going to be concerned with doing just that. The presence of an awareness that the bar also has an effect on state ability to regulate does not negate the presence of a concern about interstate commerce. At most, it makes the case one of mixed motives. Thus, it is difficult to see how a regulation aimed at prohibiting the flow of certain goods in commerce could satisfy the condition of pretextuality that Congress be indifferent to commerce.

This argument for plenary authority, and for the inapplicability of any pretext doctrine,<sup>166</sup> is specific to the commerce-as-subject category of the commerce power. When Congress is acting under its commerce-as-objective authority, and seeking to control the conditions in which interstate commerce operates, the analysis may be different. If Justice Holmes wrote consistent opinions, this would be one way to explain the apparent tension between the views he expressed in *Hammer*<sup>167</sup> and those he expressed in *Northern Securities Co. v. United States*.<sup>168</sup> *Northern Securities* upheld the application of the antitrust laws to an arrangement for the sale of stock in competing interstate rail companies. The government sought to defend its authority to criminalize the buying and selling of railroad stock by members of a partnership because of the transaction's effect on competition among railroads.<sup>169</sup> Justice Holmes dissented. "Commerce depends upon population," he wrote, "but Congress could not, on that ground, undertake to regulate marriage and divorce."<sup>170</sup> This part of his opinion relied upon the now-abandoned indirect-direct distinction of *E.C. Knight*.<sup>171</sup> Later in his opinion, however, Holmes also stated a version of a pretext doctrine.

[I]f the restraint on the freedom of the members of a combination caused by their entering into partnership, is a restraint of trade, every such combination, as well the small as the great, is within the act. . . . I am happy to know that only a minority of my brethren adopt an interpretation of the law which, in my opinion, would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of eommerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to

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original).

166. Any pretext doctrine, that is, that would be aimed at policing the line between areas of local concern and areas of national concern. There is still a place for pretext doctrine as applied to individual rights. See *supra* text accompanying notes 139-44.

167. See *supra* text accompanying notes 136-38.

168. 193 U.S. 197 (1904).

169. *Id.* at 403.

170. *Id.* at 402 (Holmes, J., dissenting).

171. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1892).

make it . . . .<sup>172</sup>

Commerce-as-objective laws, such as the law at issue in *Northern Securities*, may invite a pretext inquiry because they impose legal constraints on local activities in the name of accomplishing some interstate commerce objective. If the coercive effects on activities not part of interstate commerce are substantial enough while the effectiveness of the law in accomplishing its ostensible objective sufficiently poor, it may be that the interstate commerce objective had little to do with the choice of means actually chosen. The pretext doctrine in that case works much like strict scrutiny analysis elsewhere to flush out disingenuous law making.<sup>173</sup>

Commerce-as-subject laws can never be disingenuous in the same way. In placing legal constraints on commerce itself, they always can be defended as effective means for accomplishing an objective related to interstate commerce, namely taking away the advantages of interstate the commerce system from the goofs and services that do not comply with the law's conditions.

Exploring further whether a pretext doctrine protecting traditional areas of state concern is more appropriate in commerce-as-objective situations will take us further afield than we need to go. The burden of this Part has been to make the case that commerce-as-subject authority is a plenary authority very much worth a separate examination as it applies to federal environmental regulatory authority. The next Part turns to that application.

#### IV. SITTING ASTRIDE COMMERCE AS A WAY TO SOLVE ENVIRONMENTAL PROBLEMS

For years, the “affects” or commerce-as-objective doctrine has been used as the basis for justifying federal laws that regulate intrastate activities, sometimes by itself, sometimes in conjunction with other justifications.<sup>174</sup> Prior to *Lopez* and *Morrison*, the federal courts had become very casual in reciting that some intrastate activity affected interstate commerce without identifying with care what that effect was.<sup>175</sup> In truth, to the extent that Congress worried about the constitutional basis for legislation (and it often did not worry very much) Congress had come to believe that a “House That Jack Built” argument could be constructed for any national regulation that it wished to undertake.<sup>176</sup> To the extent that the regulation needed some intellectual connection with commerce, that connection could be summarized in two ways: either Congress wanted more commerce or it wanted better quality commerce (or it wanted both). Accordingly, in *Lopez*, the GFSZA would produce more commerce by improving the educational environment, which improves learning, which produces a better qualified workforce,

172. *N. Sec. Co.*, 193 U.S. at 410-11 (Holmes, J., dissenting) (italics in original).

