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ARTICLE: THE PROPER SCOPE OF THE COMMERCE POWER.

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SUMMARY:

... THE Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" -- such is the clause in the Constitution to which most federal power can be traced in today's general welfare state. ... Chief Justice Marshall decided, first, that navigation among the several states was interstate commerce, and second (in order to avoid the question of whether any dormant commerce power could be identified) that a 1793 federal statute that licensed ships in the "coasting trade" had preempted the New York statute. ... More to the point, *Gibbons'* limits on the extent of the commerce clause would have been important because they would have limited the degree to which Congress could have used its commerce power to cartelize the entire railroad industry, as it did by amending the ICA after World War I. ... But the transaction at issue in *E. C. Knight* was a merger that was quite impossible for Congress to reach by a plan to regulate the interstate sales of the combined sugar business (even if these preliminary merger agreements were regarded as in interstate commerce) without necessarily intruding into the regulation of manufacture, which *both* the majority and the dissent expressly regarded as outside the scope of the commerce clause. ...

TEXT:

[*1387] THE Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" ¹ -- such is the clause in the Constitution to which most federal power can be traced in today's general welfare state. The labor statutes, the civil rights statutes, the farm and agricultural statutes, and countless others rest on the commerce power, or more accurately on a construction of the commerce

clause that grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly. Is this underlying interpretation of the commerce clause correct? ²

The entire inquiry may be idle theoretical speculation, or it may have profound practical importance. I cannot say which, although at present I should guess the former; too much water has passed over the dam for there to be a candid judicial reexamination of the commerce clause that looks only to first principles. Still, in an age [*1388] in which the theory of government is again subject to general theoretical discussion, it is instructive to ask, as a matter both of first principle and of Supreme Court precedent: What is the proper construction of the grant of congressional power contained within article I, section 8, clause 3?

In Part I of this Article, I introduce the question of the scope of the commerce power by discussing its intended role in limiting government power and its relation to the individual rights protections of the Constitution. In Parts II and III, I analyze the text of the commerce clause and look at the place of the commerce clause in the overall constitutional structure. Finally, in Parts IV and V, I analyze the clause in light of the cases that have construed and extended its scope during our entire constitutional history. My analysis places special emphasis on the fifty-year period of the rise of the administrative state, from the onset of the Interstate Commerce Commission in 1887 to the height of the New Deal. My conclusion is clear enough. I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government.

I. THE PROBLEM: STRUCTURE AND INDIVIDUAL RIGHTS

The commerce power is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself. Nor does the "necessary and proper" clause work to change this basic design; although it seeks to insure that the federal power may be exercised upon its appropriate targets, it is not designed to run roughshod over the entire scheme of enumerated powers that precedes it in the Constitution. ³ If forced to summarize what the commerce clause means, I would [*1389] say that it refers more to "commerce" as that term has been developed in connection with the "negative" or "dormant" commerce clause cases, which concern the instrumentalities of interstate commerce and the goods that are shipped into it. Stated otherwise, the term commerce has a stable usage in various other contexts. Zoning for "commercial" uses, for example, is often used in opposition to zoning for "manufacturing" uses. The Uniform Commercial Code does not cover the law of manufacturers. More generally, the idea of commerce seems closer to the idea of "trade" than to other economic activities. It is in just this sense that the term was used in ordinary discourse at the time of the founding. Hume's essay *Of Commerce*, for example, explicitly places the idea of commerce in opposition to that of manufacturing. ⁴ The same usage, restrictive by modern standards, was adopted by Hamilton, who for example in the Federalist No. 11 uses commerce as a synonym for trade and navigation, and links his discussion of the commerce power with the need to have an American navy to police and protect the seas. ⁵ But whatever the uncertainties, commerce does not comprise the sum of all productive activities in which individuals may engage. There is at least a slight irony here, for the Uniform Commercial Code is enacted under state law, whereas everything from manufacturing to welfare is regulated comprehensively at the federal level.

Finding the proper interpretation is of course no easy task. One great problem has to do with the function of the commerce clause itself. The Constitution contains two general types of provisions; [*1390] the first class is structural and was designed to divide powers between state and federal government, and, at the federal level, between the different branches of

government. The second class was designed to protect individual rights against wrongdoing by government. The two types of provisions are in some sense parts of an integral strategy to ensure that the government, state or federal, does not become the enemy of the very people whom it is organized to protect. But the provisions work in very different ways, and their proper construction proceeds along rather different paths.

In considering guaranties of individual rights, we address the highest ends of government and civilization. Generally it is possible to look to the common law, to a rich political theory, and to a long political tradition in order to gather hints about what these provisions mean and how they should function. The framers understood the protection of speech, contract, and property as ends good in themselves, as rights so "natural" and ends so clear that they did not receive the intellectual justification they so desperately needed -- and still need. In reading these provisions, we can draw upon a large body of materials to guide our interpretation: Hobbes, Locke, Hume, Montesquieu, and a host of lesser, but still able, writers. ⁶ The differences that emerge in dealing with these questions are often attributable to the richness and the centrality of their subject, not to the want of speculation about them.

Provisions that go to the question of jurisdiction are no less important to sound governance than those that govern individual rights. Yet jurisdictional principles have a very different intellectual pedigree. Jurisdiction is not part of ordinary moral discourse, or of our common understanding of right and wrong. Instead, jurisdiction is always regarded as a means towards an end rather than as an end in itself. Hamilton treated jurisdiction as a more effective guarantor of individual rights than a bill of rights, because he believed that it provided clear and powerful lines to keep government from straying beyond its appointed limits. ⁷ Hamilton's judgment [*1391] was, I think, wrong to the extent that it relied on jurisdictional provisions as the sole limit to government power. ⁸ But it contained a fair measure of good sense in using jurisdictional limitations as an important, indeed indispensable, limitation upon government power.

The difficulty lies in construing jurisdictional provisions to achieve this political end. Here there is no comparable tradition of political philosophy upon which to draw. The classical writers who extolled the virtues of liberty and property did not have the practical experience of the founders in forming governments. The great debates over the social contract always asked the question of how individuals in a state of nature could enter into a social contract for their mutual advantage. They never considered the possibility that in practice social contract theory would be tested in a world in which it was hardly clear whether Sovereign States or ordinary persons were the contracting parties. It is hardly surprising therefore that the classical writers never addressed federalism, enumerated [*1392] powers, and jurisdiction, even though these form fundamental features of our constitutional system. ⁹

We must, therefore, examine this question in an artificial world devoid of theories of natural rights. We must take our cue from more immediate, technical considerations. Or so it seems. Appearances are deceiving, however, and I shall argue throughout this Article that the reasons for the expansion of the commerce clause were strongly substantive. The rationale for limited government became obscure in an age when the Progressive tradition of good government came to dominate American intellectual life. ¹⁰ Judges who were persuaded that national solutions were needed for national problems could hardly be expected to invoke the commerce clause as a barrier to federal action when they believed in the importance of popular democracy, the soundness of the underlying legislation, the need for national uniformity, or all three. A judge's view of the commerce clause might be very different, however, if the perils of collective choice and the wisdom of the underlying substantive legislation were called into question. A court which shared the framers' view of government as a necessary evil could, if it so chose, put more teeth into the commerce clause than has existing case law.

Cases from both the Progressive Era and the New Deal showed a close fusion between issues

of substantive rights and questions of federal jurisdiction. The very attitudes that led to the demise of substantive due process protection of economic liberties lay behind [*1393] judicial interpretation of the commerce clause. ¹¹ To trace this history, it is necessary to discard the aura of inevitability that modern courts and writers have placed around the commerce clause. ¹² At each stage in the historical analysis, the right question to ask is: Was this extension of federal power justified by the text and structure of the Constitution? There are no shortcuts in the journey. Let us start with the text.

