Rediscovering a Principled Commerce Power

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"Federalism [and the Separation of powers] serve[s] to assign political responsibility, not to obscure it." Were the Federal Government [or the Executive] to take over the regulation of entire areas of traditional State [or Legislative] concern, ... the boundaries between the spheres of federal and state [or executive and legislative] authority would blur and political responsibility would become illusory.

—Justice Kennedy (concurring)
United States v. Lopez

I. CONSTITUTIONAL STRUCTURE AND POLITICAL ACCOUNTABILITY

In the 1999-2000 Term, the U.S. Supreme Court supplied two views of federal legislative power and its relationship to accountable political governance. At their root, both decisions dealt with the federal commerce power, though in different aspects. In United States v. Morrison, the issue was whether—in passing a particular section of the Violence Against Women Act—Congress had exceeded its power to regulate interstate commerce. As discussed below, the Court held that Congress had. In FDA v. Brown & Williamson Tobacco Corporation, the issue was whether Congress had delegated power to the Food and Drug Administration (FDA) to regulate tobacco as a drug. The Court held that Congress had not made this choice.

Morrison was squarely part of the Rehnquist Court’s federalism enterprise, continuing the Chief Justice’s search for the difference between what is national and what is local.7 As the captioned quotation from Justice Kennedy suggests, a vibrant federalist structure is thought to promote accountability because separate political spheres keep at least some set of policy choices within close geographical

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4. Id. at 627.


6. Id.

7. See Morrison, 529 U.S. at 608.
reach and scrutiny. In addition, dividing power also means more policy perspectives can be satisfied.

By contrast, Brown & Williamson concerned whether major political decisions can be made by agencies under broadly worded delegations of authority. It is obvious that accountability is directly advanced if Congress itself plainly and courageously makes difficult policy choices. Nevertheless, in the real world of limited time and complexity, Congress often defers these choices to agents within the executive branch or so-called independent agencies. Although this is just as obviously a second-best choice, it will be argued here that it is one which should not be readily displaced with the still less accountable (unelected) perspective of the federal judiciary.

In terms of fidelity to accountable governance, the Court's cases from the extraordinary Term under review were decidedly mixed. The Court kept Congress within bounds, but not itself. Specifically, reaffirming the existence of limits to the commerce power in Morrison was meritorious and warranted, albeit incomplete in rationale. By contrast, substituting the judicial will for that of the executive agency in Brown & Williamson was questionable and, given the subject matter, tragically serious. The Term of the Court, in short, left us in need of a principled basis by which to identify both the scope of the commerce power and the breadth of appropriate delegations of legislative authority made under that power.

This paper contends that the soundest basis for keeping Congress within its enumerated power is one premised upon the original understanding out of which the commerce power, itself, arose—namely, the Virginia Resolution. Under that foundational precept, Congress may regulate commerce either to vindicate a well-identified national interest or to rectify state regulatory incapacity. With respect to the delegation of legislative authority, the Court need only abide by the standard of deference in Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc. Of course, abiding by wrongheaded or costly, but statutorily authorized, regulatory decisions is easier said than done—even by restrained members of the judiciary.


In United States v. Lopez, the Supreme Court re-examined the scope of the

10. See Morrison, 529 U.S. at 608.
11. See Brown & Williamson, 529 U.S. at 120.
12. See infra notes 131-35 and accompanying text.
13. See MADISON'S JOURNAL, infra note 132, at 389.
Commerce Clause, Congress’ mainstay of regulatory authority, for the first time since the New Deal.\textsuperscript{15} The Court invalidated the Gun-Free School Zones Act,\textsuperscript{16} which had made it a federal crime to possess a weapon near a school.\textsuperscript{17} By the Court’s reasoning, possession of a gun in a school zone did not implicate any of the three essential aspects of the commerce power.\textsuperscript{18} In particular, it was not a regulation of (1) a channel of interstate commerce; (2) its instrumentalities;\textsuperscript{19} or (3) of an activity, commercial or noncommercial, having a substantial effect upon interstate commerce.\textsuperscript{20} In reaching this conclusion, the Court highlighted the absence of any jurisdictional element ensuring that there was a nexus between the firearm and interstate commerce.\textsuperscript{21} There was no showing, for example, that the gun had recently been shipped across state lines.\textsuperscript{22} Neither were there congressional findings enabling the Court to evaluate whether the activity, in fact, substantially affected interstate commerce.\textsuperscript{23} Litigation arguments regarding attenuated effects on national economic productivity were not enough to sustain Congress’ power to regulate because there was no discernible limit to such argumentation.\textsuperscript{24}

There were two separate concurrences in \textit{Lopez} that headed in different directions. Justice Kennedy emphasized agreement with the majority judgment, while finding that Congress retained broad power to regulate the national market.\textsuperscript{25} Justice Thomas doubted that this broad power had ever been faithful to constitutional text.\textsuperscript{26} The “substantial effects” aspect of commerce power analysis, he posited, was plainly overbroad.\textsuperscript{27} According to Thomas, the commerce power should be related to commerce—that is, the buying, selling, and transporting of

\textsuperscript{17} \textit{Lopez}, 514 U.S. at 551.
\textsuperscript{18} \textit{Id.} at 567.
\textsuperscript{19} The Court also references “persons or things in interstate commerce.” \textit{Id.} at 558-59. As will be discussed below, these formulations—whether instrumentalities, persons or things—should not be loosely construed by the Court. Merely because a person or thing has the capacity to travel interstate, or even if they have recently done so, should not be thought to authorize any regulation other than that aimed at protecting or advancing an interstate commercial transaction or regulating the commercial behavior of the parties that implicate truly national interests or that states are incapable of handling because of their interstate dimension. Thus, jurisdictional elements documenting simply that an object has moved in commerce is logically, and should be legally, irrelevant.
\textsuperscript{20} \textit{Id.} at 563-64.
\textsuperscript{21} \textit{Id.} at 561-62.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 562-63.
\textsuperscript{24} \textit{Id.} at 563-64.
\textsuperscript{25} \textit{Id.} at 568 (Kennedy, J., concurring).
\textsuperscript{26} \textit{Id.} at 584 (Thomas, J., concurring).
\textsuperscript{27} \textit{Id.} at 599-600 (Thomas, J., concurring).
goods. Otherwise, the enumeration of Congress’ power in Article I, section 8 would have been pointless.

Justice Breyer, in dissent for himself and three others, argued that earlier case law would have sustained the Act based on deference to Congress’ determination that the economy was affected. Further, said Breyer, it does not matter whether the regulated activity itself is commercial or noncommercial, if the regulated activity can be rationally believed (by the Court) to affect commerce. Justice Stevens wrote a separate dissent to defend the Act as dealing with guns, which he thought were inherently an article of commerce. Justice Souter also separately dissented, arguing that Lopez was just a new form of unwarranted judicial activism.

However one characterized Lopez, it did not seem to make much difference in the lower courts. Here are some examples arranged by topic:

1. The Child Support Recovery Act of 1992. The Act makes it a federal crime to willfully fail to pay a past-due support obligation with respect to a child resident in another state. Courts have uniformly upheld the Act post-Lopez, even though no mother or father would think of themselves as being involved in commerce by meeting such support obligations. Nevertheless, the Seventh Circuit found that the Act regulated an intangible obligation in commerce. The Ninth

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28. Id. at 586 (Thomas, J., concurring) (stating that the founding fathers defined commerce only as bartering and selling and not as agriculture or manufacturing).
29. Id. at 588-89 (Thomas, J., concurring).
30. Id. at 616-17 (Breyer, J., dissenting).
31. Id. at 617 (Breyer, J., dissenting).
32. Id. at 602-03 (Stevens, J., dissenting).
33. Id. at 604 (Souter, J., dissenting).
35. See, e.g., United States v. Williams, 121 F.3d 615, 622 (11th Cir. 1997) (holding that “Congress properly exercised its power under the Commerce Clause when it enacted the Child Support Recovery Act”); United States v. Crawford, 115 F.3d 1397, 1400 (8th Cir. 1997) (holding that the Child Support Recovery Act is a valid exercise of Congress’ commerce power because payments or debts of child support on behalf of an out-of-state child are “things in, or having a substantial relation to, interstate commerce”); United States v. Black, 125 F.3d 454, 468 (7th Cir. 1997) (affirming the district court’s “findings that the CSRA is a valid exercise of Congress’ plenary power under the Commerce Clause”); United States v. Bailey, 115 F.3d 1222, 1230 (5th Cir. 1997) (holding that the Child Support Recovery Act is constitutional because “[t]he payment of support obligation is indeed commercial”); United States v. Johnson, 114 F.3d 475, 480 (4th Cir. 1997) (holding the CSRA is a constitutional exercise of Congress’ commerce power to regulate a “thing in interstate commerce”); United States v. Parker, 108 F.3d 28, 30 (3d Cir. 1997) (holding “the Child Support Recovery Act falls within the scope of congressional authority under the Commerce Clause as a valid regulation of activity having a substantial effect upon interstate commerce”); United States v. Bongiorno, 106 F.3d 1027, 1034 (1st Cir. 1997) (holding that the Child Support Recovery Act is constitutional and does not violate the Sixth, Eighth, or Tenth Amendments); United States v. Hampshire, 95 F.3d 999, 1004 (10th Cir. 1996) (holding that “the CSRA does not violate the Commerce Clause”); United States v. Mussari, 95 F.3d 787, 791 (9th Cir. 1996) (holding that the CSRA is a valid exercise of Congress’ power under the Commerce Clause); United States v. Sage, 92 F.3d 101, 108 (2d Cir. 1996) (“[E]ven though no payments are ‘in’ interstate commerce when a prosecution is commenced[,] . . . the transaction the parent is obligated to consummate is . . . in interstate commerce.”).
36. Black, 125 F.3d at 458.
Circuit characterized child support as an interstate contract implicating commercial channels or instrumentalities.\textsuperscript{37} Other courts merely relied on congressional findings of substantial impact.\textsuperscript{38}

2. Drug Crimes. \textit{Lopez} challenges to federal drug charges all failed.\textsuperscript{39} Most of these charges were brought under provisions of Title 21 of the United States Code.\textsuperscript{40} For the most part, these cases simply rely upon congressional findings of the impact of the intrastate manufacture, distribution, and possession of controlled substances.\textsuperscript{41} Prosecution of the mere possession of drugs for personal use was also sustained, the theory being that possession is just one step removed from commerce and that is close enough.\textsuperscript{42}

3. Environmental Regulation. \textit{Lopez} challenges did not get very far here, either. In \textit{National Association of Home Builders v. Babbitt}, the D.C. Circuit sustained the application of the Endangered Species Act to protect the Delhi Sands Flower-Loving Fly, an endangered species that does not travel interstate, but which was in some danger of being harmed by the construction of a hospital for human beings.\textsuperscript{43} The appellate panel was divided in rationale, but ultimately relied upon the "substantial effects" element.\textsuperscript{44} Judge Sentelle, in dissent, did not

\textsuperscript{37} Mussari, 95 F.3d at 790.

\textsuperscript{38} See, e.g., Parker, 108 F.3d at 30 (noting that the court must give "substantial deference" to Congress' findings); Hampshire, 95 F.3d at 1004 (holding the CSRA to be a valid exercise of Congress' commerce power because "Congress clearly considered the economic impact of delinquent parents and, in its discretion, concluded that the impact substantially affects interstate commerce").


\textsuperscript{40} See, e.g., United States v. McDonald, 198 F.3d 235 (2d Cir. 1999) (challenge to 21 U.S.C. § 846); Tisor, 96 F.3d at 372 (challenge to 21 U.S.C. §§§ 841(a), 843(b) and 846); Leshuk, 65 F.3d at 1106 (challenge to 21 U.S.C. § 841(a)).

\textsuperscript{41} See, e.g., Tisor, 96 F.3d at 375 ("Congress expressly found that drug trafficking had a 'substantial effect' on interstate commerce.").

\textsuperscript{42} Leshuk, 65 F.3d at 1111-12 ("In passing the Drug Act, Congress made detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, 'have substantial and direct effect' upon interstate drug trafficking . . . ." (emphasis added)).

\textsuperscript{43} Nat'l Assoc. of Home Builders v. Babbitt, 130 F.3d 1041, 1043-44 (D.C. Cir. 1997).

\textsuperscript{44} See id. at 1049-54.
see how a wholly intrastate fly could have an interstate effect. In *United States v. Olin Corp.*, the appellate court rebuffed a *Lopez* challenge to the application of CERCLA, a federal law authorizing the EPA to order the clean up of contaminated sites. The fact that the contamination was entirely local made no difference, the appellate panel reasoned, because a failure of a local company to clean up hazardous material might lead other companies to do the same, and all that "opting-out" would substantially affect commerce.

4. Guns. Despite the topical overlap with the facts of *Lopez*, federal gun crime prosecutions were unabated, even those involving possession alone. Often, these statutes would have a jurisdictional element (e.g., making it a crime to possess a certain gun that moved in interstate commerce), but sometimes not. It did not seem to matter. The Ninth Circuit, for example, sustained the criminal prosecution of a juvenile for possession of a handgun without a jurisdictional predicate. Another aptly named case, *United States v. Rambo*, upheld a federal

45. *Id.* at 1064-66 (opining that "[a] class of activities can substantially affect interstate commerce regardless of whether the activity . . . is commercial or non-commercial").

46. 107 F.3d 1506, 1515 (11th Cir. 1997).

47. *See id.* at 1511 & n.11.


49. *See* 18 U.S.C. §§ 922(g), 922(q) (2000). Section 922(g) makes it illegal for certain criminals and other persons "to ship or transport in interstate commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Section 922(q) provides: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or otherwise affects interstate or foreign commerce at a place the individual knows, or has reasonable cause to believe, is a school zone." For cases in all eleven Federal Circuit Courts of Appeals upholding these statutes, see Nelson & Pushaw, supra note 39, at 139 nn.630-31.

50. *See* 18 U.S.C. §§ 922(o), 922(x) (2000). Section 922(o) makes it "unlawful for any person to transfer or possess a machinegun." Section 922(x) makes it illegal for a person to transfer to a juvenile or for a juvenile to possess a handgun or handgun ammunition. For cases upholding these statutes, see Nelson & Pushaw, supra note 39, at 139-40 nn.632-33.

51. *United States v. Michael R., 90 F.3d 340, 343-45 (9th Cir. 1996) ("Congress is in effect regulating interstate commerce by attacking both the supply and demand for firearms with respect to juveniles.").

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statute making it a crime simply to possess a machine gun.  