173. *E.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145-46 (1980) (showing strict scrutiny as a device for flushing out impermissible motives).

174. See, for example, *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), which justified the Surface Mining Reclamation and Control Act in three different ways, two of them dependent on the “affects” doctrine, and one based on the direct environmental effects of surface mining (such as runoff contaminating water systems) having interstate consequences.

175. *E.g.*, Funk, *supra* note 62.

176. See *supra* note 94.

which produces more commerce.<sup>177</sup> The VAWA relied on a similar argument.<sup>178</sup>

*Lopez* and *Morrison* demonstrate that a five person majority on the Court thinks that the “House That Jack Built” nexus between intrastate activity and interstate commerce is such an attenuated connection as to raise significant constitutional concern for them.<sup>179</sup> Perhaps sensing the conceptual thicket involved in articulating the conditions that make a nexus too attenuated, neither opinion rests flatly on a rejection of such a connection. Instead, the aspect of each case that was “central” to the Court’s conclusion was the criminal, noneconomic nature of the federal provision.<sup>180</sup> The distinction between commercial and noncommercial activities drawn by the Court is itself problematic,<sup>181</sup> but so long as the Court adheres to it, the Court’s major concern with the government’s “more commerce” defense of the two statutes will be satisfied. The Court’s major concern with that defense or nexus is that if

the Government’s [theories are correct], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, 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 regulatc.<sup>182</sup>

The economic/noneconomic distinction operates to keep noncommercial intrastate activities outside the reach of the “affects” doctrine, and thus prevents that doctrine from serving as the basis for regulation of “any activity by an individual” without having to address how, if at all, the nexus requirement might be tightened. Stated from the other direction, when the activity being regulated is commercial, “House That Jack Built” arguments continue to constitute a sufficient nexus between intrastate activity and interstate commerce, as witnessed by the Court’s endorsement of *Katzenbach, Perez, and Hodel*.<sup>183</sup>

So long as the Court does not further restrict Congress’s Commerce Clause authority, commerce-as-objective authority will continue to extend quite far, and commerce-as-subject doctrine may have only supplemental significance. However, should the Court develop the idea of attenuated nexus so that it on some occasions becomes outcome-determinative even when the regulation satisfies the Court’s “economic in nature” test, then the authority of Congress to sit astride the flow of commerce and prohibit undesirable goods and services from that flow will assume greater significance.

One of the virtues of commerce-as-subject doctrine is precisely that it is not vulnerable to nexus-based challenges, or to the cynicism that attenuated causal chains create about the bona fides of legislative action. If Congress acts to prohibit a class of goods from flowing in interstate commerce, it is doing exactly what this authority permits it to do. The connection with interstate commerce is built directly into the

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177. *United States v. Lopez*, 514 U.S. 549, 565, 623 (1995).

178. *United States v. Morrison*, 529 U.S. 598, 661-63 (2000).

179. *Morrison*, 529 U.S. at 601-27 (2000); *Lopez*, 514 U.S. at 551-58 (1995).

180. See *supra* text accompanying notes 45-60

181. See *supra* text accompanying notes 21-27.

182. *Lopez*, 514 U.S. at 564.

183. See *supra* text accompanying notes 62-65.

internal logic of the regulation and could not be a tighter fit. Compared to "affects" doctrine justifications, commerce-as-subject justifications also exhibit greater candor. When regulations of local, intrastate activities are justified by virtue of an attenuated connection between the activities and interstate commerce, the articulation of the justification can rightly be met with a great degree of skepticism as to whether or not it is articulating the real justification for the action. "We are providing a civil remedy for violence against women because such acts of violence have an effect on interstate commerce" is a claim that can reasonably be greeted with, "c'mon, that's not your real reason." In contrast, when regulation proceeds on the basis of commerce-as-subject, Congress's determination that the primary behaviors of violence against women, or guns near schools, or environmental degradation, are undesirable can be announced forthrightly. "We have chosen to deprive these behaviors of the benefits of the interstate commerce system" accurately expresses a real motivation for the regulation.