II. THE TEXT

The first place to look to find the meaning of the commerce clause is the text of the clause itself. Here one notices that the word "commerce" governs three separate sets of relations -- those with foreign nations, among the states, and with Indian tribes. ¹³ One should assume that the word commerce applies with equal force to all three cases, and bears the same meaning with respect to each of its objects. One cannot, for example, assign a meaning to "commerce" which is intelligible only with respect to foreign nations. The asserted construction must make equally good sense for commerce among the states and for commerce with the Indian tribes.

Similarly, one does not want a meaning of the term commerce which renders any one of these three heads of the commerce power redundant or unnecessary. The modern view which says that commerce among the several states includes all manufacture and other productive activity within each and every state, because of the effect that such manufacture has upon commerce, violates this constraint. If commerce includes all that precedes trade with foreign nations, among the states, and with Indian tribes, then the three heads of jurisdiction cover the same ground; that is, each by itself covers manufacturing or agriculture within each of the states. The [*1394] scope of the clause would thus be plenary even if it said only that Congress shall have power to regulate commerce with foreign nations, or even with the Indian tribes, and remained silent about commerce among the several states. The level of industrial production within each state, after all, influences the amount, type, and price of goods available for the export trade or for the Indian trade. Granting Congress the power over commerce among the states thus accomplishes nothing that has not been already provided for elsewhere in the document. What possible sense does it make as a matter of ordinary English to say that Congress can regulate "manufacturing with foreign nations, or with Indian tribes," or for that matter "manufacturing among the several states," when the particular fabrication or production takes place in one state, even with goods purchased from another?

Taking the alternative position, that commerce means trade, or as Chief Justice Marshall said, "intercourse," ¹⁴ with or among the parties named, changes the situation dramatically. By Chief Justice Marshall's account, "intercourse" covered both shipping and navigation, and the contracts regulating buying and selling. Using that two-part definition it becomes clear that trade with foreign nations is not trade among the several states or with the Indian tribes. Each part of the clause attributes the same meaning to the term commerce, and each of the objects of the clause -- foreign nations, the states, and Indian tribes -- becomes an indispensable part of the constitutional structure. The power to regulate commerce with foreign nations, for example, is needed to ensure that trade negotiations with foreign nations are not conducted by each of the [*1395] several states in its own individual capacity. ¹⁵

It is worth noting that this view of commerce as trade is consistent with the other prominent mention of the word commerce in the Constitution. Article I also states that "[n]o preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another" ¹⁶ The term "commerce" is used in opposition to the term "revenue," and seems clearly to refer to shipping and its incidental activities; this much seems evident from the use of the term "port." The clause itself would sound odd if it referred, for example, to preferences "given by any Regulation of Commerce, Manufacture or Revenue to the ports

of one State." The term commerce in this commerce provision does not carry with it the extensive baggage placed upon it by the better-known New Deal cases concerning the commerce clause.

III. THE STRUCTURE

One obtains the same interpretation of the commerce clause when considering the clause in light of the overall constitutional structure. Article I, section 8, contains an extensive list of separate, discrete, and enumerated powers granted to Congress, whereas article I, section 9, contains a comparable list of powers specifically denied to it. The lists of inclusion and exclusion suggest that the provisions contained in any one section should be read to recognize the existence and necessity of other specific powers and limitations contained elsewhere in article I, as well as the certainty that some matters are wholly beyond the power of Congress.

This view certainly appears to agree with the original theory of the Constitution. The federal government received delegated powers from the states and the individuals within the states. The exact source of the granting power might be somewhat unclear; after all, the preamble begins with "We the People," ¹⁷ yet ratification was by nine of the thirteen sovereign states. ¹⁸ Yet whatever the pedigree **[*1396]** of the Constitution, there was clearly no sense that either grantor conferred upon the Congress the plenary power to act as a roving commission, in order to do whatever it thought best for the common good. The looseness of vague grants of power would have given rise to the possibility of massive abuse, a possibility the framers seemed determined to control. The federal government was to have supremacy in the areas under its control, but the quid pro quo was that these areas were to be limited by specific jurisdictional grants. A system which says that the commerce clause essentially allows the government to regulate anything that even indirectly burdens or affects commerce does away with the key understanding that the federal government has received only enumerated powers. The doctrine of "internal relations" is not only a philosophical creed that says every event is related to every other separate event; it is also something of an economic truth in a world in which the price of any given commodity depends upon the costs of its inputs and upon the alternatives available to potential buyers. To say that Congress may regulate X because of its price effects upon any goods in interstate commerce, or because of its effects upon the quantity of goods so shipped, is to say that Congress can regulate whatever it pleases, a theory that cases such as *Wickard v. Filburn* ¹⁹ have so eagerly inferred.

On this score, moreover, there is no reason to distinguish the commerce of the eighteenth and nineteenth centuries from that of the twentieth. Business in one state has always had profound economic effects upon the fortunes of other states. The pre-Civil War battles between North and South over the tariff show just how much the fate of each state has always depended upon national economic policies. ²⁰ There was no economic revolution during the Progressive Era or the New Deal that justifies the convenient escape of saying that it is only the nature of business and trade that has changed, not the appropriate construction of the commerce clause. ²¹ The intimate interdependence between trade and national **[*1397]** economic conditions was as clear to the Phoenicians and the Romans as it is to ourselves. There has been no basic transformation of the economy that requires, or allows, a parallel transformation in the scope of the commerce clause. International trade is driven by the principle of comparative advantage and the costs of reaching distant markets. It did not begin with either the steamship or the railroad.

If the constitutional limitations on federal powers were designed to act as a substitute Bill of Rights, then the expansive interpretation of the commerce clause has done away with this protection completely. The necessary effect is that greater burdens are placed upon the substantive limitations, such as the Bill of Rights, found elsewhere in the Constitution. These limitations have met with varying fates themselves; one need only contrast the takings clause of the fifth amendment with the first amendment protection of the freedom of speech.

In some cases, the second barrier against expanded government has held. In other cases, chiefly those concerning economic liberties, it has crumbled, leaving liberty at the mercy of the "good faith" of the Congress whose mischief the barrier was designed to constrain.

Nor is any of this understanding upset by the "necessary and proper" clause of the Constitution, which may expand the power of Congress, but does not provide for an unlimited grant of federal power. The necessary and proper clause provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." ²² As drafted the clause does nothing to upset the balance of power between the federal and the state governments, nor to contravene the principle of enumerated powers on which the structure of article I, section 8 rests. What the necessary and proper clause does is to ensure that the Congress shall have all means at its disposal to reach the heads of power that admittedly fall within its grasp. [*1398] Such is the import of the phrase "for carrying into Execution": Congress shall not fail because it lacks the means of implementation. The clause does not, however, authorize the creation of new and independent heads of power, such as over local manufacture or agriculture, that obliterate the distinction between a federal and a national government. The necessary and proper clause thus permits the regulation of local affairs that are in a sense inseparable from national ones, as happens when local and interstate cars, for example, move along the same line. ²³ But it is hardly "necessary" to regulate every form of local activity in order to regulate the three heads of commerce over which Congress has power. And it is surely not "proper" to do so. ²⁴

This reading of the necessary and proper clause may appear somewhat narrower than that given by Chief Justice Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." ²⁵ Yet as stated, Chief Justice Marshall's broad reading of the clause does take into account the risks of overinclusion, by reference to matters which "consist with the letter and spirit of the constitution," which surely includes respect for the principle of enumerated powers, which Chief Justice Marshall acknowledged as being preserved in the tenth amendment. ²⁶ More to the point, Chief Justice Marshall adopted just this limited interpretation of "necessary and proper" in *Gibbons v. Ogden* when he wrote: "In the last of the enumerated powers, that which [*1399] grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred." ²⁷ In essence he treats the clause as a *limitation* upon means only, and surely not as an extension of *permitted* ends. So understood, the necessary and proper clause places a small but important weight upon the jurisdictional scales. But it is far from an automatic trump that overrides other jurisdictional limitations. Its historical role in the explication of the commerce clause is relatively small, and deservedly so. ²⁸