5. Access to Abortion Clinics. Congress passed the Freedom of Access to Clinic Entrances Act ("FACE"), making it a crime to use force or threats of force to intimidate consumers or providers of abortion and also to damage or destroy abortion facilities. While there were a few district court rumblings that FACE exceeded Congress' commerce power, FACE was sustained uniformly at the appellate level.

6. Carjacking. It is a federal felony to take a motor vehicle that has been transported in interstate commerce from a person with the intent to cause death or serious bodily harm. Under Lopez, multiple challenges were made to the statute without success. Cars are instrumentalities of commerce, said the courts, and Congress has power to protect them.

7. Robbery. Extortion and robbery are federally punishable under the Hobbs Act if these acts are directed at commodities in commerce. All this has meant is that the goods, once moved, are in interstate commerce.

52. United States v. Rambo, 74 F.3d 948, 951-52 (9th Cir. 1996) (stating that section 922(o) regulates commerce because the ban on machine gun possession is an "attempt to control the interstate market for machine guns by creating criminal liability for those who . . . facilitate an illegal transfer out of the desire to acquire mere possession").


56. See, e.g., United States v. Bird, 124 F.3d 667, 672-82 (5th Cir. 1997) (relying on "evident congressional purpose to ensure the availability of abortion-related services in the national commercial market"); see also Nelson & Pushaw, supra note 39, at 149-50.


58. See, e.g., United States v. Cobb, 144 F.3d 319, 320-22 (4th Cir. 1998); United States v. Romero, 122 F.3d 1334, 1339 (10th Cir. 1997); United States v. McHenry, 97 F.3d 125, 126-29 (6th Cir. 1996); United States v. Coleman, 78 F.3d 154, 158-60 (5th Cir. 1996); United States v. Hutchinson, 75 F.3d 626, 627 (11th Cir. 1996); United States v. Bishop, 66 F.3d 569, 575-90 (3d Cir. 1995); United States v. Robinson, 62 F.3d 234, 235-37 (8th Cir. 1995); and United States v. Oliver, 60 F.3d 547, 549-50 (9th Cir. 1995).

59. See Cobb, 144 F.3d at 322 (holding that cars are instrumentalities of commerce).

60. 18 U.S.C. § 1951(a) (2000) (making it a felony to "obstruct[, delay[, or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . ."]

61. See, e.g., United States v. Atcheson, 94 F.3d 1237, 1241-44 (9th Cir. 1996) (holding that an attempt to obtain out-of-state credit and debit cards is sufficient to qualify for prosecution under the Hobbs Act).
III. TAKING LOPEZ SERIOUSLY—AT LEAST A LITTLE.

Lopez did not go totally ignored. It was taken seriously in two instances related to arson and gender violence decided in the 1999-2000 Term. The federal arson statute punishes those who would destroy or attempt to damage or destroy by fire or explosive "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting commerce." The appellate courts generally upheld arson convictions either on the theory that the statute requires some nexus to interstate commerce or that the target buildings received utility, mortgage, insurance, or like services derived from interstate commerce. Where the targeted building was a private residence, however, two circuits required a stronger factual showing of substantial effect: the bare assertion that a house was heated by interstate gas, or that a computer was used in the home did not constitute a substantial effect.

In Jones v. United States, the Supreme Court agreed with this more sensible view in a unanimous opinion written by Justice Ginsburg. Jones involved interpretation of the federal arson statute as applied to a private residence, so the basic question was not whether Congress might reach a particular activity, but whether it actually had. That said, the common sense, almost facile rejection by the entire Court of attenuated "affecting commerce" claims in this statutory context is remarkable, given how little effect Lopez otherwise was having in the lower courts and the profound constitutional differences that remain on the Court over the scope of the commerce power. Justice Ginsburg observed that "[i]t

63. See, e.g., United States v. Grimes, 142 F.3d 1342, 1346 (11th Cir. 1998) (apartment building had "requisite interstate commerce nexus"); United States v. Sherlin, 67 F.3d 1208, 1212-13 (6th Cir. 1995) (college dormitory "was used in an activity affecting interstate commerce").
64. See, e.g., United States v. Hicks, 106 F.3d 187, 189 (7th Cir. 1997) ("[T]he supplying of gas to private homes is a major interstate activity."); United States v. McMasters, 90 F.3d 1394, 1398 (8th Cir. 1996) (residential rental property "received some utilities from out-of-state"); and United States v. DiSanto, 86 F.3d 1238, 1247-48 (1st Cir. 1996) (restaurant received utilities and food supplies from out-of-state).
65. United States v. Pappadapoulis, 64 F.3d 522, 528 (9th Cir. 1995) ("[A] private residence that merely receives natural gas from out-of-state sources is neither an article nor an instrumentality of commerce.").
66. United States v. Denalli, 73 F.3d 328, 330-31 (11th Cir. 1996), amended in part on reh’g, 90 F.3d 444 (1996) (holding a computer to be an insufficient link to interstate commerce where the computer was used to produce documents which were physically carried into interstate commerce, but the documents were not stored on the computer and the computer was not connected to phone lines and had no modem).
68. Id. at 854 ("Is such a dwelling place, in the words of § 844(i), ‘used in . . . any activity affecting commerce’?").
69. Id. at 854-55 ("The proper inquiry . . . is into the function of the building itself, and the determination of whether that function affects interstate commerce." (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part))).
70. See supra notes 35-61 and accompanying text.
71. See supra notes 25-33 and accompanying text.
surely is not the common perception that a private, owner-occupied residence is ‘used’ in the ‘activity’ of receiving natural gas, a mortgage, or an insurance policy.”

Noting that the residence was not used in any trade or business but as the center of family life, the unanimous Court posited that “hardly a building in the land would fall outside the federal statute’s domain” were the statute construed in the fashion suggested by the government. “Given the concerns brought to the fore in Lopez,” the Court believed it wise to avoid the seriously troubling “constitutional question that would arise” were the arson law to make “‘traditionally local criminal conduct’ . . . ‘a matter for federal enforcement.’”

Justices Stevens and Thomas, in concurrence, emphasized that there is a “kinship” between the Court’s “well-established presumption against federal pre-emption of state law,” and its reluctance to “‘believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this.’” The fact that Jones received a thirty-five year sentence when the maximum penalty for the comparable state offense was only ten years illustrated, said these Justices, “how a criminal law like this may effectively displace a policy choice made by the State.” Suddenly, it looked as if the Court meant what it said in Lopez. However, given the indeterminate nature of the “substantial effects” element, it is still not evident that we know—fully—what the Court is saying.

In United States v. Morrison, the Supreme Court also reminded the lower courts that it was serious in Lopez about finding some limit to Congress’ regulatory authority under the Commerce Clause. At issue in Morrison was a single section of the Violence Against Women Act of 1994 (VAWA)—specifically, section 13981. This section purported to create a private cause of action for compensatory and punitive damages as well as injunctive and other appropriate relief against any “person . . . who commits a crime of violence motivated by gender.” In December 1995, Christy Brzonkala, a former student at Virginia Polytechnic Institute (“Virginia Tech”) sought to apply this section to two other

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72. Jones, 529 U.S. at 856.
73. Id. at 857.
74. Id. at 858 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)).
75. Id. at 859 (Stevens, J., concurring) (quoting United States v. Altobella, 442 F.2d 310, 316 (7th Cir. 1971)).
76. Id. (Stevens, J., concurring) (citations omitted).
77. See United States v. Lopez, 514 U.S. 549, 567 (1995) ("Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further." (citations omitted)).
79. Id.
Virginia Tech students and football players, Antonio Morrison and James Crawford. 81 Brzonkala filed her VAWA case in 1995, alleging that Morrison and Crawford forcibly raped her in a dormitory room a year and three months earlier during her freshman year. 82 Before she filed her federal lawsuit, the university discipline system brought no charges against one of the players and eventually suspended a light punishment of the other. 83

Christy Brzonkala was obviously ill-treated by her university, and she fared even less well in federal court. Reviewing the Court's decision in Lopez, the district court found section 13981 to exceed Congress' commerce power. 84 Like the Gun-Free School Zones Act, 85 the court found that section 13981 regulated neither the channels of interstate commerce nor its instrumentalities. 86 In addition, the district court found that section 13981 was directed at a non-economic activity without any jurisdictional requirement limiting its application to particular acts that substantially affect interstate commerce. 87 Nor, said the district court, could the section be sustained under Congress' section 5 enforcement power because it did not remedy violation of the Equal Protection Clause by the states, or the private conduct of those acting under state law. 88 A divided panel of the Fourth Circuit reversed, 89 but the full circuit reinstated the district court verdict, invalidating the statutory section in a comprehensive opinion. 90

The Supreme Court affirmed. 91 Summarizing Lopez, the Court noted that this case arose in the "substantially effects" portion of that analysis, implicating neither channels nor instrumentalities of commerce. 92 To determine whether a substantial effect exists, the Court emphasized four inquiries: (1) Does the statute have anything to do with commerce or any sort of economic enterprise? 93 (2) Does the statute have a jurisdictional element that demonstrates how the regulated conduct or product is connected to, or has an effect upon, interstate commerce? 94 (3) Has Congress provided specific legislative findings with respect to (1) and (2) above? 95

82. Id. at 781-82.
83. Id. at 782.
84. Id. at 801.
86. Brzonkala, 935 F. Supp. at 786.
87. Id. at 791-92.
88. Id. at 800-01 ("Clearly VAWA does not undo or stop the violations in the States' criminal justice systems.").
92. Id. at 609.
93. Id. at 610.
94. Id. at 611-12.
95. Id. at 612 ("[T]he existence of such findings may 'enable us to evaluate the legislative judgment that the activity substantially affect[s] interstate commerce, even though no such substantial effect is visible to the naked eye.' ")(citations omitted)).
and (4) Are the Congressional arguments in support of regulation based upon more than an attenuated concern with national or economic productivity? In raising these questions, the Court made it apparent that a statute that imposes a criminal sanction on non-economic behavior is not likely to be within the reach of the Commerce Clause. Separating economic from non-economic behavior remains difficult for the Court, but where neither the subject-matter, actors, nor conduct are economic in nature, a statute is certainly suspect. Finally, legislative findings are not a constitutional requirement, but even if present, they will not sustain a law based upon compound inferences of substantial effect.

Having laid out the relevant questions, the Court found section 13981 to be beyond the scope of the commerce power. Gender crimes are not, in any sense, an economic activity. The Court does not rule out the regulation of non-economic activity under the Commerce Clause, but it does declare that no prior case has ever reached intrastate activity that was non-economic. There was also no jurisdictional element accompanying section 13981. The Court cited with approval appellate decisions that had sustained other sections of the VAWA that made it a federal crime to cross state lines with the intent to injure one's spouse. These sections, the Court observed, were sustained because they implicated channels of commerce.

Acknowledging that there were page upon page of congressional findings that commerce was substantially affected by gender-motivated violence, the Court nevertheless proclaimed the ultimate determination to be a judicial one. The Court said it could discern no limit in Congress' reasoning that would preserve a meaningful distinction between that which is local and that which is national. There is simply no "but-for" relationship between the violent assault upon Christy Bronzkala and interstate commerce. The Court cited United States v. Lankford, 196 F.3d 563, 571-72 (5th Cir. 1999), which upheld § 2261 under a Commerce Clause challenge.

96. Id.
97. Id. at 610-11.
98. Id. at 611.
99. Id. at 612.
100. Id. at 613.
101. Id.
102. Id.
103. Id.
104. Id. at 613 n.5 (discussing 18 U.S.C. § 2261(a)(1)). The Court cited United States v. Lankford, 196 F.3d 563, 571-72 (5th Cir. 1999), which upheld § 2261 under a Commerce Clause challenge.
105. Morrison, 529 U.S. at 613 n.5.
106. Id. at 614-15.
107. Id. at 615.
108. See id.
always been the province of the States."\(^{109}\)

There remains something unsatisfying about the Court's rationale, though not its outcome, in *Morrison*. First, commerce and economic activity are not synonyms. Commerce, for example, more easily relates to trade, while economic activity presumably encompasses all activities leading up to trade, including the manufacture and the working conditions of those employed in the making of goods and services to be traded.\(^{110}\) This is, of course, Justice Thomas' position.\(^{111}\) It has the virtue of being historically sound, but the vice of being modernly unworkable. In truth, however, Justice Thomas need not abandon history or original understanding, but merely refine it in light of even deeper first principles. The formal distinction between pre-commercial and commercial activities drawn by the pre-New Deal Court,\(^{112}\) it will be contended below, was merely a judicially-created shorthand for preserving the principle of the Virginia Resolution.\(^{113}\) That the shorthand failed does not mean the principle is unsound.

Second, the past cases are not as agreeably brushed aside as the majority in *Morrison* would have us believe.\(^{114}\) Did *Wickard v. Filburn*\(^{115}\) really relate to intrastate economic activity as the Court claims?\(^{116}\) If the home consumption of wheat is economic activity, what is not? Beyond this, some of the Court's factors seem like makeweights, at best. What good, for example, is a jurisdictional element in terms of the Court's desire to preserve federalism (and through it, political accountability)?\(^{117}\) As Justice Breyer points out in dissent, and the

\(^{109}\) *Id.* at 618 (citing Cohens v. Virginia, 6 Wheat. 264, 426, 428 (1821)).

\(^{110}\) *See generally* United States v. E.C. Knight Co., 156 U.S. 1 (1894).

\(^{111}\) "No distinction is more popular to the common mind, or more clearly expressed in economic or political literature, than that between manufacture and commerce. Manufacture is transformation-the fashioning of raw materials into change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it should also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacturer, but also agriculture, horticulture, stock raising, domestic fisheries, mining in short, every branch of the human industry."

\(^{112}\) *Id.* at 14 (quoting Kidd v. Pearson, 128 U.S. 1, 20, 21 (1888)).

\(^{113}\) *See Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (arguing that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases").

\(^{114}\) *See E.C. Knight Co.*, 156 U.S. at 16-17 (drawing distinction between manufacture and commerce).

\(^{115}\) *See infra* text accompanying notes 131-35.

\(^{116}\) *See Morrison*, 529 U.S. at 610-11.

\(^{117}\) 317 U.S. 11, 127-29 (1942) (holding that the consumption of home-grown wheat substantially affects interstate commerce).

\(^{118}\) *See id.*, at 659 (Breyer, J., dissenting) ("Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being.").

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Court's own footnote reference to other sustainable VAWA provisions suggests, it would seem that Congress can easily re-enact section 13981, limiting the crime to those who have crossed state lines or employed a device that moved in interstate commerce in order to reach noncommercial behavior. Or will the redrafting turn out to be that easy? The relative weights of the Court's factors are decidedly unclear. We now know that congressional findings count for little, so would a jurisdictional element really be enough? Or is it only adequate where the activity is economic? And why so little scrutiny of the channels and instrumentality rationales? These rubrics have the potential of authorizing the very same attenuated, inference-laden regulations as the cumulative or substantial effect principle.