Relying on commerce-as-subject doctrine has an additional virtue, which is that plenary version of that doctrine expressed by Justice Holmes in *Hammer* and as later endorsed by *Darby* not only represents existing doctrine, it also rests on a sound justification.<sup>184</sup>

For environmental purposes, the most important aspect of the authority to control the "use of channels of commerce,"<sup>185</sup> for environmental purposes will prove to be the power to approve use of the channels of commerce, conditional on compliance with certain requirements as to how goods have been produced and as to how they are subsequently used. Existing doctrine gives the Congress ample conditional-approval or regulatory authority of the needed kind.

The vast majority of the nation's environmental problems are related in one of two ways to goods that travel in interstate commerce. Environmental degradation can be a function of the way that a product is produced, as when pesticides are manufactured with insufficient attention paid to the disposal of one or more hazardous or harmful waste byproducts. Major portions of our air pollution and water pollution problems result from the byproducts of commercial processes as goods and services are being produced. The other connection between products in interstate commerce and environmental problems arises once the products are put to use. Cars, trucks, and buses contribute to air pollution through use, as do stoves in residential dwellings, backhoes, tractors, and excavation equipment used in construction. Environmental problems also are caused by the way items are disposed of after use, and thereby become part of our municipal waste, hazardous waste, or radioactive waste problems.

To address the environmental impacts of commercial products at either the production end or the use and disposal end of their life cycles, commerce-as-subject doctrine would have to permit Congress to condition the use of the channels of interstate commerce on compliance with regulatory requirements related to how products are produced, how they are used, and the means by which they are discarded. The general theory of this aspect of commerce authority developed earlier quite easily encompasses conditions of these kinds.<sup>186</sup> Existing Supreme Court precedent also includes examples of each kind.

184. See *supra* Part III.

185. *Lopez*, 514 U.S. at 558.

186. See *supra* text accompanying notes 120-27.

*Darby*, which was cited with approval in *Lopez*'s brief description of category one (commerce-as-subject) doctrine, upheld section 15(a)(1) of the Fair Labor Standard Act ("FLSA"), which prohibits the shipment in interstate commerce of goods when workers are not paid in compliance with the FLSA.<sup>187</sup> Section 15(a)(1) in effect makes the use of interstate commerce conditional upon the goods being produced in accordance with FLSA requirements. Important as upholding this position was, even more crucial to FLSA's administrability were sections 15(a)(2), (6), and (7), the provisions of the FLSA that directly require employers to conform to the wage and hour provisions with respect to "all employees engaged in the production of goods for interstate commerce."<sup>188</sup> The Court upheld these provisions, although the rationale that is most often understood to be the basis of the Court's decision was the "affects" doctrine. "The power of Congress to regulate interstate commerce extends to the regulation . . . of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it."<sup>189</sup> In fact, reliance on the "affects" doctrine was unnecessary. These provisions of the statute can be justified through the Sweeping Clause as an appropriate means of ensuring the effective implementation of Congress's decision to sit astride the stream of commerce, by ensuring that the conditions for shipping goods interstate have been met.

Environmental regulation aimed at controlling the pollution effects of the means of production can be justified through the same reasoning. Congress may withhold the benefits of the interstate commerce system from those who would produce electricity, cars, steel, petrochemicals, and so forth in ways other than those that Congress has determined adequately protect the environment, in the same way that it may withhold those benefits from manufacturers and others who pay wages not in compliance with the FLSA.