IV. THE CASE LAW BEFORE THE NEW DEAL: 1824-1936

The elaborate case law under the commerce clause can be profitably interpreted in light of the above understandings. Thus it is often said today that the New Deal does not represent violent revolution but prudent reformation ²⁹ (one thinks of Martin Luther and that other reformation). More precisely, the newer cases are said only to have returned to the wisdom of Chief Justice Marshall, who understood the importance of an expansive interpretation of the commerce clause to the maintenance of the Union. ³⁰ In between, in such cases as *United States v. E.C. Knight Co.*, ³¹ the courts are said to have strayed from the original understanding to a view that effectively hampered the power of Congress to impose much-needed social and economic regulation. This set of insights has even been dressed up in

plausible philosophical garb. Professor Tribe's treatise, *American Constitutional Law*, tells us that the Supreme Court between 1887 and 1937 substituted a "formal classification"

[*1400] of economic activities for the "empiricism" ³² that characterized Chief Justice Marshall's great judgment in the pivotal case of *Gibbons v. Ogden*. ³³

The New Deal was not a reformation, but a sharp departure from previous case law, and one that moved federal power far beyond anything Chief Justice Marshall had in mind. *Gibbons* is often regarded as an expansive interpretation, and for its time so it was. Yet when the critical passages of the opinion are read as a whole, it seems quite clear that the case strongly adumbrated the subsequent holding in *E. C. Knight*, with which it is said to contrast so clearly. It is worth a minute to describe Chief Justice Marshall's logic, for the key to understanding his view is to understand that he found in the rigid and formal structures of the Constitution the materials that enabled it to be the foundation on which a perpetual Union could rest. His vision of the Constitution was not that of a living and changing organism, but of a great temple of government that, properly understood, could endure for the ages. ³⁴

[*1401] A. *Gibbons v. Ogden*

At issue in *Gibbons v. Ogden* was whether New York could grant an exclusive franchise that permitted steamships to ply between New Jersey and New York only with the franchisees' permission. ³⁵ New Jersey had passed a retaliatory law; citizens of New Jersey sued in New York for violating New York law could recoup treble damages against the New Yorker in a New Jersey court. ³⁶ The New York statute threatened massive commercial balkanization. ³⁷ Chief Justice Marshall decided, first, that navigation among the several states was interstate commerce, and second (in order to avoid the question of whether any dormant commerce power could be identified) that a 1793 federal statute that licensed ships in the "coasting trade" had preempted the New York statute. ³⁸

Professor Tribe has summarized his view of the broad scope of *Gibbons* as follows:

[I]n an elaborate preliminary discussion, [Chief Justice] Marshall indicated that, in his view, congressional power to regulate "commercial **[*1402]** intercourse" extended to all activity having any interstate impact -- however indirect. Acting under the commerce clause, Congress could legislate with respect to all "commerce which concerns more states than one." This power would be plenary: absolute within its sphere, subject only to the Constitution's affirmative prohibitions on the exercise of federal authority. ³⁹

This passage suggests that Chief Justice Marshall in *Gibbons* gave a very extensive reading to the reach of the commerce clause. But that is only because of the redactor's power of selection. Consider the fuller context of the quotation from *Gibbons*:

Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and

that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. ⁴⁰

The passage gives a quite different sense of the commerce clause's scope than the one that Tribe suggests. It is hard to find in the phrase "commerce which concerns more States than one" a total jurisdiction over all commercial activity, especially when the phrase is preceded by the word "restricted." ⁴¹ Quite the opposite; [*1403] it looks as though Chief Justice Marshall wanted only to refute the argument (see his first sentence quoted) that interstate commerce can only take place on the narrow boundary between the two states. ⁴² Such a position, if carried into law, would have rendered the commerce clause a dead letter. Commerce between two states, or among many, must take place physically within the confines of one or both of them. It is therefore the nature of a transaction, rather than its location, that stamps it as part of interstate commerce. Navigation between states takes place at one instant in one state, and at another instant in another. Both portions of the journey are covered by the commerce clause, even if purely intrastate navigation is excluded. The power may be plenary, but it is surely limited as to its objects. Matters outside its scope are fully reserved to the states. Chief Justice Marshall did write, as Tribe suggests, of the "plenary" nature of the commerce power. But again his words must be set in context. Chief Justice Marshall thus wrote: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." ⁴³ But he continued:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. ⁴⁴

It follows therefore that "plenary" powers were understood by [*1404] Chief Justice Marshall to be wholly consistent with powers "limited to specified objects."

This view is, moreover, reinforced when we take into account Chief Justice Marshall's own principles of construction, which should give caution to advocates of both judicial restraint and judicial activism. His attitude was essentially that the Constitution should be construed in its "natural sense." He was rightly suspicious of any effort to impose principles of "strict construction," but by the same token did not wish to give words an extravagant meaning given their function and purpose within the framework of the constitution. ⁴⁵ He followed a middle course on the issue of construction, that of ordinary meaning, no different from that which a good contracts judge follows when he attaches ordinary meaning to contractual provisions. ⁴⁶ Even with an explicit reference to the necessary and proper clause, ⁴⁷ Chief Justice Marshall acknowledged that the commerce clause was itself directed toward specific ends, as was captured by the distinction between "internal" and "external" commerce, where internal commerce was that trade "between man and man in a State, or between different parts of the same State." ⁴⁸ By that definition internal commerce is as commonplace in our own time as it was in Marshall's: every purchase [*1405] at a supermarket is internal commerce, even if the market itself acquired its own goods from a supplier out of state.

Nor is this balance between internal and external commerce undone because Chief Justice Marshall used the word "affects" to round out the scope of Congress' power. Those references to activities that "affect" interstate commerce cannot be read in isolation from the rest of the text, as an effort to nullify the basic doctrine of enumerated powers. Instead, his purpose was to counter prior contentions about the scope of internal commerce that had been stated by the New York court in *Livingston v. Van Ingen*. ⁴⁹ There, New York Chief Justice Kent gave the commerce clause its narrowest possible construction, and thus treated as part of internal commerce any portion of an interstate journey that was undertaken wholly within local

waters.⁵⁰ When Chief Justice Marshall spoke of local regulations that "affect" interstate commerce, he did so to reject the argument that New York could insist that all rival carriers be required to use sails in New York waters, even if they used steam elsewhere. So long as this local restriction "affected" the journey as a whole, the regulation reached commerce among the several states, notwithstanding that its "direct" impact was on New York waters alone. There is not the slightest hint that Chief Justice Marshall meant to have the "affects" qualification expand the specific objects to which the "plenary" commerce clause applies, beyond the control of interstate commercial transactions and the instrumentalities of interstate commerce.

Further elaboration of Chief Justice Marshall's meaning appeared elsewhere in his opinion. At one point he addressed whether the states could pass inspection laws, or whether these laws fell solely within the domain of the congressional commerce power.⁵¹ He finessed that question by giving a very narrow definition of what interstate commerce included:

[*1406] That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.⁵²

It is instructive to compare this passage with the most famous sentence of *E. C. Knight*, which has been cited as a sign of its narrow and indefensible rigidity: "Commerce succeeds to manufacture, and is not a part of it."⁵³ Chief Justice Marshall himself could have written that sentence, citing *Gibbons* as authority. His style was anything but "empirical," if that term is used to identify the necessary economic connection between intrastate and interstate commerce. Indeed the passage just quoted is wholly inconsistent with the indirect burden on interstate commerce approach taken in the modern law. Chief Justice Marshall's greatness rests upon his appreciation of the boundaries which should dominate the constitutional playing field. Individual cases may fall close to the boundary lines, and must be placed on one side or the other. Yet the position of the boundary lines must remain fixed if the power to adjudicate is to remain. Things cannot be partly in and partly out of interstate commerce. As long as one government or the other must regulate, the boundaries must be sharp -- such as the foul lines in baseball -- and not fuzzy. It has been said that modern constitutional law represents the triumph of "formalism" over "realism."⁵⁴ If this is true, then Chief Justice Marshall was the great formalist, not the precursor of the modern realists.