There are other objections that can be raised to the Morrison rationale, but these are more ideological than constitutional. Justice Souter, for example, asserts that there are no traditional state functions. True, Garcia v. San Antonio Metropolitan Transit Authority short-circuited the Court's attempt to draw the constitutional distinction along these lines under the Tenth Amendment, but that hardly means all judicial efforts to discern the scope of enumerated power in service of principles of federalism are pointless. The dissenting voices also echo the concern just stated over the workability of formal categories. One suspects, however, that the dissenters are more interested in scoring debating points by jeering the past judicial efforts to distinguish between direct and indirect effects or to differentiate manufacture from commerce, than in reviving any true or principled basis for those earlier judicial failures. Justice Souter states bluntly that there are simply two conceptions of the commerce power as either categorically limited or plenary. To the dissent, the Court lost its right to categorically choose between these old rivals in 1937 when it accepted the New Deal. A pragmatic summary of these objections often gets stated in terms of Congress' superior institutional competence. Justice Souter, for example, posits that it is not the

118. See id. at 613 n.5.
119. See id. at 659 (Breyer, J., dissenting) ("[I]n a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs.").
120. See id. at 614-15.
121. Id. at 645-52 (Souter, J., dissenting).
122. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 545-47 (1985) (rejecting as "unsound" and "unworkable" the distinction between "traditional" or "integral" governmental functions for purposes of determining immunity of state functions under the Commerce Clause).
123. See Morrison, 529 U.S. at 643-44 (Souter, J., dissenting).
124. Id. at 640 (Souter, J., dissenting).
125. Id. at 644 (Souter, J., dissenting).
business of the Court to determine if a given activity "substantially effects" commerce. Rather, Congress takes testimony, makes findings, and if those are nominally rational, the Court's work is finished. Certainly, this makes everything very simple, but one wonders if it is not also the constitutional abdication of the judicial function.

IV. IS THERE A BETTER RATIONALE AND WILL THE COURT FIND IT?

Justice Thomas posits that Lopez and Morrison are steps in the right direction, but still not a "jurisprudence . . . consistent with the original understanding . . ." Thomas remains especially critical of the "substantial effects" test as being inherently inconsistent with the idea of enumerated power. A good start toward honoring this principle might be to stop skirting the issue of definition with vague terminology like "economic activity" and substantively define commerce. In so doing, the definition must transcend the unworkable categories of the past while still drawing upon the historical intent to limit legislative power. In other words, the definition must be both made and historically informed. Substantial scholarly work lends support for a conception of commerce as market-oriented, gainful activity, including all of its preparatory (manufacturing and working condition) stages, relationships (labor contracts), and instrumentation (insurance and financing). Lying outside of this would be noncommercial subjects (most crimes, for example) or non-market oriented activities (matters related to morality and social policy).

But the validity of regulation cannot be sustained in light of commercial definition alone. The definition should also reflect a principled understanding of the purpose of the original enumeration of the commerce power in Article I: namely, Madison's proposition that the national government was to have "compleat authority in all cases which require uniformity." This principle is

126. Id. at 628 (Souter, J., dissenting).
127. Id. (Souter, J., dissenting).
128. Id. at 627 (Thomas, J., concurring).
129. Id. (Thomas, J., concurring).
130. For a particularly helpful exploration of the possibility of a historically anchored definition, see Nelson & Pushaw, supra note 39. Nelson and Pushaw supply sound advice on the substantive definition of commerce, but deliberately decline to link that definition to the federalism principle of the Virginia Resolution. Id. at 108-19. This omission arguably undermines the definitional effort itself, and the understanding of its impact on existing federal law. Professor Randy Barnett disputes the "gainful activity" scope of the Nelson and Pushaw definition, finding the founding documents to support only a more literal "trade-only" definition of commerce and attributing the Nelson and Pushaw understanding to less representative or reliable founding commentary and errant secondary sources. Professor Barnett's textual exegesis is impressive, but respectfully, incomplete without accounting for how the powers listed in Article I, section 8 were intended as a nonsubstantive restatement by the Committee on Detail of the guiding principle derived from the Virginia Resolution. See generally Randy E. Barnett, Commerce 68 U. CHI. L. REV. 101, (2001); Randy E. Barnett, Necessary and Proper, 44 UCLA L. REV. 745, 775 (1997).
131. THE WRITINGS OF JAMES MADISON 345 (G. Hunt ed. 1904)
derived from the sixth of the Virginia Resolutions of 1787, approved on July 17, 1787.\textsuperscript{132} Focusing on the Resolution is helpful because it moves the Court beyond the past or present incomplete judicial efforts aimed at identifying the scope of enumerated power with intractable commerce/noncommerce lines.\textsuperscript{133} In particular, a Resolution-based approach gives added weight to the overlooked phraseology “among the several states.”\textsuperscript{134} Under the Virginia Resolution, “among the several states” was a synonym for power directed at either vindicating a national commercial interest—that is, one held by the nation as a whole like interstate movement and transportation, communication, or national defense—or a commercial subject that cannot be addressed by an individual state without undermining the policies of other states.\textsuperscript{135}

Dividing what is federal from what is local in reliance upon principles of national interest or state incapacity is too vague and manipulable a standard to sustain such division. In the analytical terms of Dean Kathleen M. Sullivan, the effort is too much standard and not enough rule.\textsuperscript{136} There is truth to this objection, but it is a truth that must be confessed about virtually any exercise of power in the hands of an imprudent or unrestrained office holder. The real question is whether the principles of the Virginia Resolution assist the federal judiciary in the preservation of constitutional structure against such excess. The answer is in the affirmative. In this respect, the specific clauses of the Resolution are rightfully the kernel of judicial inquiry, asking: (1) whether the states are severally incompetent; (2) whether the harmony of the United States may be interrupted by individual state legislation; and (3) whether the interest being

\textsuperscript{132} The sixth resolution stated that the National Legislature ought to """"legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent,"" or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."" RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1778 AS REPORTED BY JAMES MADISON 389 (Charles C. Tansill, ed., 1989) [hereinafter MADISON'S JOURNAL].

\textsuperscript{133} In this respect, refocusing on the Resolution faces the truth of the following proposition: "Congress' criteria for assessing the necessity for federal intervention do not in fact seem to be especially well-defined, and it is certainly far from clear that these criteria entail a prior assessment of the state's own ability, acting alone or in concert, to achieve the objectives ...." George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 COLUM. L. REV. 331, 409 (1994) (advocating subsidiarity principle of legislative as guide for European community still seeking to establish its basic federal-state equilibrium).

\textsuperscript{134} See U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{135} See MADISON'S JOURNAL, supra note 132, at 389.

\textsuperscript{136} Kathleen M. Sullivan, The Supreme Court, 1991 Term-Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22, 57-69 (1992) (outlining the basic rules versus standards debate and discussing the advantages and disadvantages of each approach). According to Dean Sullivan, rules limit discretion, but standards confer it, and specifically "tend[] to collapse decisionmaking back into the direct application of the background principle or policy ...." Id. at 58-59.
legislated affects the general interests of the Union. As will be suggested below, an honest appraisal of the first inquiry would find most crime to be well within the individual prosecutorial competence of the states. An apt example is the arson that was the subject of the Jones litigation, already discussed. The second consideration concerning harmony is essentially a pragmatic inquiry into whether multiple outcomes provide more confusion than resolution. Courts regularly undertake such inquiry in matters of preemption, and while such questions can be complex, many are not. Again, the arson of a single, private residence in Jones is illustrative because that case is easily distinguished from one where the arson destroyed property overlapping two jurisdictions or servicing many out-of-state interests, such as a regional, national, or international airport. Finally, federal legislation may be appropriate if it advances the "general interests of the Union." This third strand is best informed by the Court's seminal decision in Gibbons v. Ogden, where the Court struck down a New York law granting a monopoly over steamship travel to Robert R. Livingston and the inventor of the steamboat, Robert Fulton.

The prevailing counsel in Gibbons was Daniel Webster, who explained vividly how the "general interests of the union" in navigation were being undermined in the waters surrounding New York City in 1824. Webster argued:

By the law of New-York, no one can navigate the bay of New-York, the North River, the Sound, the lakes, or any of the waters of that State, by steam vessels, without a license from the grantees of New-York, under penalty of forfeiture of the vessel.

By the law of the neighbouring State of Connecticut, no one can enter her waters with a steam vessel having such license.

By the law of New-Jersey, if any citizen of that State shall be restrained, under the New-York law, from using steam boats between the ancient shores of New-Jersey and New-York, he shall be entitled to an action for damages, in New-Jersey, with treble costs against the party who thus restrains or impedes him under the law of New-York! This act of New-Jersey is called an act of retortion against the illegal and oppressive legislation of New-York; and seems to be defended on those grounds of public law which justify reprisals between independent States.

137. See Madison's Journal, supra note 132, at 389.
138. See infra notes 161-69 and accompanying text.
139. See supra notes 67-76 and accompanying text.
140. See generally, Jonathan D. Varat, Federalism and Preemption in October Term 1999, 28 Pepp. L. Rev. 749 (2000) (noting that the number of alternative and combined approaches to the preemption problem undercut the accuracy of any simplistic dichotomy between state-power and federal-power orientations).
141. See supra text accompanying notes 67-76.
143. See id. at 4-5 (Daniel Webster, for the Plaintiff).
It would hardly be contended, that all these acts were consistent with the laws and constitution of the United States. If there were no power in the general government, to control this extreme belligerent legislation of the States, the powers of the government were essentially deficient, in a most important and interesting particular.\textsuperscript{144}

It is instructive that Webster spent little time trying to do what the Court has belabored ever since, trying to give definition to the term "commerce."\textsuperscript{145} Webster termed it vain to look for a precise or exact definition.\textsuperscript{146} That, he said, was not the way the Constitution proceeded.\textsuperscript{147} Instead, the extent of the power was to be measured by its object.\textsuperscript{148} And what was the object or prevailing motive of the commerce power? "[T]o rescue [the general union] from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law."\textsuperscript{149} As evil as both gun possession at a school or gender violence surely is, neither suggest the federal government is needed to act to rescue national, general interests of the type alluded to by Webster.

Webster thus sought to characterize an appropriate exercise of commerce power as a corollary to other constitutional provisions that are commonly accepted as demanding federal or general action.\textsuperscript{150} The most prominent and uncontested example is perhaps the conduct of foreign relations.\textsuperscript{151} In this respect, Webster made reference in his oral argument in \textit{Gibbons} to motions in Congress as early as 1781, declaring the general and national interest in the sole and exclusive power of regulating trade with foreign nations and as between the states.\textsuperscript{152} And bringing us back to the Virginia Resolutions, Webster observed how their great and only object was to devise a means for the uniform regulation of trade.\textsuperscript{153}

In making these arguments, Webster did not envision a commerce power

\begin{itemize}
  \item \textsuperscript{144} \textit{Id.} (alteration in original) (emphasis added).
  \item \textsuperscript{145} \textit{Id.} at 10-11.
  \item \textsuperscript{146} \textit{Id.} at 10.
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} at 10-11 ("In conferring power, it proceeded in the way of \textit{enumeration}, stating the powers conferred, one after another, in few words; and, where the power was general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power.").
  \item \textsuperscript{149} \textit{Id.} at 11.
  \item \textsuperscript{150} \textit{Id.} at 10-12.
  \item \textsuperscript{151} \textit{Id.} at 11.
  \item \textsuperscript{152} \textit{Id.} at 12.
  \item \textsuperscript{153} \textit{Id.} ("The entire purpose for which the delegates assembled was to devise a means for the uniform regulation of trade.").
\end{itemize}
without limit. Indeed, as noted, the limit is implicit in its likeness to foreign policy or international matters to which the states are disabled. But the commerce power was not to consume the states’ separate sovereignty; rather, the Court was to interpret the power to keep the interests of the two governments “as distinct as possible. The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress.”

Chief Justice Marshall was persuaded. Marshall construed commerce to include navigation, which on its face seems a non-sequitur to commerce. It is sufficiently strained to trouble every beginning law student thereafter encountering Gibbons. But the oddity drops away when navigation is linked not to commercial activity per se, but to an interest that must be held by the union of the states in order to avoid imperiling national interests. Modernly, of course, Congress has construed “commerce” so expansively that until the statutory overruling in Dewey Jones, it even included the local arson of a private residence. One cannot blame either Marshall or Webster for this mistaken and enlarged use of federal power, however. Indeed, Marshall’s decisional words directly connect the scope of the commerce power to the concerns of the Virginia Resolution and, in so doing, state the faithful constitutional limit. He wrote:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Marshall put into words what Gunning Bedford, Jr., meant when he said “[N]o state [is] separately competent to legislate for the general interest of the Union.” We are the ones who have forgotten this principled limitation. What is a national interest is not synonymous with a “very important” political topic, even as both Congress and the general population often mistake the commerce power to reach any subjectmaking headlines. Rather, a national interest is one that can only be exercised or defended by the nation in its entirety or alternatively

154. Id.
155. Id. at 17.
156. See id. at 76 (“The correct definition of commerce is, the transportation and sale of commodities.”).
157. See supra notes 67–76 and accompanying text.
159. MADISON’S JOURNAL, supra note 132, at 390.
one that affects the commercial well-being of a state, but cannot be addressed by it, without the cooperation of neighboring states or the union as a whole.

The cumulative or substantial effects element of modern commerce clause analysis is a mechanical, overbroad formula that obscures, rather than illustrates, the principle of the Virginia Resolution. It should be abandoned. To ask whether an individual action "substantially affects" interstate commerce is to ask either a wrong question or a non-question. A principled inquiry by contrast seeks to identify the presence or absence of a commercial interest that can only be claimed by the nation as a whole or that must be addressed nationally because of demonstrated state incapacity. Demonstrated state incapacity must be theoretically as well as practically grounded, not merely rhetorically asserted by a group of state officials that have grown accustomed to federal direction and subsidy. In this respect, incapacity should mean that individual state regulatory activity would actually be defeated by competing state regulatory policy—say, for example, where a minimum wage in one state would be undermined by virtue of the migration of private labor to a neighboring state without such policy.  