Some significant sources of pollution produce goods that enter interstate commerce scarcely ever or not at all. Dry cleaners quite often engage in business of an entirely local nature, and yet they contribute significantly to the generation of volatile organic compounds, which in turn contribute to local smog problems, for example. Many such environmental problems can be addressed under the authority to sit astride the flow of commerce by refocusing attention from the production of goods in interstate commerce to the use and disposal of the interstate inputs to local business. Regulating the subsequent use and disposal of products that have been shipped in interstate commerce is justified by reasoning parallel to that explaining regulating the condition of production. The Court has recognized Congress's power to condition the use of the channels of interstate commerce on the proper use and disposal of those goods after they have enjoyed the benefits of those channels. The Court, for example, has upheld the conviction of a druggist who filled two pill boxes, each with twelve tablets, for failing to affix the required warning label to drugs which had traveled in interstate commerce.<sup>190</sup>

This logic applies to a wide range of goods in commerce, not limited to products that cause environmental harm when used or discarded due to their own properties. Backhoes that are used to destroy endangered species habitat or road levelers used to

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187. *United States v. Darby*, 312 U.S. 100 (1941).

188. *Id.* at 117.

189. *Id.* at 119-20.

190. *United States v. Sullivan*, 332 U.S. 689 (1948).

build roads that violate the terms of the National Environmental Policy Act ("NEPA") are also goods that travel in interstate commerce. Federal authority to condition the use of the channels of interstate commerce on subsequent use in ways that comply with federal conditions reaches these goods and uses as well as it does hazardous chemicals.

The Supreme Court has easily approved criminal statutes regarding the use of materials that have traveled in interstate commerce when the statutes involved have included a "jurisdictional element" in the statement of the offense. *Lopez* specifically endorsed using the commerce power in this way. Such jurisdictional elements ensure, "through case-by-case inquiry, that the [criminal instrument, such as a gun] in question affects interstate commerce."<sup>191</sup> In *Lopez*, the Court even hinted that such a provision in the GFSZA might have rendered that statute constitutionally permissible.<sup>192</sup> Most environmental statutes lack a jurisdictional element. It is far from obvious, however, why individualized proof ought to be a prerequisite of constitutionality. If Congress makes a determination that a substantial quantity of certain kinds of goods traveling in interstate commerce exhibit a characteristic to which it wishes to deny the benefits of the interstate commerce system, the Sweeping Clause ought to give Congress sufficient latitude to regulate all such goods without the requirement of individualized proof of interstate shipment. Congress's efforts as applied to goods that do move in interstate commerce are valid; and individualized proof burdens and diminishes the effectiveness of such admittedly valid federal efforts. To make its policy more efficiently and effectively enforced, Congress should be able to sweep a prophylactic circle around the problem—at the very least in cases in which the great preponderance of such goods do flow in interstate commerce.

The holding in *Lopez* itself, of course, is inconsistent with this argument, because guns are an excellent example of goods the vast majority of which travel in interstate commerce.<sup>193</sup> If this prophylactic argument were a good one, it ought to have justified the GFSZA as written, without a jurisdictional element, but the Court found the absence of a jurisdictional element significant. "The GFSZA," Chief Justice Rehnquist wrote, "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that admittedly have an explicit connection with or effect on interstate commerce."<sup>194</sup> *Lopez* cannot be considered conclusive on this point, however, because a prophylactic argument based on commerce-as-subject doctrine was never made by the government. Instead, the government's brief and oral argument relied upon the "affects" doctrine to justify the statute.<sup>195</sup>

The foregoing sketches only the largest features of how the commerce-as-subject doctrine bears on federal authority to address environmental problems. More doctrinal detail must await a more extended investigation of the causes and cures for specific environmental problems. The discussion here suffices, I believe, both to ground this other category of commerce and to indicate some of its advantages over "affects" doctrine as a basis for many environmental statutes. (1) It has been left entirely

191. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

192. *Id.* at 562. See *infra* text accompanying notes 192-93.

193. See *infra* text accompanying note 203.

194. *Lopez*, 514 U.S. at 562.