There is a good deal to be said for Marshall's categorical approach. If pressed to give a common law analogy to Marshall's way of thinking, I would offer the common law trilogy of the liabilities **[*1407]** of a landowner to the trespasser, the licensee, and the invitee. No judge ever thought that these categories were crystal clear, nor that individual cases would not give rise to honest disagreements of opinion. But it was thought that the categories were fixed and limited as a matter of principle: "There is no half-way house, no noman's land between adjacent territories. When I say rigid, I mean rigid in law."⁵⁵ And the modern disintegration of the categories has done little to produce any coherent law of occupiers' liability.⁵⁶ So it is with interstate commerce. The principle that the power of Congress *did not* extend to the internal commerce of the state was as important to the overall scheme as the recognition that the power of Congress extended to interstate commerce. Marshall well understood the fact that local events affected interstate commerce, but he *rejected* it as a basis for extension of congressional power over internal matters. *Gibbons* thus stands in sharp opposition to the very assertion of federal power that characterizes such cases as *United States v. Darby*⁵⁷ and *Wickard v. Filburn*.⁵⁸ In *Wickard*, **[*1408]** Justice Jackson captured the transformation of *Gibbons* when he wrote: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."⁵⁹ No way.

B. The Expansion of Commerce Clause Jurisdiction

There is a long road from *Gibbons* to modern doctrine of the broad reach of congressional power under the commerce clause. This section will trace the twists and turns in that road. In one sense *Gibbons*, for all its importance, is an odd place from which to begin the journey, because the case itself as much concerned the limitation of state power as it did the extent of congressional power under the coastal trading statute. Indeed, the negative, or dormant, commerce clause power that prohibits states from intruding on the federal authority over interstate commerce even absent any congressional legislation on the subject of the state action dates from *Gibbons* as well; Justice Johnson's concurring opinion argued that the commerce clause standing alone prohibited New York from passing the statute in question.⁶⁰ The primary purpose [*1409] of this Article is not, however, to trace the negative side of the clause,⁶¹ which has proven quite stable in recent times. Rather, the purpose is to follow the expansion of the affirmative power of the clause. This development took place along three separate lines.⁶² The first line took its cue from the narrow holding of *Gibbons* that navigation counted as commerce under the clause, and concerned the "instrumentalities of commerce." This Article follows the expansion of the clause, briefly in connection with navigable waterways, [*1410] and more extensively with the systematic and inexorable expansion of the federal power to regulate the railroads under the Interstate Commerce Act of 1887, as amended.⁶³

The second line of cases involved the regulation of goods admittedly in interstate commerce (that is, goods in transit across state lines) in order to control the primary conduct of persons in either the sending or receiving state. This line of cases might be called the "indirect regulation" cases. The third line of cases, emanating from *E. C. Knight* itself, explored the distinction between manufacture and commerce among the several states.

Between 1870 and 1937 the scope of federal power under these three lines of case law continued to expand, but in ways that still left an extensive area of economic life outside the power of Congress. In particular, the distinction between manufacture and commerce laid down in *E. C. Knight* in 1895 retained its validity until it was at last overturned in 1937 by *NLRB v. Jones & Laughlin Steel Corp.*⁶⁴ In general the expansion of the first and second heads of the commerce power fall within the general scheme set out by Chief Justice Marshall in *Gibbons* in that they address both the power of Congress to regulate the means by which goods are shipped in interstate commerce, as well as the types of goods that can be shipped. In my judgment, the scope of the federal power under these two heads moved, prior to 1937, a step or two beyond where proper argument would take them. But although these difficult cases can be argued at the margin, nothing in the case law under these two heads undermined the essential validity of the line between commerce, on the one hand, and manufacture and agriculture on the other, clearly adumbrated in *Gibbons* and accepted in *E. C. Knight*. It is only when that last distinction is rejected that a system of enumerated powers is dismantled. Yet there is no conceptual necessity for saying that power to regulate commerce among the several states must reach everything if it is to reach anything. The modern generation of negative commerce clause cases is instructive because it proves that it is possible, and sensible, to articulate an enduring conception of interstate commerce -- just as Chief Justice Marshall had insisted.

[*1411] 1. *The Instrumentalities of Commerce*

Gibbons itself laid down the distinction between the "internal commerce" or "interior traffic" of a state and commerce among the states.⁶⁵ Although Chief Justice Marshall articulated the distinction with confident assurance, its limits were not really tested until 1870, when the Court in *The Daniel Ball*⁶⁶ considered an 1852 inspection statute for steam passenger vessels operating on the navigable waters of the United States. The appellant questioned whether Congress had the power to inspect a ship that remained solely within a single state, even

though it carried goods that had been shipped from other states, or were eventually destined for shipment into other states.⁶⁷ As framed, the case offered an instructive counterpoint to *Gibbons*, which had decided that the federal commerce power reached a single, continuous journey that started in one state and ended in another. The Court in *The Daniel Ball* asked what happened when that same journey involved two ships instead of one. If Chief Justice Marshall's view of the commerce clause was as expansive as the received wisdom has it -- if "plenary" had meant "wholly unbounded" -- then it is unintelligible why the Supreme Court should have paused a second to decide *The Daniel Ball*. It is only because *Gibbons* extended the scope of the commerce power to "intercourse," and kept it there, that there was any occasion to deliberate on the loose ends left open by *Gibbons*.

Relative to the understandings of its time, *The Daniel Ball* gave *Gibbons* a modestly expansive interpretation. The opinion by Justice Field -- no friend of big government -- upheld the 1852 inspection statute because of the Court's explicit fear that any other interpretation of the commerce clause would strip the federal government of its fundamental powers. "Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end," he wrote, "the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."⁶⁸

[*1412] Justice Field's conclusion has assumed the status of a necessary truth. Nonetheless, there is reason to ask whether the decision is as impregnable as it seems. It appears that the commerce clause could well apply to *goods* destined for sale in another state as part of a continuous transaction, even if they are shipped by boats that operate solely within the territorial waters of one state. Where the transfer of goods from boat to boat is part of a comprehensive plan -- as when the various carriers have coordinated travel schedules -- then Congress should have jurisdiction. But it is far from self-evident that because the goods are in the interstate market the ships which carry them on parts of the journey are in interstate commerce as well. The states could regulate the safety of the boats on which the goods are carried, while the federal government could (as it has never seen fit to do) pass a statute dealing with the rights and duties of common carriers and their customers, as well as maintain jurisdiction over any ship that did cross a state line. There need be no gap in the system of regulation. And as long as ships remain within a single state, shipowners hardly need the federal power to protect them from inconsistent regulation. If state regulation became overly onerous, a shipowner could escape it by explicitly organizing his business to specialize in interstate transport, or by moving to another state. Deciding *The Daniel Ball* the other way would have promoted competition between state governments. Such an outcome would hardly have made the commerce clause a dead letter, as Justice Field insisted, even if it would have stopped the further expansion of federal power.

There is a danger in this alternative analysis of *The Daniel Ball* that federal jurisdiction will be less comprehensive than is needed to perform a particular regulatory task. The Court in *The Daniel Ball* and subsequent decisions reacted to this danger by weighing the risk of underinclusion within the federal power more heavily than the reverse danger of overinclusion. With the vantage of hindsight, *The Daniel Ball* originated the "protective principle" which, when pushed to its limit, finds that the use of federal power in a doubtful case is *always* "necessary," perhaps in the sense of the "necessary and proper" clause.⁶⁹ But there are some risks to the strategy, that although not evident here, must be kept in mind. Unless the countervailing principle of enumerated powers is **[*1413]** brought to the fore, then the basic structure may be lost in a series of small accretions, each one palatable on its own, even though the whole structure is not.