A standard informed by the Virginia Resolution contrasts dramatically with the congressional considerations which purported to create a private cause of action under the VAWA. Despite assertion in congressional testimony, there is no logical reason why individual states could not adopt rape shield laws or harsher civil or criminal penalties for violent assaults on the basis of gender animus. People tend to migrate where personal safety is better secured, not the converse. So long as states legislate compatibly with federal individual right protections, such as the guarantee of equal protection, our federalist structure leaves the enactment of criminal law, including assault, rape, or illegal drug or gun possession as state matters. The right to be protected from such harms is an individually asserted and held claim, not a national one. So too, most education

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160. A principled commerce clause analysis would not accept state incapacity without close scrutiny, however. Empirical literature indicates that the ability of citizens to vote with their feet and escape redistributionist policies is not perfect. Psychological and financial attachments make exit costly, and thus by the same token, also create some leeway for individual state policy without the necessity of federal involvement. See generally, Bhajan S. Grewel, Economic Criteria for the Assignment of Functions in a Federal System, in ADVISORY COUNCIL FOR INTER-GOVERNMENT RELATIONS, TOWARDS ADAPTIVE FEDERALISM: A SEARCH FOR CRITERIA FOR RESPONSIBILITY SHARING IN A FEDERAL SYSTEM 1, 28 (1981) (criticizing the argument that the national government is better apt to achieve income redistribution than the states because "mobility tends to be less as the size of jurisdictions increases"); see also L. F. Dunn, Measuring the Value of Community, 6 J. URB. ECON. 371, 380 (1979) (discussing a migration model which measures the economic value of community by showing "the size of compensation that would be necessary to induce workers to relocate"). In addition, some scholars argue that the human charitable impulse is fulfilled by government redistribution, and at least to some extent, is a positive good which will not prompt out-migration. Mark V. Pauly, Income Redistribution as a Local Public Good, 2 J. PUB. ECON. 37 (1973).
and land use policies are of a state character because state capacity for addressing these issues is ample, and not subject to contradiction by the actions of surrounding states. That trans-boundary air and water resources must be protected on a national level does not deflect from this. Air and water resources rarely inhabit one state. It is the common nature of the resource that makes these environmental questions equivalent to the matter of the national interest in military defense.

This principled approach should assist the Court in resisting novel claims of unlimited or inherent federal power as it goes about eliminating old ones. At a minimum, it should help the Court recognize that not all “instrumentalities” or “channels” are either being used for commercial purposes or involve either a national interest or an interest over which the individual states are incompetent. For example, the carjacking of the family car is a non-commercial matter fully capable of being addressed by the laws of the states, as is the nonpayment of child support. In other words, the commerce power understood in terms of the Virginia Resolution encourages the Court not to facilely assume that the mere presence of an interstate instrumentality or channel is a sufficient justification for federal regulation. For a commercial activity to be within the federal ambit it must implicate either an interest held by the nation as a whole or troubled by state incapacity. Congress might make it a crime to impede someone from actually traveling in interstate commerce in order to obtain an abortion or some other service, but that is because no state can capably address impediments occurring in more states than one. By contrast, localized harassment or obstruction are matters for the local police under local law. Similarly, burglary and theft that is not truly occurring within a channel of commerce ought to be reserved for state prosecution.

From a principled perspective, the definition and prosecution of local, intrastate crime is reserved to the states. Notwithstanding the present bulk of the U.S. Code, this should hardly be a surprise because the states’ primary role in the definition of crime is a proposition acknowledged in The Federalist Papers and inherent to the Tenth Amendment to the Constitution. Moreover, returning to a principled definition of the commerce power echoes the Court’s own assessment

161. See The Federalist No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton writes: “There is one transcendent advantage belonging to the province of state governments ... I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.” Id. For the federal sovereign to appropriate this power in an absolute fashion would certainly upset this “most attractive source of popular obedience.” Id.

162. The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. In the Federalist Papers, Madison states:

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. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

that "[t]he States possess primary authority for defining and enforcing the criminal law."\textsuperscript{163} This is profoundly related to political accountability. The "formulation, execution, or review of broad public policy . . . go to the heart of representative government."\textsuperscript{164} This direct and primary political accountability reserved for the states would become illusory, however, "[w]here the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities."\textsuperscript{165} Yet, this is exactly what has happened, especially since the Court's decision in \textit{Perez v. United States} upholding the federal prosecution of local loan sharking.\textsuperscript{166} Justice Stewart in dissent foresaw the consequence of such unprincipled commerce determination, writing:

In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting . . . . I cannot escape the conclusion that this statute was beyond the power of Congress to enact.\textsuperscript{167}

Channels and instrumentalities also ought not be used--as the cumulative or substantial effect principle was--to reach noncommercial subject matter beyond local crime. The quintessential example of non-commercial, non-criminal overreach is \textit{Champion v. Ames}, in which the Court used the interstate movement of lottery tickets to restrict lotteries, not because the tickets jeopardized interstate channels or instrumentalities in any way, but rather to express moral disapproval for gaming.\textsuperscript{168} Such moral judgment is a local matter. Even respected advocates

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166. See Perez v. United States, 402 U.S. 146, 157 (1971) ("L]oan sharking in its national setting is one way organized interstate crime . . . syphons funds from numerous localities to finance its national operations.").
167. Id. at 157-58 (Stewart, J., dissenting).
\end{tabular}
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of expansive interpretations of the commerce power have conceded:

[T]he cases most out of harmony with the historical approach to the commerce clause are not those holding federal legislation invalid, but those upholding federal statutes regulating movement across state lines where no true ‘commerce’ was present at all. The fact that automobile thieves or persons bent on private immorality cross state lines does not render their activity commercial. 169

Because of the state action limitation on the equal protection guarantee, Congress has long used the commerce power to reach private discrimination on the basis of race. 170 Any reformulation of commerce authority thus runs the risk of jeopardizing important civil rights guarantees. The principled reformulation suggested here should be capable of avoiding this, however. For example, federal laws banning discrimination at public accommodations, such as motels and restaurants, might easily be justified under the commerce clause as the vindication of an interest (color-blindness) held by the nation as a whole. Were this to be at all uncertain, an alternative and more direct approach would be to uncouple commerce and civil rights by reaching private racial discrimination directly under a generous, Harlan-like construction of the Thirteenth Amendment 171 or perhaps under a revived conception of citizenship under the Fourteenth Amendment privileges or immunities clause. 172

Finally, it should be obvious that a better Commerce Clause rationale requires enhanced judicial scrutiny. Structural provisions like the commerce clause are as important for maintaining individual liberty (and as already mentioned, political accountability) as the Bill of Rights 173 Judicial review of asserted federal power should thus approximate intermediate scrutiny rather than deferential rational basis. The rational basis standard understates the risk of excessive federal action.

necessary to protect the country at large against a species of interstate commerce which... has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right.

Id. 169. Robert L. Stern, That Commerce Which Concerns More States Than One, 47 HARV. L. REV. 1335, 1355 (1934). Stern advocates that the Court should allow “federal control of those business transactions which occur in and concern more states than one and which the individual states are incompetent to control.” Id. at 1366.

170. See, e.g., Mitchell v. United States, 313 U.S. 80 (1941) (prohibiting discrimination on interstate railroads under the interstate bus segregation statute to “protect national travel”).
171. See The Civil Rights Cases, 109 U.S. 3, 36 (Harlan, J., dissenting) (concluding that the Thirteenth Amendment confers upon Congress the power to prohibit racial discrimination).
173. See U.S. CONST. amend. I-X.
At the time this paper was in preparation, the Court had taken up the scope of the commerce power yet again. In Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC"), a consortium of Illinois towns went looking for a spot to dump their trash. They found one—a former gravel pit—but it required a certain amount of filling of rain water ponds comprising 17.6 acres out of a 533 acre parcel [or in a 410 acre landfill area]. The Army Corps of Engineers denied permits (required under the Clean Water Act) for the filling once it was learned that migratory birds visit the ponds. The Illinois towns argued that Congress lacked authority to reach the intrastate landfill activity "based on the presence of migratory birds alone." The district and appellate courts thought otherwise and upheld the decision of the Army Corps of Engineers, but the Supreme Court reversed.

Not surprisingly, the case largely turned on statutory interpretation. The Corps has authority to regulate the discharge of fill material into "navigable waters," which are defined in law as the "waters of the United States, including the territorial seas." In the earlier case of United States v. Riverside Bayview Homes, Inc., the Court held that the Corps had jurisdiction over wetlands actually abutting a navigable waterway. While that decision gave little emphasis to the adjective "navigable," the Court in SWANCC said, "it is one thing to give a word limited effect and quite another to give it no effect whatever." The statutory construction is not unrelated to constitutional consideration, especially because the interpretation adopted by the Corps was at the "outer limits of Congress' power." The Court remarked that the concern was heightened because the proffered interpretation would alter the federal-state balance and permit "federal encroachment upon a traditional state power."

174. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 847 (7th Cir. 1999).
175. Id. at 847-48.
177. SWANCC, 191 F.3d at 847.
178. Id. at 849.
179. See id. at 853 (affirming the decision of the district court, 998 F. Supp. 946 (N.D. Ill. 1998), and holding that "the decision to regulate isolated waters based on their actual use as a habitat by migratory birds is within Congress' power under the Commerce Clause . . . ").
182. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985) (holding that "a definition of 'waters of the United States' encompass[es] all wetlands adjacent to other bodies of water over which the Corps has jurisdiction").
183. SWANCC, 121 S. Ct. at 683.
184. Id.
185. Id.
In dicta, the Court commented upon the scope of the Commerce Clause, remarking that “[t]wice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.” Referencing *Lopez* and *Morrison*, the Court analyzed the migratory bird rule under the “substantial effects” aspect and found the rule wanting. Helpfully, the Court remarked that application of this catch-all element demands that the Court “evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.” While this unfortunately perpetuates the mistaken “substantial effects” inquiry, the Court’s observation is somewhat clarifying because the manner in which the case was argued and decided below seemingly allowed the Corps to obscure that it was seeking to regulate local land use activity by focusing on the hypothesized, recreational commerce relating to migratory birds. But as the Court observed: “[T]his is a far cry, indeed, from the ‘navigable waters’ and ‘waters of the United States’ to which the statute by its terms extends.”

Regulatory protection of migratory birds might be done pursuant to international treaty or as a condition on the receipt of federal money. Additionally, nothing in *SWANCC* precludes it from being done under the commerce power as well, if there is some statutory basis to think that Congress had actually made that choice in law. Nevertheless, to purport to reach the subject via the circuitous route of the “substantial effects” test distorts the commerce power and correspondingly reduces political accountability. Construction of an intrastate landfill is intra-state land use regulation, and local officials should (and usually do) get an earful from constituents about such matters. If Congress is going to displace state and local authority, it should be because there has been an explicit, national debate identifying an overriding national interest or

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186. *Id.*
187. *Id.* at 683-84.
188. *Id.* at 683.
189. *Id.* Courts have held that term “navigable waters” includes any waters, though not exactly navigable itself, that flow into a navigable waterway. *E.g.*, United States v. Eidson, 108 F.3d 1336 (Fla. 1997) (holding that ditches, canals, streams, and creeks can qualify as “waters of the United States”).
190. See *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920) (“Valid treaties, of course, are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.” (internal citations omitted)).
191. See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (holding that Congress has the power to fix the terms of monetary disbursements so long as those terms do not induce states to engage in unconstitutional activities).
192. *SWANCC*, 121 S. Ct. at 684 (“[W]e find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here.”). Four Justices in dissent thought this could be inferred by congressional acquiescence to the migratory bird rule. *Id.* at 685 (Stevens, J., dissenting). The House in 1977 unsuccessfully sought to amend the Clean Water Act to make it plain that navigable waters could not include isolated ponds and the like. *Id.* at 690 (Stevens, J., dissenting). However, as the Court pointed out, “Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.” *Id.* at 681 (quoting *Central Bank of Denver, v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (internal citations omitted)).
state regulatory incapacity. There may be a national interest in the protection of migratory birds, but this is not easily discerned from a statute aimed largely, if not entirely, at navigable waters. If the states are incapable of preserving sufficient local habitats to address the interstate demand for the “hunting, trapping, and observing” of birds—which were the interests identified by the Seventh Circuit to sustain a federal role—that case needs to be made, not inferred.

The last point warrants emphasis. Identifying or claiming anything as a nationally-held interest requires demonstrating—not simply inferring—actual state incapacity. As Gunning Bedford pointed out, the elements of the Virginia Resolution are mutually reinforcing. To not see the interrelationship of the Framers’ concerns leads to the complacent acceptance of an over-extended commerce power and makes it more difficult to separate that which is local from national.

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193. SWANCC v. U.S. Army Corps of Eng’rs, 191 F.3d 845 (7th Cir. 1999).
194. Cf., SWANCC, 121 S. Ct. at 695 (Stevens, J., dissenting).
195. MADISON’S JOURNAL, supra note 132, at 389-90. Bedford added the language to legislate for the “general interests of the union,” which he explained simply meant to emphasize that states were separately incompetent to legislate on such subjects. Edmund Randolph, Governor of Virginia and chief sponsor of the original “separate incompetence” language, was troubled by Bedford’s proposal.

Mr. RANDOLPH. This is a formidable idea indeed. It involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police. The last member of the sentence [regarding interrupted harmony] is also superfluous, being included in the first [regarding general interests].

Mr. BEDFORD. It is not more extensive or formidable than the clause as it stands: no State being separately competent to legislate for the general interest of the Union.

Id. Bedford’s language carried, over Randolph’s objections, and it was this modified vision of legislative power that the Committee of the Whole referred to a Committee of Detail, on July 26th. 1 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 221 (2d ed. 1836). Randolph was on that Committee, which promptly converted that broad Virginia Resolution into the specific list of enumerated powers found in Article I, § 8. Id. at 221-23. Bedford did not object to the replacement of his wording with a specific list of enumerated powers, presumably because the list accomplished all that Bedford had intended. Neither Bedford nor any other Founder intended the Commerce Clause to become a “sweeping clause” that could redraw the federal-state balance upon Congressional enactment. As Robert L. Stern has commented:

Significantly, the Convention did not at any time challenge the radical change made by the committee [of detail] . . . . It accepted without discussion the enumeration of powers made by a committee which had been directed to prepare a constitution based upon the general propositions that the Federal Government was “to legislate in all cases for the general interests of the Union . . . and in those to which the states are separately incompetent.” . . . This absence of objection to or comment upon the change is susceptible of only one explanation—that the Convention believed that the enumeration conformed to the standard previously approved, and that the powers enumerated comprehended those matters as to which the states were separately incompetent and in which national legislation was essential.