195. *Id.* at 563 (describing the "Government's essential contention" as arguing that the GFSZA is valid "because possession of a firearm in a local school zone does indeed substantially affect interstate commerce").

unaffected by the Supreme Court's recent decisions. (2) It justifies environmental regulatory action through a straightforward logic that permits those defending the action to be candid about that justification and therefore has strong defenses against the accusation that Congress is "really" acting for some other reason. (3) It eliminates the problem of attenuated causal chains. To be sure, greater reliance on commerce-as-subject justifications would inevitably produce pressures on the Court to reduce its reach, as it has somewhat reduced the reach of the "affects" doctrine. However, (4) Part III demonstrated that broad authority under this branch of commerce doctrine has a quite sound justification based on constitutional text, context, structure, early Supreme Court precedent, and longstanding judicial interpretation.

Commerce-as-subject authority should also prove a powerful tool for addressing environmental problems because many environmental concerns arise from the way our economy produces, uses, and disposes of goods that are bought and sold through commerce. The integrated, open national market that the federal government supervises contributes enormously to the success of those commercial activities and hence to the magnitude of the attendant environmental problems. Regulating the flow of goods in interstate commerce so as to reverse the negative association between commerce and environmental quality constitutes appropriate federal management of that interstate system. Not all environmental problems can be reached in this way—the control of naturally occurring arsenic in local drinking water systems may well be an example of a localized environmental problem to which the national market is in no way contributing. The powerful leverage commerce-as-subject authority gives to the national government should not be overlooked or left undeveloped, however, simply because that authority is not all-encompassing. Indeed, were reasoning based on commerce-as-subject authority shown to be all-encompassing, it might for that reason fall prey to the Supreme Court's disinclination to accept any line of argument that has no stopping point.

#### V. DOING MISCHIEF WITHOUT MAKING CONSTITUTIONAL LAW

The prior Parts have developed the ways in which the Court's changes in commerce doctrine still leave the federal government with broad authority to implement responses to the nation's environmental problems. Part II argued that the revisions to the "affects" doctrine are relatively minor so far, and that the manner in which federal authority has been reduced will not much affect federal environmental authority. Parts III and IV argued that the separate commerce-as-subject doctrine independently provides strong support for many pieces of environmental legislation, and so far that branch of commerce doctrine has been completely unchanged by the Court. This Part's message is more pessimistic. Without changing the standards by which the Congress's commerce authority is to be judged, the Court can do a great deal of mischief in impairing Congress's practical abilities to respond to environmental problems.

This reality has been amply demonstrated by *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.<sup>196</sup> *SWANCC* was not a constitutional decision at all. In it, the Court interpreted the Clean Water Act ("CWA") in a manner that found a longstanding administrative interpretation extending the

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196. 531 U.S. 159 (2001).



jurisdiction of the statute to wetlands visited by migratory birds to be ultra vires, on the grounds that Congress had not clearly expressed its intentions to enact that broad jurisdiction. By a vote of five to four, the Supreme Court ruled that an Army Corps of Engineers regulation asserting jurisdiction over wetlands “which are or would be used as habitat by . . . migratory birds which cross state lines,” exceeded the Corps’ statutory authority because in enacting the CWA Congress had not extended agency jurisdiction to “nonnavigable, isolated, intrastate waters.”<sup>197</sup> Despite being a nonconstitutional decision, *SWANCC* has by far the greatest implications for environmental legislation of any of the recent cases, far extending the relatively minor impact of *Lopez* and *Morrison*.

Simply understood in terms of its strict holding, *SWANCC* has had an appreciable, albeit still evolving, impact on the federal regulation of wetlands under section 404 of the Clean Water Act, a program of environmental consequence in its own right. The effect of *SWANCC* is to consign certain wetlands exclusively to the jurisdiction of state regulators with estimates of the size of this category ranging from between 30% to 60% of the wetlands previously under Corps jurisdiction.<sup>198</sup> On the day before President Clinton left office, the chief counsels of the EPA and the Corps issued a joint memorandum providing instructions to agency staff based on the most narrow reading possible of *SWANCC*’s reach. The Bush Administration has not yet resolved its own interpretation, but as of this writing it continues in pending litigation to defend a narrow reading.<sup>199</sup> Even if these efforts to minimize the impact of *SWANCC* continue and are successful, there remains no doubt that this single statutory decision has done more to affect the actual federal presence in solving an important environmental problem than have the Court’s changes in its interpretation of the scope of Congress’s theoretical authority under the Commerce Clause.