It is precisely that form of incrementalism that characterized the later cases involving the use of railroads in interstate commerce. The impetus for national regulation clearly came from the famous decision in *Wabash, St. Louis & Pacific Railway v. Illinois*.⁷⁰ That case prevented state governments from regulating railroad fares from points within a state to points outside

it.⁷¹ There was a functional reason for the decision, given the risk that separate states could impose inconsistent obligations upon carriers. Congress attempted to solve this problem by passing the Interstate Commerce Act (ICA)⁷² in 1887.

Sensible economic concerns led to the passage of the first ICA, which was designed to prevent discrimination against short-haul carriers. The problem arose because of the structure of the railroad lines. Different carriers went by different routes from one population center to another. Thus there was competition on the long-haul routes (such as San Francisco to Chicago) because shippers had many choices. But, once out in the plains, any given line had a local monopoly that it could exploit against farmers and others. When it exacted monopoly profit, its short-haul rates could easily exceed its long-haul rates, even if the actual cost of long-haul shipment was greater. But simply preventing the price per segment from exceeding the price for the whole trip would have gone a long [*1414] way toward eliminating monopoly profit without getting the government involved in the ratemaking that characterized the Interstate Commerce Commission (ICC) after the "reforms" of this century, including the Transportation Act of 1920.⁷³

One question was whether the ICC's authority reached trips that began and ended within a single state. In essence this was the land-based version of the question raised, and answered in the affirmative, in *The Daniel Ball*. Nonetheless, as a matter of first principle, one could forcefully insist that the proper answer should have been no. The obvious response to this assertion is that unprincipled exploitation of short-haul users would have continued on a limited scale even after the passage of the ICA. But that need not have been the case. The states could have had exclusive jurisdiction over these short-haul runs, and their local laws could have replicated the key substantive provision of the ICA, thereby protecting purely intrastate shippers: the railroad could not charge more for the intrastate run than it charged for any longer interstate run of which the intrastate segment was a part. The danger of radical state restrictions on the power of carriers to cover their costs for internal runs could have been avoided by constitutional protections against confiscation, such as those invoked during this period in *Smyth v. Ames*.⁷⁴ The jurisdictional balance between federal and state governments could have been quite stable if left where *Gibbons* had placed it. More to the point, *Gibbons'* limits on the extent of the commerce clause would have been important because they would have limited the degree to which Congress could have used its commerce power to cartelize the entire railroad industry, as it did by amending the ICA after World War I.⁷⁵

Historically, however, the dividing line between interstate and intrastate journeys did not endure. It is instructive to trace the expansion of the commerce clause in the railroad cases. At each point the Supreme Court seemed aware that there must be some [*1415] limit to the commerce power, but on virtually every occasion it found the federal legislation at issue not to exceed the limit. The Court failed to understand that too much federal jurisdiction was as dangerous as too little. In this regard, *Houston, East & West Texas Railway v. United States (The Shreveport Rate Case)*,⁷⁶ decided in 1914, marked an especially instructive watershed. This case has been read as an important step forward (the bias is implicit) for the commerce power. The facts were complicated, and the details have unfortunately been forgotten in modern times. Nonetheless they deserve close attention today.

Various points in East Texas were served by interstate carriers operating out of Shreveport, Louisiana on one end, and Dallas and Houston, Texas on the other.⁷⁷ Before the intercession of the ICC, the prices charged by these railroad lines were far higher for shipping goods from Shreveport to Texas than were the rates for shipping goods within Texas, where rates were set by a state body, the Texas Railroad Commission.⁷⁸ The ICC ordered adjustments to railroad rate structures that "unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas."⁷⁹

The ICC proposed a compound remedy to alleviate the perceived ills. The first part of the ICC

order imposed specific maximum rates that the carriers could charge on their interstate, i.e., Louisiana-Texas, routes.⁸⁰ The second part was a general nondiscrimination provision which held that the rates in interstate traffic could not be higher than those in intrastate traffic.⁸¹ The order, however, left it to the railroads to decide whether they raised intrastate rates, lowered interstate ones, or did a little of both. All that was required was equalization of rates within the ceilings set by the first part of the ICC order. Given the structure of the order, it was possible for the railroads to comply in full with the ICC order [*1416] without changing their intrastate rates: the railroads simply had to reduce their interstate rates until they equalled the rates charged on the intrastate runs. Accordingly, the decision upholding the ICC order could be read not to involve a conflict between the rates established by the ICC for interstate traffic and those set by the Texas Railroad Commission for intrastate traffic, and as such the decision does not appear to have extended the scope of the commerce clause very far.

This narrow reading of the case, however, is belied in at least two respects. First, the *Shreveport Rate Case* protected the railroads if they chose to raise their intrastate rates in defiance of the rates set by the Texas Railroad Commission. Although there was no necessary regulation of intrastate rates, the remedy envisioned made the state powerless to set any intrastate maximum below the ICC maximum if the railroads chose to raise their local rates to the ICC levels. The unmistakable thrust of the opinion was to make the congressional power paramount over state authority:

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.⁸²

Second, the *Shreveport Rate Case* relied upon and extended earlier decisions that had sustained the power of Congress to regulate railroad safety, even when there was a "commingling of duties relating to interstate and intrastate operations."⁸³ *Southern Railway v. United States*,⁸⁴ had sustained the Safety Appliance Act⁸⁵ with respect to cars in interstate travel even though it necessarily embraced cars that were used in intrastate travel as well. In the *Second Employers' Liability Cases*,⁸⁶ the Court had sustained Congress' authority to allocate liability for accidents caused to employees in interstate commerce, even when they were caused by employees engaged in intrastate commerce. These cases arguably [*1417] could be justified under some protective principle as a response to the same hard choice faced by the Court in *The Daniel Ball*: if Congress were confined to matters that were purely in interstate commerce, then it could never legislate to the limit of its jurisdiction.⁸⁷ Yet for Congress to reach the full limits of its jurisdiction it must on some occasions go beyond it. The choice is necessarily either over- or underinclusion. It is hard to gainsay a judicial decision that opts for the former over the latter, at least in cases where interstate and intrastate commerce are inextricable, such as different railroad cars on the same train. A necessary and proper clause argument has evident force here.⁸⁸

Justice Hughes (the same Justice Hughes who later as Chief Justice wrote *NLRB v. Jones & Laughlin Steel Corp.*)⁸⁹ made it appear in the *Shreveport Rate Case* that there was a seamless web encompassing both the safety cases and the rate regulation cases. But the rate regulation case marked an expansion of the commerce power, although perhaps an inadvertent one, beyond the safety cases that preceded it. The commerce clause was at issue in the safety cases because railroad cars were used for both interstate and intrastate runs at different times, and were often mixed on the same train. There was thus a "commingling of duties relating to interstate and intrastate operations."⁹⁰ Yet no such commingling existed with respect to the rate structures, as it was surely possible to regulate interstate fares without regulating intrastate fares. The various rate schedules were distinct; it was possible

for the ICC to set rates on the interstate runs without having to set them on intrastate activities. Indeed, it appears that this was Congress' intention in passing the original statute.⁹¹ In order to uphold the expanded [*1418] jurisdiction sought by the ICC, the "commingled" approach of the safety cases had to yield to a broader formulation whereby Congress could extend "its control over the interstate carrier in all matters having . . . a close and substantial relation to interstate commerce."⁹² At this point the Justices should have considered whether the risks of overextension of federal power were worth running. But, lacking an underlying theory of the risks of regulation, the Court acted as though any exercise of the congressional jurisdiction were benign. The path of broad construction and social virtue again coincided, in the Court's view.