Robert L. Stern, That Commerce Which Concerns More States Than One, 47 HARV. L. REV. 1335, 1340 (1934). In this article, Stern argues for a broadened conception of commerce beyond that related to movement. Id. His principled assessment reveals how re-anchoring the commerce power on its point of origin does not disable, but enable, the national government to address subjects the several states cannot.
that which is truly national. The SWANCC dissent’s manipulation of the Lopez/Morrison factors illustrates that only a principled definition based upon the Resolution will forestall such constitutional legerdemain. In this regard, the dissent simply posits that the activities regulated are “economic,” the effects on the commercial activities associated with migratory birds are not “attenuated,” and the permitting of local waste facilities are not local land use, but the “paradigm of environmental regulation.” In truth, neither the Court majority nor the dissent is in a position to assess the constitutionality of the claimed power because Congress in this instance not only failed to legislate explicitly on the topic being regulated, but also failed to inquire about what could or could not be accomplished in this context by the states, themselves.

Knowing where state land use authority ends and federal environmental responsibility begins need not be wholly mysterious. It is often wonderfully assumed that all environmentally-related legislation must be federal because, otherwise, the states would find themselves caught in a version of the prisoner’s dilemma—namely, the race to the bottom. Professor Richard Stewart has thus contended:

Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards. If each locality reasons in the same way, all will adopt lower standards of environmental quality than they would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards . . . .

This is entirely plausible and seems to mandate federal involvement until one realizes that economic theory may supply, at least in some instances, its own “binding mechanism,” enabling the enactment of higher standards by individual states. If the environmental effects being regulated are substantially contained within an individual state, there is nothing preventing that state from weighing environmental gain against the cost of that gain attributable to the movement of capital or development. So long as the costs and benefits are both internalized, the several states are not prevented from reaching rational—that is, effi-

196. SWANCC, 121 S. Ct. at 693-95 (Stevens, J., dissenting).

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cient—outcomes. 198

SWANCC, as decided, is a missed opportunity for the Rehnquist Court to take up Justice Thomas' invitations to disavow the aggregation or substantial effects inquiry. 199 Indeed, had the Court chosen to abandon its mistaken precedent in SWANCC, it might well have sketched (as has been more fully done here) an alternative, principled justification for federal migratory bird regulation. Because the Court returned the matter to Congress for further deliberation, it might have highlighted the importance of providing a constitutionally secure footing for federal environmental law generally. The proper allocation of environmental responsibility is better guided by the principle of the Virginia Resolution than the past, unthinking application of the cumulative or substantial effect doctrine made (in)famous in Wickard v. Filburn. 200 Of course, even returning to first principle will not eliminate dispute about the scope of federal power. In this regard, one academic author has already argued that the federal-state balance envisioned by the Virginia Resolution would license even the regulation in Wickard because states are separately incompetent to control the production of a fungible good like wheat. 201 However, that is not enough—a principled definition requires that attention be paid to both the principle and the presence or absence of commercial activity. If, indeed, the regulation in Wickard punished a farmer regardless of whether the wheat was intended for market or personal consumption, which is what the Court held, the regulation is out of federal bounds. 202 Federal power depends on both the regulation of commerce involving more state than one and either a well-identified national interest or state regulatory incapacity.

The Court recently passed up yet another opportunity to flesh out these elements in a case challenging the validity of regulations protecting the red wolf, an endangered species. In Gibbs v. Babbitt, the Fourth Circuit, in an opinion by Chief Judge Wilkinson, sustained regulation under the Endangered Species Act (ESA). 203 The regulations resulted in the reintroduction of the red wolf into the

198. For a nice exposition of the economic theory underlying the original understanding of the Commerce Clause, supporting in broad strokes the principled alternative argued for here, see Jacques LeBoeuf, The Economics of Federalism and the Proper Scope of the Federal Commerce Power, 31 SAN DIEGO L. REV. 555 (1994).
199. SWANCC, 121 S. Ct. at 677.
202. See Wickard, 317 U.S. at 124 (holding that whether the subject was “consumption” or “marketing” was not material to the decision).
southeastern United States in an effort to prevent the animal’s extinction. Landowners are allowed thereunder to “take” (i.e., hunt, shoot, wound, trap, etc.) a red wolf found on private land, but only so long as the action “is not intentional or willful or is in defense of that person’s own life or the lives of others.”

Landowners seeking to defend their crops (and not just their lives) challenged the regulation as beyond the scope of Congress’ commerce power. Applying Lopez and Morrison, two members of the appellate panel sustained the regulation, and not without some basis. In particular, the strongest aspect of the court’s opinion affirms that “the national government can act to conserve scarce natural resources of value to our entire country.” Unfortunately, there are notably weak aspects of the Gibbs opinion as well, especially its discussion of how protecting the species deals with a commercial subject matter. In this regard, Judge Luttig, in dissent, argues that “[t]he killing of even all forty-one of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in Lopez and in Morrison to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all.” Much of the majority and dissenting opinions are spent debating whether the pelt trade will resume or not. Beyond this, the majority insists that “[m]any tourists travel to North Carolina from throughout the country for ‘howling events’—evenings of listening to wolf howls accompanied by educational programs.” This is too much for Judge Luttig to accept. In his dissent, Judge Luttig finds the supposed commercial nexus less than convincing because, among other things, the tourism speculation was premised upon “a Cornell University professor’s unpublished study.” Published or not, the dissent is right to deduce that Congress’ power surely cannot depend on such speculations. However, the

204. Id. at 488.
205. Id. (explaining that although the taking provision “prevents landowners from harassing, harming, pursing, hunting, shooting, wounding, killing, trapping, capturing, or collecting any endangered species,” the provision is relaxed in this case “to insure that other agencies and the public would accept the proposed reintroduction”).
206. Id. at 490.
207. Id. (stating that “while Congress’s power to pass laws under the Commerce Clause has been interpreted broadly, both Lopez and Morrison reestablish that the commerce power contains judicially enforceable outer limits”).
208. Id. at 486.
209. See id. at 497 (holding that “the anti-taking provision at issue here involves regulable economic and commercial activity as understood by current Commerce Clause jurisprudence” because it substantially affects interstate commerce and there is a rational basis for upholding the regulation).
210. Id. at 507 (Luttig, J., dissenting).
211. Compare id. at 495 (stating that the “anti-taking regulation is also connected to a third market—the possibility of a renewed trade in fur pelts,” and that “Congress had the renewal of trade in mind when it enacted the ESA”), with id. at 509-10 (Luttig, J., dissenting) (stating that “an activity that has no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade, will once again emerge as a centerpiece of our Nation’s economy”).
212. Id. at 493.
213. Id. at 507 (Luttig, J., dissenting).
dissent is mistaken in believing that "[t]he affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge."214 The power very much depends upon a careful judicial assessment of the national interest at stake, the inability of the several states to enact policies that preserve or advance that interest as well as the commercial nature of the subject matter. A Congress that not only does not bother to find that the ESA in general, let alone the preservation of the red wolf on private property in North Carolina in particular, even relates to commercial activity is not very helpful to the Court and arguably deserves little deference.215

Gibbs is a close case. Given the fact that endangered species do not stay put,216 that states have not—as a historical matter—regulated wild life exclusively,217 and that any attempt by a single state to address the conservation of a mobile resource is indeed likely to be thwarted by the prisoner’s dilemma or "race to the bottom" effect earlier discussed,218 the national stake in preserving a species from extinction is quite substantial. What is missing is Congress' justification that commercial activity is also implicated. Because the principled factors derived from the Virginia Resolution are interrelated and flexible, as the founders intended them to be, and because both the national interest in endangered species and state incapacity to effectively deal with them strongly lean in favor of federal action, the quantum of "commercial" evidence arguably need not be overwhelming, but it

214. Id. at 510 (Luttig, J., dissenting).
215. The majority applies a review standard it describes as “rational basis review with teeth” and suggests that under this standard courts “may not simply tear through the considered judgments of Congress.” Id. at 490. Given the lack of findings or expressed judgment, the court is being overly generous. This is yet another example of the unsuitability of rational basis review to an area that is vital to maintaining the federal-state balance.
216. Because they are mobile, regulating wolves is very much different than regulating the siting of a landfill in SWANCC. Wolves—unlike bales of waste—are "great wanderers." 60 Fed. Reg. 18,940, 18,943 (Apr. 13 1995) (to be codified at 50 C.F.R. pt. 17).
217. States do play a role in the regulation of wildlife, but it is not exclusive. Compare Geer v. Connecticut, 161 U.S. 519 (1896) (upholding a state statute prohibiting the interstate shipment of game killed within the state), with Hughes v. Oklahoma, 441 U.S. 322 (1979) (overruling Geer, finding that states do not own the game within their borders and state regulation is necessarily limited by the dormant (and presumably) affirmative commerce power). But it is the uniqueness of wildlife as a national asset that is influential here. It is arguably erroneous to lump this case together with the federal regulation of on-site, intrastate waste disposal. For a questionable result on this score, see United States v. Olin Corp., 107 F. 3d 1506 (11th Cir. 1997) (relying upon the tired “substantial effects” bromide to sustain a post-Lopez challenge to CERCLA).
218. For example, a House Report accompanying the ESA states:

[It]he protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded.

cannot be entirely facetious either.  

V. IF CONGRESS HAS THE POWER, CAN IT GIVE IT AWAY? HEREIN OF ACCOUNTABILITY AND LEGISLATIVE DELEGATION

Turning now from the scope of the commerce power, the Rehnquist Court in both the October Term 1999-2000 and the present Term has also addressed the extent to which the exercise of that power can be delegated to an administrative or executive agency. There is no question that the sale of tobacco products is a commercial transaction, and that Congress is well within its commerce power in attempting to address its manifold health dangers. There is also little doubt that the known health risks associated with tobacco can largely be capably addressed only at the national level. State laws restricting access would readily be undermined by contrary accessibility rules in a neighboring state. So too, environmental problems like the regulation of airborne pollutants are only capable of meaningful attention by more states than one. Air knows no state boundary.

In FDA v. Brown & Williamson and Whitman v. American Trucking Associations, the issue remained political accountability, though not by means of federalism, but by the separation of powers. In Brown & Williamson, the ultimate issue was whether, given existing congressional enactment, an administrative agency, the FDA, tasked with protecting the public health, or the Supreme Court, was to be tobacco policy maker. Five Justices, in an opinion by Justice O'Connor, opted for the Supreme Court and the continued unfettered sale of tobacco products. In American Trucking, a divided panel of the D.C. Circuit concluded that the EPA had promulgated ozone and particulate matter standards without articulating an "intelligible principle" for the reduction it proposed. Rather than effectively setting policy, itself, as the Supreme Court had done in

219. Were there no commercial nexus whatsoever, Congress would not be powerless. As the dissent aptly observed:

An activity that has no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade will once again emerge as a centerpiece of our Nation's economy. And, importantly, an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless. 

Gibbs, 214 F.3d at 508-09 (Luttig, J., dissenting).

220. As discussed in the text earlier, this is not perfectly true insofar as state restrictions on access by young people to tobacco products might well be successful (that is the costs and benefits of such local regulation might be internalized) because the migration of the underage population is constrained. See supra note 160 and accompanying text.


224. Id. at 160.

225. Am. Trucking, 175 F.3d at 1034.
Brown & Williamson, the Circuit Court remanded the case to the EPA to supply further justification.\textsuperscript{226} This was only nominally more deferential to a proper locus of policy making, as it also meant that "[t]wo unelected, life-tenured judges ha[d] decided that the United States should forego [at least for the length of the remand] the opportunity to save about 10,000 lives per year in order to save about fifty billion dollars per year. Judges are the least politically accountable officials."\textsuperscript{227} The point was forgotten in Brown & Williamson but gratefully remembered by the Supreme Court's recent reversal of the D.C. Circuit in American Trucking.

Both Brown & Williamson and American Trucking were tests of judicial restraint. Both called for a faithful application of the agency deference principle in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*\textsuperscript{228} As is well known, *Chevron* proceeds in two steps. In step one, the court determines if Congress has spoken in clear and unambiguous terms. If it has, the court applies the statute accordingly. If, however, Congress has been silent or ambiguous, then the court, in step two, must defer to any "permissible construction of the statute" adopted by the agency.\textsuperscript{229} The court is not to apply the construction of the statute that it would prefer.\textsuperscript{230} Judge Laurence Silberman observed in academic writing:

One concept, more appropriately than any other, serves to distinguish those who advocate judicial restraint, \ldots{} from those who hold a countervailing view. That concept is avoidance of judicial policy making \ldots{} *Chevron*'s rule \ldots{} is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary.\textsuperscript{231}

Nevertheless, as Judge Silberman observed, and Justice Scalia has admitted, those judges inclined to see themselves as strict constructionists are also sometimes inclined to deny that agencies have a range of policy choices because for them laws are assumed to have "plain meaning."\textsuperscript{232}

It takes extraordinary judicial temperance to sustain as plausible an agency interpretation with which one is in fundamental disagreement. Judicial restraint

\begin{itemize}
\item \textsuperscript{226} Id. at 1040.
\item \textsuperscript{228} 467 U.S. 837 (1984).
\item \textsuperscript{229} Id. at 842-43.
\item \textsuperscript{230} Id. at 843.
\item \textsuperscript{231} Laurence H. Silberman, *Chevron-The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 821-22 (1990) (commenting on impact of *Chevron* on modern-day judicial policy making).
\item \textsuperscript{232} Id. at 822.
\end{itemize}
was not the order of the day in Brown & Williamson. Instead, five Justices decided that ambiguity did not mean ambiguity, but clarity. While Congress had conferred expansive authority on the FDA to regulate both drugs and drug delivery devices, categories that seemed to fit a product like tobacco quite comfortably, Justice O’Connor, for the majority, found that “Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.” According to the Court, tobacco was a step one Chevron matter, end of case. There was only one small problem; Congress had not spoken clearly. For example, when it provided funding for the very FDA regulations at issue, regulations that had not been stayed by the district court, the Senate Committee on Appropriations stated that it was “aware of the ongoing litigation, [but] [t]he Committee emphasizes that its action is in no way to be construed as concurring or disagreeing with any court ruling regarding FDA’s authority. . . .” Only Dante could sufficiently reprove such political cowardice. Be that as it may, it was a far cry from clearly precluding anything. As the Solicitor General has pointed out: “Congress’s failure to enact bills that would have expressly authorized FDA to regulate tobacco products ha[d] no more bearing on the question presented in this case than does Congress’s failure to enact bills that would have excluded tobacco products from the reach of the Act . . . .” Having chosen to do neither, it was up to the more democratically accountable branch to decide, not the Court.