The text, legislative history, and prior case law that form the raw material for the Court’s interpretation of the CWA have been subjected to extensive commentary, and this Article will not add to discussion of the internal coherence of *SWANCC* itself.<sup>200</sup> Regardless of whether or not the Court’s reading of the CWA is of good or poor professional quality, the significance of the opinion lies in the ostensible motivation for that reading. Construing the statute as it did permitted the Court to avoid an issue that

197. *Id.* at 171; 72.

198. John Kusler, *The SWANCC Decision and State Regulation of Wetlands 1*, available at <http://www.aswm.org/fwp/swancc/aswm-int.pdf> (Jan. 2001).

199. The Department of Justice has appealed in the case of *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), in which the court dismissed criminal charges against a developer who filled wetlands without a CWA permit, because the court believed the particular wetlands involved were covered by *SWANCC* and thus beyond federal jurisdiction. The Department of Justice’s brief adopts a narrow reading of *SWANCC*, contending that the CWA permit requirement continues to cover wetlands that are hydrologically connected to navigable waters or their tributaries. Brief of the United States at 17-19, *United States v. Rapanos*, 109 F. Supp. 2d 1011 (E.D. Mich. 2002) (No. 02-1377). Nonetheless, EPA and the Corps may still revise their stance. See *DOJ Appeal Hints at Narrow Administration View of SWANCC Ruling*, Vol. 23, No. 32 INSIDE EPA 1, 4-5 (Aug. 9, 2002).

200. The most thorough treatment is Funk, *supra* note 62. For what it is worth, I align myself with Professor Funk’s criticisms of the Court’s reasoning. See *id.* at 10771 (“[T]he Court’s interpretation of the Act . . . does great violence to the text, purpose and history of the Act . . .”).

it thought raised “significant constitutional questions.”<sup>201</sup> To the Court, those questions cast into doubt whether the federal Commerce Clause authority extended to the kind of nonnavigable, isolated, intrastate wetlands that the Solid Waste Agency of Northern Cook County wanted to fill. Certainly this question was controversial; all parties to the litigation had in fact come to the Court thinking this constitutional issue had been squarely presented by the case and would be decided by it, although the possibility of a statutory off-ramp that would save the Court from having to reach the constitutional question had been there all along.

*Lopez* and *Morrison* have been widely understood to throw a shadow of doubt over a number of features of federal constitutional law, including protection of endangered species,<sup>202</sup> regulation of abandoned hazardous waste facilities<sup>203</sup>—and protection of isolated wetlands.<sup>204</sup> *SWANCC* has added to the depth of that shadow in the wetlands area. The Court said enough about the government’s constitutional defense of the statute to suggest that such a defense might be difficult. Having to decide the constitutional question would require determining and then “evaluat[ing] the precise object or activity that, in the aggregate, substantially affects interstate commerce.”<sup>205</sup> That object or activity was

not clear, for although the Corps has claimed jurisdiction over petitioner’s land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner’s municipal landfill, which is ‘plainly of a commercial nature.’ But this is a far cry, indeed, from the ‘navigable waters’ and ‘waters of the United States’ to which the statute by its terms extends.<sup>206</sup>

These *dubitante* views expressed in the opinion’s closing paragraphs have been interpreted by some to cast a very dark shadow indeed on the constitutional question. For those observers, “[t]here seems to be little, if any, doubt that if Congress ever were to pass a law employing similar means or seeking to achieve the same objective as the [Migratory Bird] Rule that the Court would strike it down as violating the Commerce

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201. *SWANCC*, 531 U.S. at 174.

202. *See, e.g.*, *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001) (a post-*Morrison* challenge to federal Commerce Clause authority to protect the habitat of the red wolf. Federal authority was sustained by a 2-1 panel.); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (a post-*Lopez*, pre-*Morrison* challenge to federal protection of the habitat of the Delhi Sands Flower-Loving Fly. Federal authority was sustained by a 2-1 panel decision.). Both cases are extensively discussed in Bradford C. Mank, *Protecting Intrastate Endangered Species: Does the Endangered Species Act Erode on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723 (2002).