For all their nimble footwork, the authors of the *Shreveport Rate Case* did not necessarily commit the Court to an all-inclusive view of the commerce clause. The regulations in question were imposed upon the intrastate business of interstate carriers. Congress' commerce power did not yet necessarily reach intrastate carriers that did not engage in any interstate business. In addition, the *Shreveport Rate Case* tied federal regulation of local business to proof of discrimination against interstate commerce. The ICC could not have comprehensively regulated the entire railway business under its authority alone, for some local rates at least were not set in conjunction with discriminatory interstate rates. Yet this barrier too was quickly overrun by the Court in *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad*,⁹³ which upheld the constitutionality of one of the worst pieces of modern economic legislation, the Transportation Act of 1920.⁹⁴ The Act replaced specific control of long-haul/short-haul problems with comprehensive regulation of the railroad industry, and helped cartelize an entire industry by imposing comprehensive rate of return regulation.⁹⁵ Yet, under the rationale of the *Shreveport Rate* [*1419] *Case*, the statute could *not* have been sustained in its entirety under the commerce clause because it reached local railroad runs that by no stretch of the imagination competed with interstate runs.⁹⁶ On these local routes a showing of nondiscrimination, so critical to the *Shreveport Rate Case*, could not be made. But the Court again took a benevolent view of an expansive statute,⁹⁷ finding that Congress could ensure that the costs of running railroads were properly distributed between interstate and intrastate carriers.⁹⁸

The connection between federal jurisdiction, interest group politics, and substantive entitlements is clear. The Court adopted a benevolent, public interest interpretation of the 1920 statute, and hence saw no risk in extending federal power farther than prior law had taken it. But too much regulation is always at least as risky as too little.⁹⁹ Furthermore, the Court's extension of the commerce clause in the *Shreveport Rate Case* dictated the likely structure of future regulation, to which the Court also was to acquiesce. It was [*1420] not possible, or at least it was less possible, to have comprehensive rate-of-return regulation, complete with control over entry, if Congress could not touch the local portions of the railroad business. If the emphasis had remained on the long-haul/short-haul problem, then a system of federal and state regulation that limited congressional control to wholly interstate trips would have been adequate to the task. The original ICA thus was clearly superior to its 1920 version. It was only the judicial expansion of the commerce clause that made it possible for Congress to adopt its own unfortunate substantive provisions.

The game has still not run its course, for even the decisions of the Court in rate cases after the *Shreveport Rate Case* do not mandate the conclusion that the commerce clause is all-embracing. To see the remaining distinctions, consider the fate of one critical passage from the *Shreveport Rate Case*:

Congress is empowered to regulate, -- that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement;' to adopt measures 'to promote its growth and insure its safety;' 'to foster, protect, control and restrain.' Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their

operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. ¹⁰⁰

This passage appears to say that the commerce clause supports congressional power over the *instruments of commerce*, that is, the railroads and the highways, because of the impossibility of disentangling the various threads of interstate and intrastate business, but extends no further. Federal jurisdiction over commerce would end at the railroad station, with the already bloated ICC of the 1920 Act. This judgment implies no preference for regulated over-competitive industries. The railroads have serious long-haul/short-haul problems that make the competitive solution difficult. In any event, the conflict is not between federal regulation and market competition. Instead it is a conflict between state and federal regulation, [*1421] and there is no reason to think a priori that one will be superior, by whatever measure, to the other.

One could therefore find a stable stopping point to the commerce power by limiting its reach to transportation by rail, river, road, and today, by air. Congressional power would be limited to commerce as traditionally understood, even though it would reach intrastate as well as interstate commerce with respect to those transportation facilities that were devoted to both.

It is possible, however, to unhinge the last fragment of the previous passage from the whole so as to make it appear that any competition, from whatever source, justifies federal regulation. Just that step was taken during the New Deal. But before we turn to this ultimate transformation of the *Shreveport Rate Case* line of cases, ¹⁰¹ it will be instructive to examine the other two lines of commerce clause cases.

2. What Goods May Be Shipped in Interstate Commerce?

The pre-New Deal expansion of the commerce clause did not stem solely from the federal regulation of the instrumentalities of interstate commerce. It was also intimately connected to the types of goods that could be shipped in interstate commerce at all. These cases, it seems clear, did not necessarily involve only commerce among the several states, although the regulated goods were in transit from one state to another. But the relevant questions were, and remain, intractable because both the motive and effect of congressional regulation concerned matters that were themselves not within the "stream of commerce," at least as the phrase was understood before 1937. The true goal of these regulations was to govern -- "influence" is not a strong enough word -- the behavior of individuals and firms before their goods entered commerce or after they left it. In evaluating the statutes, the Court was required to consider the interaction between the commerce clause and the rest of the constitutional structure, in particular the principle that Congress possessed only the limited and enumerated powers conferred upon it by article I -- powers that did not allow it to intrude upon the reserved powers of the states. The drawing of the relevant lines is by no means an easy task. But there is on balance [*1422] good reason to believe that here too the Court, even before the 1937 revolution, construed the commerce clause in ways that extended the power of Congress beyond its proper scope.

The first case in the line was *Champion v. Ames* ¹⁰² in 1903. The question before the Court was whether Congress under the commerce clause could prohibit the transportation of lottery tickets across state lines. ¹⁰³ The first Justice Harlan's opinion upheld the statute as a proper application of the commerce power. ¹⁰⁴ But Justice Harlan's defense of federal power in *Champion* is problematic. Although the statute in question operated on articles of interstate commerce, its purpose surely was not to protect or to facilitate interstate commerce. Quite the opposite -- its purpose was designed to influence the primary conduct of individuals, either before the goods entered interstate commerce or before it left them. One tell-tale sign of the new aggressiveness to which the commerce power was turned was that Congress

sought to *prohibit*, not to regulate, the transfer of lottery tickets in interstate commerce. In and of itself, this fact hardly seems dispositive, for it is doubtful that the commerce clause could be read so that "regulation" occupies a domain so narrow that all types of prohibition fall outside the power of Congress. Hamilton himself spoke of "prohibitory regulations" when addressing in *The Federalist* No. 11 the need to regulate commerce with foreign nations.¹⁰⁵ If these prohibitions are (regrettably) proper in the foreign context, then they cannot be wholly banished in the domestic one.

Analytically, too, it seems that regulations comprehend prohibitions. To be sure, regulation and prohibition do not mean the same thing, and the Constitution itself uses the two terms in clear opposition to each other.¹⁰⁶ It would be very odd indeed to say that [*1423] Congress had the power "to prohibit all commerce with foreign nations, among the states, or with the Indian tribes," for the total elimination of all trade seems hard to reconcile with the original vision of vibrant national markets unimpeded by petty local regulations.¹⁰⁷ But it is difficult to have the extreme case determine the principle, given the massive overlap between regulations and prohibitions in ordinary speech. The class of conditional prohibitions -- of the sort which say that no goods may travel in interstate commerce unless evidenced by a bill of lading -- is so extensive, and benign, that it is difficult to see how any jurisdictional limitation on congressional power could be erected on the strength of the verbal distinction alone.

The source of the uneasiness with *Champion* does not, however, disappear even if we acknowledge, however uneasily, that all prohibitions are regulations within the meaning of the commerce clause. Instead, the common concern with both regulations and prohibitions of the sort found in *Champion* and its progeny is that Congress will use its powers of regulation to upset the doctrine of enumerated powers. Stated otherwise, *Champion* is perhaps the first case in which Congress had consciously sought to exploit the outer reaches of the commerce clause in ways that might trench upon the power of the states. In one sense, the Congress stayed within the commerce clause because Chief Justice Marshall told us that the commerce power is "plenary" over everything that comes within its specified limits. But in another sense Congress used its plenary power to arrogate to itself matters reserved to the states. The uneasiness that one thus feels with *Champion* is quite similar to that which is provoked by the troublesome doctrine of unconstitutional [*1424] conditions, which no one quite understands, but which no one will nonetheless ignore.¹⁰⁸ One way to read unconstitutional conditions is an effort by the state to expand its power over the private activities of individuals by conditioning their access to public facilities, most typically roads: thus the doctrine has been invoked to hold that the state cannot allow a private carrier to use the public highways unless it first agrees (without compensation) to be regulated as a public carrier.¹⁰⁹ The clear function of the doctrine is to curb the state desire to use its power of public instrumentalities to control private behavior, even though it is allowed to exclude vehicles of certain classes from the highways altogether.