Why didn’t that happen? The Court held that the FDA’s assertion of jurisdiction was not contemplated by Congress. According to the majority, Congress had precluded any role for the FDA in the regulation of tobacco, primarily through the enactment of tobacco-specific legislation which, according to Justice O’Connor, ratified the FDA’s earlier statements that the FDA lacked the

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234. The FDCA defines “drugs” as “articles (other than food) intended to affect the structure or any function of the body of man or other animals . . . .” 21 U.S.C. § 321(g)(1)(c) (1995). Similarly, a “device” is defined as “an instrument, apparatus, . . . contrivance, . . . or other similar or related article, including any component, part, or accessory . . . . intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body . . . .” 21 U.S.C. § 321(h)(3) (1995). The Act recognizes that certain products may be both a drug and a device, and if so, the FDA is given authority to require that a device be restricted to sale, distribution, or use . . . upon such . . . conditions as [the FDA] may prescribe . . . if, because of its potentiality for harmful effect or the collateral measures necessary to its use, [the FDA] determines that there cannot otherwise be reasonable assurance of its safety and effectiveness.
236. See id. at 133.
238. “The hottest places in hell are reserved for those who, in time of great moral crisis, maintain their neutrality.”
authority to regulate tobacco. O'Connor relied heavily on post-enactment legislation, and especially the legislative history of each of six pieces of legislation, to determine Congress' intent regarding the appropriate role of the FDA. According to Justice O'Connor, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended." Following this line of reasoning and ignoring—as Justice Breyer, in dissent, pointed out—the Court's longstanding view that such subsequent views are not "controlling," Justice O'Connor proceeded to examine everything from committee hearings, to legislators' statements on the floor or in committee, to statements by bureaucrats, to proposals rejected in committee or on the floor that would have expressly granted the FDA jurisdiction over tobacco products, to committee reports.

Remarkably, Justice Scalia joined the majority without authoring a separate opinion raising his well-known concerns about the unreliability of legislative history. This is all the more conspicuous because the legislative history relied upon did not even relate to the specific statute under review, but instead to a host of subsequent and not fully related enactments. In another opinion in the same Term dealing with whether Massachusetts could refuse to do business with companies that did business with the politically oppressive regime in Burma (Myanmar), Justice Scalia wrote:

241. See id. at 142-47.
243. Id. at 143 (quoting United States v. Estate of Romani, 523 U.S. 517, 530-31 (1998)).
244. Id. at 181-82 (Breyer, J., dissenting).
245. See id. at 144, 148-56, where Justice O'Connor discusses 1964, 1965, and 1972 hearings considering tobacco legislation, and hearings before the House Committee on Interstate and Foreign Commerce, Senate Committee on Labor and Human Resources, and a Subcommittee of the House Committee on Appropriations.
246. See id. at 146, 150-56, where Justice O'Connor directs the reader to see statements of particular legislator or supplies such statements for support.
247. See id. at 144, where Justice O'Connor considers statements by Surgeon Generals, a letter from the FDA to the Director of Bureaus, Divisions, and Directors of Districts, an FDA Deputy Commissioner, and other statements by officials.
248. See id. at 147, 154-55.
249. See id. at 151, where Justice O'Connor discusses Senate Report No. 94-251.
250. Id. at 123; see also Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.").
251. See supra notes 240-41 and accompanying text.
Neither the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor), nor Executive statements and letters addressed to congressional committees, nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The only reliable indication of that intent—the only thing we know for sure can be attributed to all of them—is the words of the bill that they voted to make law.

Of course, Congress did not specifically say in the text of any law whether or not tobacco was a drug. Yet, it was not unreasonable to think tobacco to be so. As Justice Breyer pointed out in dissent, joined by Justices Stevens, Souter and Ginsburg, the FDCA’s language allowed jurisdiction because nicotine clearly affects the structure and function of the body by producing chemical effects, such as sedation, addiction, stimulation, and weight loss. In addition, the assertion of jurisdiction by the FDA was hardly “an unthinkable disposition” because, contrary to the Court majority’s attempt to limit the FDA’s remedial powers to the removal of unsafe products, the FDCA does not require a ban. As Justice Breyer in dissent observed:

[T]he [FDCA] plainly allows the FDA to consider the relative overall “safety” of a device in light of its regulatory alternatives, and where the FDA has chosen the least dangerous path, i.e., the safest path, then it can—and does—provide a “reasonable assurance” of “safety” within the meaning of the statute.

In this instance, the least dangerous remedy was regulating tobacco use rather than an outright ban that would have created an unregulated black market. In any event, tobacco’s chemical effects were the kinds of product effects that the FDA typically reviews and controls.

Moreover, no subsequent legislative text specifically addressed the FDA’s tobacco-related authority. Thus, contrary to the majority’s assertion of a patent absence of regulatory jurisdiction, the later statutes simply supported the intent to proceed without interfering with whatever authority the FDA may have possessed. In particular, Justice O’Connor’s interpretation of the Federal

253. See Brown & Williamson, 529 U.S. at 162 (Breyer, J., dissenting).
254. Id. (Breyer, J., dissenting).
255. Id. at 175-76 (Breyer, J., dissenting).
256. Id. at 174-75 (Breyer J., dissenting).
257. Id. at 169 (Breyer, J., dissenting).
258. See id. at 126.
Cigarette Labeling and Advertising Act's ("FCLAA") preemption provision\(^{259}\) as an indication of Congress' intent to retain exclusive control of tobacco regulation was mistaken, because the Court had previously held that the FCLAA's preemption provision did not bar state or federal regulation outside the provision's literal scope.\(^{260}\)

In the end, political accountability lost in Brown & Williamson. The Court majority simply disregarded both text and reasoned agency judgment in favor of its own judgment cobbled together with inferences derived from the post-enactment legislative history of other statutes. Until the Supreme Court reversed course, it looked like we were headed for the same accountability disappointment in American Trucking. The D.C. Circuit's remand to the agency in American Trucking only seemed more deferential to the more democratically accountable agent than the Court's outcome in Brown & Williamson. After all, the D.C. Circuit held that the Clean Air Act ("CAA") was not necessarily an unconstitutional delegation of the legislative function to the EPA, only a potentially unconstitutional one.\(^{261}\) In this sense, unlike Brown & Williamson, the appellate court actually appeared to be giving both Congress and the Executive the benefit of the doubt—a doubt that could have been resolved in its favor if the EPA responds with an "intelligible principle" limiting its discretion.\(^{262}\) The D.C. Circuit thus purported to align itself with political accountability by reviving the nondelegation doctrine.\(^{263}\) But as noted below, this pretense of deference and nod toward

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\(^{259}\) The FCLAA preempted any other regulation of cigarette labeling: "No statement relating to smoking and health, other than the statement required by . . . [this Act] shall be required on any cigarette package." \(\text{Id.}\) at 148 (quoting 15 U.S.C. § 1334(a)).

\(^{260}\) \(\text{Id.}\) at 185 (Breyer, J., dissenting) (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)).

\(^{261}\) \(\text{See Am. Trucking Ass'ns, Inc. v. U.S. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (agreeing with the proposition that "the EPA has construed [sections of] the Clean Air Act so loosely as to render them unconstitutional delegations," but not holding that the CAA itself was an unconstitutional delegation).}

\(^{262}\) \(\text{See id. (holding that the nondelegation doctrine requires EPA to "articulate [] [an] 'intelligible principle' to channel its application").}\) Recall that the CAA requires the EPA to promulgate and periodically revise national ambient air quality standards (NAAQS) for certain pollutants. \(\text{Id.}\) at 1033. The EPA issued final rules revising the NAAQS for particulate matter and ozone, both non-threshold pollutants, i.e., ones that have some possibility of adverse health effects (however slight) at any level above zero. \(\text{Id.}\) at 1033-34. The appellate court took issue with the EPA's construction of Section 109(b)(1), which authorized the EPA to "set each standard at the level 'requisite to protect the public health' with an 'adequate margin of safety.'" \(\text{Id.}\) at 1034. In other words, the appellate court reasoned that the criteria established by § 109 required the EPA, in picking any non-zero level for PM and ozone, to "explain the degree of imperfection permitted." \(\text{Id.}\) While the court found no problems with the factors used by the EPA in assessing the public health effects of pollutants, it found that the EPA "lack[ed] any determinate criteria for drawing lines[, i.e.] 'how much is too much.'" \(\text{Id.}\)

\(^{263}\) \(\text{See id. at 1038 (acknowledging the accountability function of the nondelegation doctrine).}\) See generally Robert W. Adler, American Trucking and the Revival (?) of the Nondelegation Doctrine, 30 ENVT'L L. REP. 10233 (2000) (discussing the importance of the nondelegation doctrine to political
accountability was a Trojan horse, but unlike the myth, properly rejected.

The principle of nondelegation originates in section 1 of Article I of the U.S. Constitution, which states: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."264 This provision has been interpreted as prohibiting Congress to delegate its legislative power to another branch of government, and thus is "one manifestation of the general notion of separation of powers, and democratic governance through elected representatives."265 As then-Justice Rehnquist elaborated, "[T]he very essence of legislative authority under our system" is the making of "the hard choices."266 Hard decisions often share a common characteristic—they cannot be easily resolved by formula, but must be decided on the basis of political perspective or other ideological consideration. Because of this, nondelegation is said to result in more transparent governmental process along the horizontal axis of the separation of powers just as a constitutionally proper conception of the commerce power better delineates federal and state action. As Justice Kennedy, writing for the Court, explained:

By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable. Article I’s precise rules . . . make Congress the branch most capable of responsive and deliberative lawmaking . . . . The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.267

Regrettably, as high-minded as this sounds, the complexities of modern government often make it difficult for Congress to legislate with sufficient detail to remedy modern problems. Therefore, some form of delegation, in particular to officers of the executive branch, is necessary for Congress to carry out its accountability.

265. Adler, supra note 263, at n.36 and accompanying text. As Locke writes: "[T]he Legislative can have no power to transfer their Authority of making Laws, and place it in other hands." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (R. Cox ed. 1982).
266. Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring); see also Field v. Clark, 143 U.S. 649, 693 (1892) (noting that legislative power is concerned with the "expediency or the just operation" of particular commands, whereas the execution of the law turns on ascertaining "the existence of a particular fact" upon which a legislative command may be contingent).
267. Loving v. United States, 517 U.S. 748, 757-58 (1996). Indeed, with only slight modification, it is possible to apply Justice Kennedy’s insights on federalism to nondelegation. For example, when Justice Kennedy in Lopez posits that two different levels of government "accord more liberty than one," and that this "requires for its realization two distinct and discernable lines of political accountability," the same could similarly be said for the sufficient allocation of authority between the legislative and executive branch. Lopez, 514 U.S. at 576-77. In this regard, Justice Kennedy is surely right that "citizens must have some means of knowing which of the two [of either two levels of government or two branches of the federal government] to hold accountable for the failure to perform a given function." Id.
legislative functions. But how much delegation? Prior to the 1930s, the Supreme Court had never invalidated a federal statute under the guise of the nondelegation doctrine. The Court's approach to nondelegation issues was summarily stated in *J.W. Hampton, Jr. & Company v. United States*, where it declared that no unlawful delegation occurred when Congress laid "down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." Since *J.W. Hampton*, the "intelligible principle" standard has taken on different forms.

First, from *J.W. Hampton* through the New Deal era, the Court operated according to the following rule when addressing nondelegation challenges: "No unlawful delegation will be found so long as Congress articulates an 'intelligible principle' to guide and constrain the delegated power." During this period, the Court decided the only three cases in which statutes (or portions thereof) were invalidated on nondelegation grounds. During a second era, post-1930, the cases shifted the doctrine to provide: "[N]o unlawful delegation will be found so long as Congress states or a reviewing court can find a sufficiently narrow interpretation of the statutory language to constitute an intelligible principle to guide and constrain the delegated power." This latter approach permitted the Court in *Industrial Union Department v. American Petroleum Institute* ("Benzene decision") to interpret the Occupational Safety and Health Act to avoid "a sweeping delegation of legislative power." As exemplified by the Benzene decision, the nondelegation doctrine thus became a rule of statutory construction, involving greater judicial discretion.

A possible third approach suggested by the appellate decision in *American
Trucking posited that: "[N]o unlawful delegation will be found so long as the agency articulates an intelligible principle to guide and constrain its delegated power."

The Supreme Court disagreed, and rightly so.

Remand to the agency was not to be preferred—as a matter of accountability—over Brown & Williamson where the Court substituted its judgment for that of the agency. The D.C. Circuit recognized that its remand served only two of three rationales for the nondelegation doctrine. Yes, in having the agency develop an "intelligible principle," the EPA was less likely to exercise its delegated authority arbitrarily. And yes, an "intelligible principle" would make meaningful judicial review feasible. Nevertheless, the appellate court's remedy would not have served the nondelegation doctrine's key purpose of ensuring that Congress makes the important choices of social policy. It is in this sense that Brown & Williamson might be characterized—if one can disregard the majority's artificial discovery of clear meaning not in the statute, but in the fragments of legislative history of other subsequently-enacted statutes—as perhaps a more justifiable remand to Congress, not merely the agency.

However, what both the majority in Brown & Williamson and the D.C. Circuit seemed to overlook was that agency choices are reflections of presidential ones—or, at least, presidents have to explain them. President Clinton made a choice to encourage the FDA to aggressively pursue tobacco as a drug. That choice had profound consequences for individual freedom, health, and national economy. It was not up to the Court to obscure that. In American Trucking, the circuit court seemingly sought to avoid the Brown & Williamson-like imposition of a judicial view by inventing a middle course, but in so doing, it created its own unique form of constitutional difficulty. Specifically, the D.C. Circuit's judicially-fashioned remand to the agency was actually an invitation to the EPA to legislate from scratch. By court order, the EPA would be legislating its own underlying

273. Adler, supra note 263, at nn.112-13 and accompanying text.
274. Am. Trucking Ass'ns v. U.S. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (remanding to serve the functions of preventing arbitrary exercise of agency authority and to "enhance the likelihood that meaningful judicial review will prove feasible," but not to serve political accountability function).
275. Id.
276. Id.
277. Unfortunately, as a matter of practical reality, all knew that a remand to Congress was the equivalent of sending the issue into a political void.
278. According to the D.C. Circuit:

To choose among permissible interpretations of an ambiguous principle, of course, is to make a policy decision, and since Chevron it has been clear that "[t]he responsibilities for assessing the wisdom of such policy choices . . . are not judicial ones." Just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority. [Thus,] the approach of the Benzene case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of Chevron.


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statutory framework, and in so doing, conceivably preventing subsequent political administrations from ever again changing policy. Yet, agencies have no constitutional warrant to supply the limits of their own delegated authority. Indulging that notion would allow unelected judges to instruct unelected agency officials to preclude subsequent, statutorily permitted changes in executive perspective by an elected president. In supposedly paying homage to *Chevron* deference, the appellate court was nullifying *Chevron* itself.