203. *See United States v. Olin Corp.*, 197 F.3d 1506 (11th Cir. 1997) (a 3-0 panel decision, *Olin* reversed a district court holding that the federal Superfund statute’s regulation of the on-site disposal of hazardous waste exceeded federal Commerce Clause authority).

204. *See, e.g.*, *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997); *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993).

205. *SWANCC*, 531 U.S. at 173.

206. *Id.*

Clause.<sup>207</sup> Others are not nearly so pessimistic.<sup>208</sup> The crucial point to grasp about this academic debate is that it is going to remain just that. The Court will not actually have to resolve the constitutional question anytime soon, because Congress is not about to enact a statute extending CWA jurisdiction to isolated wetlands anytime soon. While the Supreme Court's Commerce Clause doctrine has changed only a little in the past six decades, the legislative climate for environmental legislation has changed dramatically in just half that time—from 1972 when the CWA was enacted to today—in ways that fundamentally change Congress's practical ability to pass strong environmental laws.

Prior to *SWANCC*, the Corps of Engineers, EPA and many others, including members of Congress, had believed that the existing language of the CWA had given the Corps jurisdiction over isolated wetlands without the need to enact different language. The provision of the CWA that putatively accomplished this feat—an amendment which defined “navigable waters of the United States” as simply “waters of the United States”—had rolled through the Congress and then over a presidential veto in 1972. In these salad days of the modern Environmental Era, concern about environmental degradation was pronounced, enthusiasm toward federal solutions high, and optimism abounded that environmental problems were solvable by technologically and economically feasible measures.<sup>209</sup> The weight of opinion about the competence of the federal government, the ability of states to administer their own affairs, and the appropriate balance between burdens on private property or private initiative on the one hand and public purposes on the other have now all changed, and all in ways that make passage of environmental legislation more difficult. Environmental legislation has become politically divisive. At a time when political institutions are themselves closely divided, the prospects are not bright for enacting contentious legislation sure to produce well-organized losers, which such wetlands legislation certainly would be.<sup>210</sup>

207. Michael Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31 ENVTL. L. REP. 11079, 11082 (2001).

208. Charles Tiefer, *SWANCC: Constitutional Swan Song for Environmental Laws or No More than a Swipe at Their Sweep?*, 31 ENVTL. L. REP. 11493 (2001). Crucial to its statutory interpretation of the CWA, the Court concluded that in enacting this statute, Congress had only exercised its commerce power over navigable waters, which extends only to issues related to navigation. Under this reasoning, Congress could not have meant to extend jurisdiction to nonnavigable isolated wetlands. The reach of both “affects” doctrine and commerce-as-subject doctrine extends further than this. Thus it is possible that the Court would look differently at a statute in which it was clear Congress meant to exercise the full extent of its commerce authority. See, for example, a remark by one of the Justices at oral argument, responding to comments by a second Justice:

I think his position is not that the commerce power doesn't allow you to protect [those waterfowl]. It's that the navigable waters aspect of the commerce power doesn't allow you to protect them, and if Congress wants to come back and exert its commerce power generally, it would be a different issue.

*Id.* at 11497 n.43.

209. For a quick review of the tenor of the times in the early 1970s, see MARY GRAHAM, *THE MORNING AFTER EARTH DAY: PRACTICAL ENVIRONMENTAL POLITICS* (1999).

210. See Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47 (2003) for an analysis of why Congress is likely to be stalemated on pursuing legislative “fixes” to adverse Commerce Clause rulings across the wide range of public policies.