The *Champion* line of cases shows the same type of tensions at work, as the Court struggled to find the line that allowed the power of Congress to remain plenary, without undermining the reserved powers of the state. Some forms of regulations, and indeed prohibitions, seem not to threaten the delicate balance of the federal system. As the dissent in *Champion* suggested, for example, a clear instance of an acceptable prohibition is one preventing the shipment in interstate commerce of goods that are themselves a peril to interstate commerce:

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one State to another to engage in the lottery business."¹¹⁰

Here there is no concern that Congress by the use of a single enumerated power is trying to dominate the states in the exercise of [*1425] their reserved powers.

Similarly, a somewhat broader but wholly defensible line could stress the harmony between federal and state regulation. Suppose that the statute at issue in *Champion* prohibited the shipment of lottery tickets from any state in which their production was illegal or into any state in which their possession was illegal. Here the congressional statute would be *in aid of* valid legislation at the state level. It would reinforce, rather than contradict, state law. In *Champion*, however, the tie between state and federal regulation was nonexistent, or even negative. The shipment of lottery tickets was forbidden in interstate commerce although their use may have been wholly legal in the states from which and to which they were sent. To be sure, if congressional power under the commerce clause had been clearly established, the supremacy clause would have resolved the conflict between state and federal laws in Congress' favor.¹¹¹ But the supremacy clause is of no help until the proper scope of the commerce clause has been first determined, in light of the concerns raised by the doctrine of unconstitutional conditions. The narrower tests previously discussed would not seem to allow the *Champion* prohibition. These two tests -- "in aid of" state legislation, and the "noxious use" test -- would not make the commerce clause a dead letter, but they also respect the independent power of the states.

There was yet a third line of argument that could have prevailed in *Champion*. The case could have rested on a peculiar amalgam of the police power and the commerce clause, showing yet again the affinity between jurisdictional and substantive concerns. Lottery tickets were an issue toward which states had long taken a quite schizophrenic attitude. Sometimes the states prohibited lotteries; sometimes they allowed private firms to run them under state charter; sometimes they ran the lotteries themselves.¹¹² Generally speaking, gambling fell within the class of dubious private activities subject to police power regulation, along with, for example, prostitution. One possible stopping point under the commerce clause would provide that Congress could prohibit the transmission in interstate commerce of those goods which a state *could* ban [*1426] under its police power, as it was then understood, even if the state had not actually prohibited their use. Justice Harlan, who wrote the majority opinion in *Champion*, always gave an expansive,¹¹³ and occasionally maddeningly extravagant,¹¹⁴ scope to the police power whenever supposed issues of health and morals arose, though otherwise he was a tiger in defense of individual liberty and freedom of contract.¹¹⁵ Justice Harlan's opinion in *Champion* emphasized the police power, stressing the iniquitous nature of lotteries and asking, "why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?"¹¹⁶ Harlan rejected the idea that the commerce clause "countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals."¹¹⁷

The question then arises: Could the argument equating prohibition under the police power with prohibition under the commerce clause survive? Why not? It is an argument that could permit the federal government to regulate the transport of prostitutes across state lines,¹¹⁸ whether or not prostitution was legal in the state to which they were sent, or to prohibit the sale of adulterated foods and drugs.¹¹⁹ Note that each of these examples would be far more secure if the sale of the ultimate product or service were illegal in the state to which the goods were shipped, as was typically the [*1427] case. This somewhat broader conception, although perhaps less preferable than the more limited versions of the commerce clause discussed above, would still have left its scope less than comprehensive.

It was just this conception of the relationship between the commerce clause and the police power that held the line against federal power in *Hammer v. Dagenhart*.¹²⁰ In *Hammer*, federal legislation forbade the shipment in interstate commerce of any goods manufactured in any plant that used child labor in ways prohibited by the statute within a thirty-day period

prior to the shipment. ¹²¹ There was no requirement that the actual goods shipped in interstate commerce had to have been made by child labor -- only that some goods made at the plant had been made with the use of child labor. The validity of the statute was hardly compelled by *Champion*, for the sale of ordinary clothing could not be prohibited as an illicit item of commerce under even the most extravagant version of the police power. Indeed, the Court understood the statute for what it was; it was not an effort to control the goods themselves, but to prescribe the internal rules governing their manufacture within the state. ¹²² The delicacy of this legislation was manifest in an age when direct federal regulation of manufacture had been precluded by the Supreme Court in *United States v. E. C. Knight*. ¹²³ In *Hammer* the Supreme Court stuck to its guns, and by a narrow five-four decision refused to extend *Champion* beyond the noxious or dangerous products to which it applied.

On balance, *Hammer* was correctly decided, assuming that the commerce clause must be understood within the larger structural context of the Constitution. Thus, if the child labor statute in *Hammer* had been good law, one can envision the following cycle of evasion and response: A firm using child labor now divides its business into two halves, subject to common stock ownership. One half makes goods for intrastate commerce using child labor, while the other half makes goods for interstate commerce without using [*1428] child labor. Congress then passes a new statute which says that no firm whose shareholders have a dominant interest in a second firm that uses child labor may send its goods into interstate commerce. The firm decides to go out of the interstate business altogether. Congress next passes a statute which says that no firm that acquires part of its supplies from any firm that uses child labor may ship its goods in interstate commerce, whether or not the goods made with child labor are incorporated into its own goods shipped interstate.

Why stop here? If the political will exists, Congress can pass a law which states that no firm in any state may ship its goods in interstate commerce unless every other firm within that state forswears the use of child labor. In each case the statute technically regulates only goods within the stream of interstate commerce. If prohibitions are simply forms of regulation, then Congress can raise the price of state independence so high that even the fool-hardy must capitulate. Congress can make any use of child labor a federal issue by redefining the keys that unlock the gates to interstate commerce. If child labor can be reached by Congress, then so can everything else reserved to the states. A "Congressional Marriage Act" could provide that "no manufacturer can ship its goods in interstate commerce unless its state legislature passes a statute under which all local marriages conform to the federal requirements." These concerns were indeed raised by Justice Day, who wrote the majority opinion in *Hammer*. ¹²⁴ Justice Day correctly noted that prior cases were limited to cases in which the "use of interstate transportation was necessary to the accomplishment of harmful results," ¹²⁵ and held that only the limited version of the commerce clause was consistent with the tenth amendment. ¹²⁶ He noted that competition within the federal system was essential to the original constitutional design. ¹²⁷

[*1429] Justice Holmes in dissent wrote a spirited and perceptive defense of the congressional power:

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. ¹²⁸

Holmes surely overstated his point. No one doubted that Congress had the power to override any state effort to block the shipment of goods in interstate commerce. But the justification of one use of that power hardly demanded acceptance of any use of it. The child labor statute in *Hammer* was invalid because Congress had used its admitted powers over interstate

commerce to eliminate a state's "internal affairs" completely. Holmes never addressed this limit to his principles, nor identified the expansive statutes that his views necessarily tolerated -- even though he had previously warned against interpreting the commerce clause so as to allow Congress to reach every productive endeavor of human life.¹²⁹ His observation that no statute should be upset because it has "indirect effects" upon the domestic affairs of the state¹³⁰ simply failed to address the structural threats that the child labor statutes posed to the distribution of state and federal power.