When *American Trucking* reached the Supreme Court, the D.C. Circuit was unanimously reversed. Devising air quality standards to a level “requisite to protect the public health,” said Justice Scalia for the Court, conferred a scope of discretion “well within the outer limits of our nondelegation precedents.”

Requisite, reasoned the Justices, simply meant sufficient, but not more than necessary to protect the public health with an adequate margin of safety. This part of the opinion is unassailable, but it seems hard to square with the Court’s willingness in *Brown & Williamson* to displace the FDA’s delegated authority to regulate an unenumerated class of “drugs.” However, consistently with the discussion immediately above, the Court did recognize that, had the grant of authority to the EPA been excessive, a remand to the agency to re-write the law was wholly inappropriate. Wrote Justice Scalia: “The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.”

But was political accountability advanced in *American Trucking*? Can it not be argued that the second death of the non-delegation doctrine actually lessens, not enhances, accountability, even as it affirms agency authority? In past cases, this has been the view of Justice Rehnquist. In this regard, Chief Justice Rehnquist has been an advocate of putting more teeth into the nondelegation doctrine where Congress abdicates its role out of lack of political will, rather than technical incapacity. Intuitively, this has much appeal from the formal aspect of the separation of powers, except *American Trucking* suggests that in terms of nondelegation theory the Court long ago resorted to dentures.

The unanimous reversal of the D.C. Circuit strongly hints that the Court is
without a workable standard to differentiate Congressional buck-passing from sensible referral in light of technical incapacity or scientific complexity.\textsuperscript{284} As of now, the Chief Justice’s view is not shared by a majority of the Court, although Justice Thomas may be read as sharing the concern. For example, in a delegation case involving crimes by members of the military, Justice Thomas relied only upon the President’s unique authority as Commander in Chief and significantly took “no position with respect to Congress’ power to delegate authority or otherwise alter the traditional separation of powers outside the military context.”\textsuperscript{285} And again in \textit{American Trucking}, Justice Thomas in a separate concurrence noted that he was “not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”\textsuperscript{286} Obviously both the Chief Justice and Justice Thomas find it important to remind executive or independent agencies that they are incapable of “legislating.” Fair enough, but the reminder will remain little more than curiosity unless some originalist principle\textsuperscript{287} actually exists to differentiate rulemaking from legislation. Indeed, Justices Stevens and Souter propose in their separate concurrence that “it would be both wiser and more faithful . . . to admit that agency rulemaking authority is ‘legislative power.’”\textsuperscript{287} They have a point. While being this candid would directly contradict the Rehnquist-Thomas supposition that Congress ought not to be passing the buck to less visible agency decisionmakers, it would also be less likely to shelter even more troubling judicial intervention into executive policymaking.

Administrative law expert Professor Richard J. Pierce, Jr. correctly and succinctly observed that in matters of delegation we have three choices:

First, we could assign the discretion to make fundamental policy

\textsuperscript{284} The Court might theoretically encourage Congress to use conditional delegations in cases of complexity, whereby an agency is directed to find further facts and to prepare proposed regulations thereon for further review and possible legislative acceptance by Congress. Such an approach is similar to the so-called “report and wait” regulatory approaches that Congress has employed since the demise of the legislative veto. The alternative preserves the constitutionally required check on the adoption of a new law and retains for Congress the affirmative responsibility for the policy choices in such new enactments. The appellate decision in \textit{American Trucking} seemed to contemplate this alternate course when it observed: “[I]f EPA concludes that there is no principle available, it can so report to Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice.” \textit{Am. Trucking Ass'n, Inc.} v. U.S. EPA, 175 F.3d 1027, 1040 (D.C. Cir. 1999).


\textsuperscript{286} 121 S. Ct. at 920 (Thomas, J., concurring).

\textsuperscript{287} Madison did observe that, as Montesquieu asserted, “[t]here can be no liberty where the legislative and executive powers are united,” but in the same document conceded that “[Montesquieu] did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other.” Federalist No. 47 (James Madison) (Clinton Rossiter ed. 1961).

\textsuperscript{288} \textit{Am. Trucking}, 121 S.Ct. at 920.
decisions to judges. . . . Second, we could force the incumbent President to make a fundamental policy decision that binds his [successors] in perpetuity. . . . Third, we could assign that discretion to each President, . . . . In our system of constitutional democracy, presidential elections matter. If a majority of the electorate disapproves of how the incumbent President decides “how much is too much [air pollution],” they will elect a new President who will draw the line either higher or lower than the incumbent. That is not a threat to democracy. That is democracy. 289

Of course, then, that would not be governance by judiciary.

VI. CONCLUSION

This essay requires the reader to indulge two inconsistent thoughts at the same time—namely, that the Supreme Court has a legitimate role to intervene in some cases and to defer in others. 290 This inconsistency is not a comfortable fit for a world filled with political partisans who insist on choosing up more regular sides, rather than engaging in reasoned, and sometimes case-specific, deliberation. Precepts of constitutional structure such as federalism and deference to agency rulemaking serve us well if we treat them as principles, and not devices to exploit to desired ends. The Commerce Clause has been adrift for decades, having been ravaged for both liberal and conservative causes alike. The judicial impulse in *Lopez* and *Morrison* to rescue the federal-state balance is a sound one, but it requires a principled and originalist foundation to succeed. It is not faithful to constitutional process to substitute the wooden categories of channels, instrumentalities, and the ever-manipulable aggregation or effects language. Instead, the Court needs to undertake a meaningful inquiry into the presence or absence of commercial activity together with a demonstrated national interest or state regulatory incapacity.

Admonishing judges not to set aside responsible agency rulemaking may seem inconsistent with the above injunction to more actively (and accurately) have the judiciary patrol the commerce boundary, but it is not. In one case the Court prevents usurpation, in the other it usurps or wrongly invites an agency to do so. Through the lens of political accountability, apparent inconsistencies in the judicial role vanish.

289. Pierce, supra note 227, at 95.
290. Constitutional scholar Thomas Reed Powell once observed that “if you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind.” LON FULLER, THE MORALITY OF THE LAW 4 (rev. ed. 1964).
DEAN SULLIVAN: Let me take in turn Professor Kmiec’s two assertions. First, he suggests that Congress’s Commerce Clause authority should be restrained by courts and that *Lopez* is a step in the right direction, but he suggests an alternative approach to judicial intervention to stop Congress from going too far into infringing on what should be state turf. And second, he suggests that the Court should not intervene, as in the *FDA tobacco case*, to usurp the legislative role by countervailing a choice made by the agencies. And I want to suggest a little bit of disagreement with him on both parts of the argument.

Let me start with a point on which we do not disagree. We do not disagree with the outcome in *Morrison* with respect to the Commerce Clause authority of Congress. I agree with Professor Kmiec that by almost any measure, the assertion of congressional Commerce Clause authority to provide a civil damages action for date rape or other gender-motivated violence is almost patently absurd. We also agree that even if the commerce authority ought to support some kinds of congressional regulation of interpersonal private discrimination, as opposed to state discrimination that can be reached under the civil rights amendments, it ought to apply to cases like *Heart of Atlanta Motel* and *Katzenbach v. McClung*. These cases at least are about nominally economic transactions such as the sale of services or food. So we don’t disagree on the outcome.

But let me suggest why I think Professor Kmiec did not suggest a more robust or toothful check on congressional authority by his test than the one the Court has traditionally used. Now to do this, let’s go back and see that there are really two issues at stake in deciding what judicial review of Congress’s commerce authority should be.

The first issue is a substantive issue. What should be the scope of Congress’s authority? What should keep Congress a branch of enumerated limited power, restricted power, and not a free roving plenary agent of regulation? So the substantive question is, “Can we distinguish that domain, which is properly national, from that domain which is properly local? Can we, with respect to commerce, distinguish that which is properly interstate and commercial from that which is directed at other kinds of activities that are noncommercial in their entirety or too local to be reached?”

So first is the substantive question; traditionally we’ve had two different ways for answering that substantive question. One is to use formal or bright-line tests, to come back to the earlier discussion. Say on the one hand, we have manufacturing, mining, or agriculture, and on the other hand, we have shipment and trade. Or on the one hand, we have direct effects on the

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interstate economy, and on the other hand, indirect effects. In other words, early pre-New Deal efforts sought to distinguish spheres of authority based on formal characteristics, a categorical or bright-line approach.

The latter approach is to do that substantive thing in a functional fashion. Saying, “Well, let’s not look at unadministrable formal categories, but let’s look at the compound aggregate effect of activities on the interstate economy.” If there are substantial effects on interstate commerce and they are illustrated through compound inferences, such as the possession of guns in schools leads to less education and more violence, which in turn leads to less educated graduates, which in turn leads to less educated workers, etc., you have an effect on the interstate economy.

Beyond substantive definition, the second question is who gets to determine these things? To whom should we look in distinguishing the national from the local sphere? Should we look to the Court, or should we look to the Congress? Congress is a better fact finder. The Court wants to have things that look like law. And usually the lineup is that if you have a formal test, you want to look to the Court. And if you want to look to a functional test, you leave it to the Congress, because the Congress is going to be a better fact finder. It’s going to be better at determining things.

Now interestingly, Professor Kmiec does a kind of flip of this usual approach. He wants the Court to intervene, and he wants the Court to intervene strongly, but he wants the Court to intervene under a new functional test. Now he starts with a formal proviso; he says it has to be commerce. He defines commerce broadly to incorporate, ala Professor Nelson, lots of economic activity that’s prior to the moment of shipment. So he starts with a formal test, but then he subjects it to a functional examination. So he starts Catholic, and then he gets suspiciously Protestant.

His functional test asks whether there is a need for national uniformity, or if there is demonstrated state incapacity. Is there some reason why local regulation will fail to serve the national commercial interest because of what you might call the market failures of federalism? Now once he goes that far, I think he’s giving Congress quite a bit more leeway than perhaps he means. Or in other words, he’s allowing the Court to uphold a great deal more congressional regulation than he might have wanted. Let’s just think about this for a minute. What are all the arguments for demonstrated incapacity? Well, obviously the classic arguments for federal regulation might include, just to name a few, that the national government is better at providing public goods, ones in which people will free ride if the states are left to provide on their own. If you want the states to provide national defense, California and Maine will do a lot of the work, and the middle states will free ride on what the border states do, so it’s better to have national defense be a public good provided by the national government.

Second, negative externalities; Ohio will always care less about pollution
that travels east on the winds than New York will, because New York gets the fish killed from the acid rain that comes down over the Adirondacks. So classically we allow federal regulation of state activity when one state’s activity will have negative externalities for another.

And third, we classically think, at least since the New Deal, that the federal government has a role to play when the states might otherwise engage in a race to the bottom, an idea which Professor Kmiec acknowledges. He says that if states are left to regulate—to provide unemployment insurance or minimum wages or bans on child labor—on their own, there may be a race to the bottom in that the states that provide the least protective regimes will attract the most business and drive out the good work of the other states.

Now since all of those functional reasons for federal regulation might justify congressional action, it seems like now Professor Kmiec’s functional standard traceable to the Virginia Resolution doesn’t check Congress much more than the substantial effects test would. I agree it’s a more principled approach, but it may not have any more functional bite than the old test. So I would challenge Professor Kmiec in the discussion following to name any federal statutes that are questionable, other than the kind of what you might call the sport of Lopez and the sport of Morrison. Can you name any other federal statute that should be struck down in your test that would not be struck down on the substantial effects test?

You do suggest in your paper that maybe it’s the birds’ case for next term, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers. But I’m not sure that that’s a case that ought to lose under your test, although who knows. The Court might still say that Congress did not have authority to reach the protection of non-navigable wetlands for the sake of protecting migratory birds. But certainly migratory birds have potential commercial uses. People pay money for binoculars to look at them. People pay money for guns to shoot at them, depending how tasty they are. And assuming you get past your formal commerce hook, then you certainly could get to a kind of negative externalities argument for federal intervention. That is, one state’s decision to dry up its ponds may affect bird watching and bird hunting in other states. Perhaps this is something in which, since birds don’t observe borders anymore than bits and bytes do, maybe the federal government should be able to intervene. So I’m wondering what exactly Professor Kmiec says would be struck down under his test that wouldn’t be struck down under substantial effects. I wonder if there might be federal

regulation of noncommercial activities such as education or maybe private
discrimination other than race discrimination, but I’d like to hear his list.

Now if I’m right that even Professor Kmiec’s test doesn’t greatly increase
the federal judicial check on federal congressional authority, then here’s a
broader question I’d like to raise for the discussion period: Why has this
Court, which has raised such a philosophical paean to states’ rights for the
very values that Professor Kmiec emphasizes, the values of liberty and the
values of limited government, not done more? Why has a Court which has
raised such great rhetorical fervor on behalf of states’ rights not done more to
actually check federal power? And we’ll pick up this discussion this
afternoon when we get to the civil rights enforcement cases. But you might
think that the Court that is bringing us *Seminole Tribe* through *Alden* and
*Kimel,* the Court that has brought us *Lopez* and *Morrison,* might do more to
check actual federal power than it’s done. And I think the bottom line on the
Court’s Commerce Clause cases is that instrumentality and the jurisdictional
nexus, as Professor Kmiec rightly points out, actually allow Congress to get
around almost any judicial invalidation of congressional law. After *Lopez,* all
Congress did was put in the statute that the gun has to travel in interstate
commerce before it is possessed at the school. And no conviction under that
subsequent legislation has been overturned. It’s easy to show that guns have
traveled in interstate commerce because they’re all made in Connecticut and
Massachusetts, a fact I didn’t know when I lived there.

So the last point on delegation and accountability: Professor Kmiec
doesn’t like the *FDA* tobacco decision because he says the Court usurped what
seems appropriately a political judgment that ought to be made by the agency
rather than Congress. I wonder if that’s the correct characterization, and I
wonder what’s so great about agencies. First of all, you might say the Court
didn’t usurp any substantive authority to make policy. It simply refereed. It
simply said, “Remand to Congress.” Nothing in Justice O’Connor’s opinion
for the Court made tobacco policy. It just remanded tobacco policy to
Congress. When Professor Kmiec says that *FDA* violates *Chevron,* I have
to salute him for his admirable bipartisan equanimity. *Chevron* was thought
to be a case allowing Reagan-era conservative agencies to reverse policies
imposed by a Democratic Congress. Here Professor Kmiec, in an admirable
spirit of equal opportunity agency deference, says “you ought to allow the
Clinton administration to have its way with administrative policy that foils a
Republican Congress.”