*Lopez* and its aftermath contrast nicely with *SWANCC* to underscore the distinction between constitutional authority and practical effect. Unlike *SWANCC*, *Lopez* is a constitutional ruling, holding that the GFSZA exceeds federal authority. Yet this constitutional ruling has had practically no impact on the federal government's presence in the area of regulating guns near schools. The difference in the ultimate impact of the two decisions can be explained entirely by the differences in the political environment that curative statutes faced. The concurrence in *Lopez* noted that a law such as the GFSZA was hugely popular. At the same time as it extolled the desirability of permitting each of the individual states to address the problem of guns in schools in its own fashion, the Kennedy-O'Connor *Lopez* concurrence also readily conceded that "it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises . . ." <sup>211</sup>

With that being the political climate, all that was needed to negate *Lopez* was a serviceable curative statute—which the Chief Justice's opinion for the Court was kind enough to outline for any interested legislator. The Chief Justice noted that the GFSZA lacked a "jurisdictional element" linking the behavior that it criminalized to interstate commerce. Lest this be misunderstood, the Court then illustrated the significance of such an element by reminding us of the analysis in *United States v. Bass*.<sup>212</sup> The federal statute at issue in *Bass* made it a crime for a felon to "receiv[e], poss[ess] or transpor[t] in commerce or affecting commerce . . . any firearm." The Court construed this statute to make the firearm having been "in commerce or affecting commerce" an element of the possession component of the statute.<sup>213</sup> As a consequence, the Court set aside the conviction of *Bass* because the government had failed to "show the requisite nexus with interstate commerce,"<sup>214</sup> but the further consequence of the case was actually to affirm that the government had the authority to criminalize possession of firearms that had the requisite nexus. Because almost all firearms have traveled in interstate commerce, *Bass* added an essential element to the federal crime, putting the government to its proof on that element, but it did not materially constrain the ability of the federal government to criminalize the basic behavior involved—if the Congress would enact curative legislation.

Predictably, the defective GFSZA was soon replaced with a version that applied to possession near a school of a firearm that "has moved in or that otherwise affects interstate or foreign commerce."<sup>215</sup> Unlike *Bass*, *Lopez* had actually set aside a statute instead of construing it to render it constitutional, but the ultimate results were the same because the Congress was quite willing to pass the appropriate statute once the Court had pointed the way. The net practical effect of *Lopez* on the federal government's presence on the issue of carrying guns to school was practically nil.

A major lesson of *SWANCC* and *Lopez*, then, is simply this: even if revision of Commerce Clause standards fails to narrow the scope of federal authority much, narrowing constructions of statutes or findings of curable constitutional defects can

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211. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

212. 404 U.S. 336 (1971).

213. *Id.* at 337.

214. *Id.* at 347.

215. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 18 U.S.C. § 922(q)(2)(A)).

nonetheless have practical impacts ranging from negligible to substantial. The net impact of such decisions will depend upon the political configuration facing curative legislation. Because significant environmental legislation will face *SWANCC* conditions more often than *Lopez* conditions, the impact of such cases in the environmental area can be substantial.

In other words, the impact of the Court's Commerce Clause revisions on the federal presence in environmental problem solving cannot be evaluated solely on the basis of how those revisions redefine Congress's theoretical authority over environmental problems. Narrowing an environmental statute through statutory interpretation, as in *SWANCC*, or finding a law unconstitutional as currently drafted, but unconstitutional in a way that can in principle be cured by a new bill, as in *Lopez*, will each cause a de facto contraction in federal problem solving abilities because the laws on the books will not soon be replaced by curative legislation.

As a result of the existing political stalemate, academics can confidently disagree about whether Commerce Clause authority extends to isolated wetlands under the Court's Commerce Clause revisions, unburdened by any anxiety that their judgment will be undermined by the Court deciding the matter. Just as surely as *SWANCC* ensures that the question of the constitutionality of isolated wetlands regulation will remain quite literally an academic question, it also illustrates how the answer to that question contributes next to nothing to judging the impact of that case on the federal government's ability to regulate wetlands. As a practical political matter, *SWANCC* removes the federal government from this area as surely as a holding of unconstitutionality would, but without touching the constitutional issue itself. As a practical measure, the shadow that *SWANCC*'s clear statement interpretive rule casts is much more ominous than the shadow *Lopez* and *Morrison* together have cast over the theoretical reach of federal authority under the Commerce Clause.