But I wonder why he thinks deference to agencies is really so democratic.

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After all, agencies are full of entrenched bureaucrats. It takes the political people who come in on top several years to even figure out what the line people are up to. Those people aren’t elected. And there’s the phenomenon of capture by intensely focused and influential groups that may be in bed with the agency over a long period of time. So I’m not sure that you should see the FDA opinion as so much more undemocratic than Chevron. Chevron could be questioned for its own democratic accountability principles. If you don’t think agencies are that democratic, it may be better to send it back to Congress, where the democratic process is more visible and accountable.

PROFESSOR KMIEC: Jan Crawford Greenburg of the Chicago Tribune and the Jim Lehrer Newshour has questions for us both.

MS. GREENBURG: Dean Sullivan, since you ended with the FDA case and you did as well, Professor Kmiec, I’m going to pick up there, and then we can embroil ourselves in Morrison and Professor Kmiec’s proposed test again.

The parties and some amici in two cases to be argued this term, one involving the Clean Air Act and another involving the Clean Water Act, both refer to FDA. The cross-petitioners in the Clean Air Act case, for example, rely on FDA for their argument that Congress surely would not have intended to delegate such extraordinary economic and political decisions to an agency. Yet in her majority opinion in FDA, Justice O’Connor said, and I quote, “This is hardly an ordinary case.” And she stressed tobacco’s unique place in American society and history and reasoned that Congress had set up a distinct regulatory regime. So my question is, “What is the reach?” What do you see the reach of FDA? Can an argument be made that it is confined to tobacco, that this is hardly an ordinary case? And how do you see it affecting this term’s cases?

PROFESSOR KMIEC: I’m willing to start. I think there is something, Jan, to be said for FDA as only a tobacco case. And the sentence you quoted from Justice O’Connor’s opinion is one that raises the curtain on that. If it is not a tobacco-specific case, it is an even greater disregard of Chevron that aggrandizes the authority of the Court at the expense of politically accountable and directed agencies. So I hope that FDA can indeed be confined to its facts.

Dean Sullivan says FDA was just a remand to Congress. Of course, it wasn’t as if Congress was out of session during the period in which the FDA promulgated rules that said tobacco was a drug and cigarettes, a drug-delivery device. They were re-authorizing appropriations for the FDA to carry out its work, and they said something like the following: “We are aware of the ongoing litigation, but we emphasize that our action of re-appropriating funds for the FDA is in no way to be construed as concurring or disagreeing with
any court ruling regarding the FDA’s authority.” Well, so much for a courageous, politically accountable Congress. And that is one reason to prefer, I believe, deference to the agency. When you can’t get politically accountable representatives to take positions for whatever reason (excluding their receipt of campaign monies from tobacco companies), maybe we should prefer the second rather than third-best outcome; namely, the reasonable administrative record of the appropriate agency that is operating under broadly-worded statutory authority. I think that’s to be preferred over the Court, which is not at all politically accountable by design.

DEAN SULLIVAN: Well, I agree that this was a tobacco case with a slightly different spin. I just don’t see this as the Court making tobacco policy. It’s just saying to a Congress that had reached impasse on tobacco, “Stop passing the buck.” I think Professor Kmiec, in quoting that pusillanimous language there, is saying that Congress was passing the buck. Why is tobacco unique? Because it’s a demonstration of political market failure in the Congress. You may have all kinds of people dying from something that you know is an addictive substance and have known for years, but the combination of the seniority system and the representation of the states and the Senate has led the Congress to be as impaired in bringing about new tobacco regulation as it was impaired in bringing about the dismantlement of Jim Crow in the ‘50s. There’s a reason why the southern states—the tobacco states—kept tobacco legislation from moving in the Congress.

We have deflected tobacco policy making to other places. Professor Kmiec thinks the executive branch was a good place to deflect it to, but it may not have had the same national airing. President Clinton didn’t run on tobacco. You don’t run very hard on tobacco regulation. He did once he was in office, but it’s not clear that the people ratified David Kessler’s approach to tobacco. It did go another place. It went to the state and private lawsuits brought against Big Tobacco on the Medicaid reimbursement and product liability theories. That might have been the greater judicial usurpation of the role of the policy-making process; the fact that we’ve now actually brought Big Tobacco to its knees through a series of liability judgments brought entirely through the judicial process.

But I just want to go back to the main point. Yes, there was a democratic failure here, but it is not clear that David Kessler is the right person to correct it, as opposed to resolving it by some sort of national debate. Justice O’Connor just thought she was sticking it back to Congress and telling them to have that national debate, have it in the open, and have it where the people can be accountable. I don’t think that’s usurpation.

PROFESSOR KMIEC: Quite frankly, I think Justice O’Connor knew that the remand to Congress would do exactly what it did; namely, send it into the void. True, the FDA is an independent agency, but “independent” in quotes. David Kessler did hold his position, while not formally, at least functionally,
at the pleasure of President Clinton. Under *Chevron*, the President is reasonably accountable for the decisions of his agent, David Kessler, and he was willing to take the political heat for the impact of the access restrictions that David Kessler promulgated with regard to young people and cigarettes. Now I think we have nothing but paralysis. The Congress is not acting. The agency was told it lacks authority.

DEAN SULLIVAN: The trial lawyers are acting.

PROFESSOR KMIEC: And I agree that may be worse in terms of governance by judiciary, but isn’t that accelerated by a decision like *FDA*? But, Jan, let me pick up the second part of your question about the coming term. We do have the consolidated cases, *Browner v. American Trucking*, which deal with the fashioning of regulations under the Clean Air Act for ozone and particulate matter. The EPA is instructed by the statute to promulgate regulations of the level requisite to protect the public health with an adequate margin of safety. They came up with a new, more stringent ozone regulation and a new, more stringent particulate matter regulation. And the D.C. Circuit said, “Since these are so-called non-threshold chemicals, which means any amount introduced into the atmosphere will be hurtful to some degree, why pick .008 rather than .007 or .006?” And of course the EPA offered up the usual rule-making record which is quite substantial and scientifically dense. Professor Tribe could understand it because he took all those advanced science classes. But the D.C. Circuit remanded to the EPA to come up with an intelligible principle beyond the principle articulated by Congress in the statute. This to me is as undemocratic as *FDA*. Of course, on its surface it looks more democratic insofar as it looks like a remand to the agency for a second chance. In other words, it has a facial similarity to a court concluding that an agency record is insufficient because it is deficient under the APA.

But a closer look reveals something else. The D.C. Circuit invited the agency to rewrite the statute with a different standard than what Congress provided, a standard that presumably will then bind later political administrations in a way directly contrary to *Chevron*. Under the theory of administrative law deference to agencies, presidential elections matter. If a majority of the electorate disapproves of how an incumbent president decides how much is too much air pollution, they will elect a new president who will draw the line differently, either higher or lower. That’s not a threat to democracy. That is democracy. The alternative to that, which is the alternative offered by

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the role that Justice O'Connor articulates for the Court in *FDA*, is government by the judiciary. I don’t know where that is to be found in the Constitution.

MS. GREENBURG: I’m going to turn to *Morrison*. I could talk a lot longer on *FDA*, but in *Morrison*, the dissenting justices, I think, doubt that the Court can come up with a workable definition of commerce and conclude that therefore, the Court will inevitably need to review cases on an ad hoc basis—a practice that Justice Souter said cannot preserve the distinction between the judicial and legislative and ultimately would again prove Justice Holmes’ maxim correct that the first call of a theory of law is that it should fit the facts. The dissenters say that the fact is that this a national economy.

First to Dean Sullivan: How do you see the Court’s prospects for drawing this line? Do you think they will ever succeed? They have a chance to do so this term in the case from Illinois involving the migratory birds. Do you think that they’ll no longer approach it at arm’s length, as Justice Souter said in his dissent?

And then, Professor Kmiec, perhaps a little more on your definition and the practical aspects of it, for drug possession, gun possession, or the pickpocket on the local street, as Justice Breyer hypothetically suggested in one of his dissents.

DEAN SULLIVAN: Just a prediction on birds—I have a prediction. This is always treacherous. Larry Tribe always used to say, “She who lives by the crystal ball must learn to eat ground glass.” I always wanted to make that joke before he did at a conference, and now I have. So the prediction on birds—I think they’re going to uphold the regulation. It’s just too much of a threat to everything else about the entire apparatus of environmental law to deny the economic impact of species protection. And I’m just not sure they’re prepared to take down the Endangered Species Act and lots of other things with it, which would seem to be the implication.

But I disagree with the dissenters in *Morrison* who suggest that you just give up and you say anything that could be connected through first-year law school student arguments to commerce entitles Congress to legislate, because that really does write enumerated powers out of the Constitution. And I think some effort to restrict Congress makes sense. And the economic/non-economic distinction is imperfect, but at least it’s a nice, formal, bright-line way to start.

PROFESSOR KMIEC: I’ll eat some of the glass and say that I think the Court will strike down the regulation. And I think they will do it largely on the basis of statutory definition. I think they will conclude that an interstate pond is not a navigable water of the United States and avoid the commerce question. And my colleagues were worried that I had really swallowed the entire globe. It’s very nice of them to be that thoughtful.

With regard to the challenge given to me by Dean Sullivan to name other areas that I think fit my functional/originalist definition, I know you’re all waiting for this, and this is where the globe does get swallowed. The main difference between the existing substantial effects test and my functional suggestion is that most morals legislation—that which regulates personal behavior—and most criminal statutes would fall outside of federal jurisdiction unless they are aimed at a commercial activity that in fact involves a national interest or a unique type of crime that the states themselves are incapable of addressing. Thus, most federal gun possession crimes and most federal drug possession crimes would be a matter of state and local regulation. Beyond this, education (personal, moral, or intellectual formation, if you will) is quintessential noncommercial activity, notwithstanding the level of tuition at Pepperdine, Harvard, Stanford, or Yale.

Much of what has passed into the federal criminal code is there not because the subject is commercial, but because it was said to be politically important. If federalism and enumerated power is to mean anything, however, claims of political importance cannot be the measure of what is or is not within the commerce power. This must be true for liberals and conservatives. Both are equal opportunity offenders of the commercial principle, and let me give an example. On the desk of the President at the moment is the Religious Land Use and Institutionalized Persons Act of 2000, 13 which is an attempt to recreate RFRA, the Religious Freedom Restoration Act, 14 but through different means.

Now one aspect of the statute is unexceptional. It relies on the spending power, and as much as the Rehnquist Court has tried to revive federalism, they have left this enormous gaping hole in the form of conditions on the spending power. And the Religious Land Use and Institutionalized Person Act might survive review on that basis. I reserve that question. But part of the statute is clearly premised upon a commerce theory, when there is no interstate commerce actually implicated.

The act basically invalidates local zoning decisions, for example if, say, a church perceives it was wrongfully excluded from a residential neighborhood. Now I support a policy of inclusion for religious uses, and I think the issue important, but that doesn’t make it federal in nature. It is entirely wrong to use the commerce power hook, based on a cumulative-effect

principle or if you will, the Wickard principle for this purpose. If the only power source supporting the Religious Land Use and Institutionalized Person Act of 2000 was commerce, I would hold that out as yet another example of what would be invalidated under the standard I propose.

PROFESSOR JAMES: Seeding some ground to the audience questions for just a moment, the questions are in two categories. One, frankly, an underhanded softball right over the plate and another a tiny spitball. The first one: "Would both of you be willing to comment on the implications of Professor Kmiec's commerce definition on the existing civil rights laws specifically on the issue of racial discrimination, both with respect to the motivation behind those laws and the effectiveness of those laws under your definition?"

PROFESSOR KMIEC: Well, as I heard Dean Sullivan say, she would leave Heart of Atlanta unassailed because it has an economic footing. I agree in outcome, but not rationale. Clearly, neither public nor private racial discrimination is tolerable in a constitutional republic. But private racial discrimination that is wholly intrastate is still not interstate commerce. Perhaps Dean Sullivan is right that because of the unique interstate facts of Heart of Atlanta, there is a reasoned basis for that case under the cumulative effect principle. With all due respect, that is too puny of a legal theory to counter the evil of discrimination for me. And I would argue there is a national interest in being free of private, as well as public, racial discrimination. What legal rationale better secures the right to be free of discrimination? Akil Amar here today suggests the Privileges or Immunities Clause. This clause has been long neglected, though it has been partially revived in Saenz v. Roe, suggesting that people are citizens of the United States with respect to certain fundamental interests. In Saenz, it was the right to travel, but, as Justice Thomas has suggested, the Clause is broader in origin. The Privileges or Immunities Clause does not have a state action hurdle.

So I would be inclined to free the commerce jurisprudence from the necessity of having to support the civil rights laws. And if Privileges or Immunities are too dead to be revived, though I don't think they are, then I would suggest that we return to Justice Harlan's opinion that the Thirteenth Amendment prohibits badges of slavery and that includes private discrimination.

DEAN SULLIVAN: I'd want to hang on to Commerce Clause to ban private discrimination rather than go to those two alternatives. First, because I don't see how—we'll hear from Professor Amar later—private discrimination deprives somebody of citizenship under the first clause of the Fourteenth Amendment. So I'm not sure that's a really robust source of an alternative approach. And Harlan's Thirteenth Amendment might get you to race, but

it's not going to get you to gender, age, marital status, veteran status, disability, or any other possible source of congressional solicitude regarding private discrimination, because apart from race, none of those things can be made analogous to slavery. So if you think that federal anti-discrimination principles are important even when it extends to the private sphere, I'm not sure you can have a substitute source of authority in either the Fourteenth or Thirteenth Amendments.

So let's just go back to the question of whether Title VII fits Professor Kmiec's commerce test. It depends how broadly it's analyzed. It depends on what the Professor means by state incapacity. If by state incapacity, he means incapacity simply in an economic sense, or that state action will lead to some sort of market failure or collective action problem, then perhaps not. But if state incapacity is meant more in the Madisonian sense, that there will be a danger of local tyranny of the majority foiling a national interest, then you bet. Local tyranny of the majority did lead to the kind of state incapacity that served federal norms, and so I do think on a broad construction of the Kmiec test, even Commerce Clause authority should be allowed here.

PROFESSOR JAMES: And then an interesting follow up which I'm sure you'll both want to at least consider commenting upon in light of your responses. "In the Morrison case, does Congress have the power to prohibit and punish the growing of marijuana by a person for his own consumption?" In effect, Wickard on drugs.

PROFESSOR KMIEC: No. Intrastate possession or use is a question of health, safety, and morals for the states, not the federal government. Congress can prohibit the interstate sale or transport of the substance, of course.

DEAN SULLIVAN: Yes. Congress has the authority.