Justice Day's majority opinion in *Hammer* was strong on the jurisdictional side, but apologetic on the substantive side.¹³¹ The issue of child labor laws had long been an emotional one, and there was a powerful consensus in the Progressive movement that these statutes were absolutely necessary to counteract the evils of an unrestrained laissez-faire economic system which tolerated, and indeed encouraged, child labor. The Solicitor General, John W. Davis (who later represented the southern states in *Brown v. Board of Education*¹³²), insisted that, although the need was pressing, individual [*1430] states were reluctant to enact their own child labor statutes because they feared that their manufacturers would be harmed by competition from industries in states still employing child labor:

The shipment of child-made goods outside of one State directly induces similar employment of children in competing States. It is not enough to answer that each State theoretically may regulate conditions of manufacturing within its own borders. As Congress saw the situation, the States were not entirely free agents. For salutary statutes had been repealed, legislative action on their part had been defeated and postponed time and again, solely by reason of the argument (valid or not) that interstate competition could not be withstood.¹³³

The quoted passage was something of an overstatement, as every state in the Union, including North Carolina (the state at issue in *Hammer*), had some statute regulating child labor on its books.¹³⁴ The real question was whether the weaker North Carolina statute, which forbade child labor below the age of twelve, was preferable to the federal minimum of fourteen.¹³⁵

Justice Day made no substantive attack on the child labor laws -- rather, he sympathized with them.¹³⁶ Justice Day was in the awkward position of having to defend jurisdictional limitations that worked against what he thought to be highly desirable social regulation.

The case takes on a different complexion, however, if one looks with even modest suspicion on child labor statutes, as I do, and thinks that as a general rule the only proper grounds for government intervention in family relations are abuse or neglect. Any reader of Laura Ingalls Wilder's *Farmer Boy* knows that child labor was not a creature of the industrial revolution.¹³⁷ Arduous labor, day and night, without any employer to regulate or to sue has always been the lot of farm children. The children in the factories were certainly not as well off as we would like, but they were probably [*1431] better off than they would have been back on the farm, or than if they had been left in the city without any opportunity to sell their labor. Their families had voted to leave the farm or the old country with their feet, as a matter of life and death.¹³⁸ Under this view, the substantive reforms may well have been misguided initiatives that inflicted harm upon the very persons they were ostensibly intended to benefit. Child labor changes in its character and intensity as changes occur in the means of production, the income level of parents, and the returns to children from more education. Restrictions on child labor may be proposed as ways to prevent child neglect and abuse, but the case for them is far from self-evident. Even if the police power is thought to be extensive enough to "protect" children from their parents as a constitutional matter, as it surely was by 1918,¹³⁹ there is a clear risk that the proper limits of the police power will be exceeded when legislation is used by interest groups that do not rely upon child labor to undercut rivals who do. Stated otherwise, child labor legislation could well be misguided paternalism or interest-group politics.

This skeptical view of the substantive issues in *Hammer* should caution one against reading more into the commerce clause than its language, or its place in the overall constitutional structure, allows. There is no obvious reason to approach the jurisdiction question with the assumption that child labor laws are intrinsically good, if only we knew how to enact them. Their strength, far from being a given, should be tested in competition between states. Such competition would show the true importance of child labor laws to the state: Will a state impose the restriction even when local firms may be hampered in interstate competition? The legislative question surely is not an all-or-nothing one. Indeed, the difference between North Carolina's twelve-year limit and Congress' fourteen is surely only a question of degree, and it is far from self-evident [*1432] which minimum is better, assuming there should be child labor laws at all.

The relatively clean line in *Hammer* prevented Congress from using its power over the movement of goods in interstate commerce to regulate the terms and conditions of their production. The line of cases regarding what types of goods could be shipped in interstate commerce thus imposed real limitations on the power of Congress. To be sure, the ICC cases afforded Congress powerful jurisdiction over the instrumentalities of interstate commerce.¹⁴⁰ But even when broadly construed these still stopped with the railroads and navigable waters (and by obvious extension interstate highways and interstate airplane transportation). The line between state police power and the commerce clause had shifted, and there is reason to think that some of the shifts had already placed too many matters on the federal side of the line. But the case law was still a long way from giving Congress comprehensive powers to regulate all productive activities.

3. Manufacturing and Commerce

I now turn to the last line of cases necessary to complete the overall picture -- those that drew the sharp and structural line between commerce on one hand and manufacture (or production and agriculture) on the other. This line of cases began with *United States v. E.C. Knight Co.*¹⁴¹ in 1895, and retained its overall validity until the 1937 term. What follows is an account of how that line of cases developed, and retained, its distinct position from the two groups of cases just considered.

E. C. Knight was the first constitutional challenge to the Sherman Act.¹⁴² At issue was the acquisition by the American Sugar Refining Company, a New Jersey corporation, of four Pennsylvania corporations that manufactured refined sugar. The United States challenged the merger under the Sherman Act as "a combination or contract in restraint of trade or commerce among the several states."¹⁴³ The Court held that the merger could not be reached by the Sherman Act because it was not part of interstate commerce [*1433] and had no "direct" effect upon it.¹⁴⁴ Chief Justice Fuller made a conscious effort to delineate the respective spheres of the state police power and the commerce clause in his majority opinion in ways that harken back to *Gibbons v. Ogden*:

Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by

resort to expedients of even doubtful constitutionality.

Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. ¹⁴⁵

Chief Justice Fuller tried to raise a barrier between manufacture, on the one hand, and sale or shipment of goods in interstate commerce, on the other. But the barrier was not as well-defined as Chief Justice Fuller made it out to be. Justice Harlan forcefully made this point in his dissent, noting that this merger was designed to regulate not only the manufacturing of refined sugar [*1434] but also "selling sugar in different parts of the country." ¹⁴⁶ The transaction in *E. C. Knight* had two purposes: manufacture, over which there could be a local monopoly that Congress could not reach, and a plan for restrictive interstate sale, designed to raise prices in interstate markets. The status of the sales plan element of the merger was the subject of dispute between the Justices. Chief Justice Fuller's majority opinion allowed federal regulation of the contracts by which the sugar was bought and sold. ¹⁴⁷ Yet it reads as though it would not have allowed the regulation of a structural agreement made prior to actual sales, by which the parties agreed to sell only certain amounts in interstate commerce at certain prices. According to his view, this master agreement would fall outside of the scope of the commerce clause. Justice Harlan's dissent, on the other hand, did *not* attack Chief Justice Fuller's position that "commerce succeeds manufacture." Instead he argued that manufacture became commerce when the sugar was sold to be transported, not subsequently, when it actually was placed in interstate transport:

It is said that manufacture precedes commerce and is not a part of it. But it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation and are as much commercial intercourse, where articles are bought *to be* carried from one State to another, as is the manual transportation of such articles after they have been so purchased. ¹⁴⁸

Justice Harlan never quite closed in on the essential issue in the case. The government did not attack the individual contracts for sale of sugar in interstate commerce, but only the prior structural arrangements that influenced the terms on which the interstate sales were made. In most antitrust cases the contracts for the division of markets or the maintenance of prices are separate and distinct from any contract arrangements for the manufacture or sale of goods. But the transaction at issue in *E. C. Knight* was a merger that was quite impossible for Congress to reach by a plan to regulate the interstate sales of the combined sugar business (even if [*1435] these preliminary merger agreements were regarded as in interstate commerce) without necessarily intruding into the regulation of manufacture, which *both* the majority and the dissent expressly regarded as outside the scope of the commerce clause. ¹⁴⁹ *E. C. Knight* was thus an early version of the *Shreveport Rate Case* problem, in which the Court recognized that the regulation of interstate commerce was necessarily either over- or underinclusive. ¹⁵⁰ The difference between the majority and dissenting opinions in *E. C. Knight* is best explained as a response to the issue of whether too much or too little regulation was desired. Justice Harlan in dissent thought that the regulation was appropriate, for the peril of national monopolies was too great to be ignored. ¹⁵¹ To Chief Justice Fuller, on the other hand, the decisive consideration was that the expansion of the commerce power to meet the danger of monopoly ran the far greater risk of upsetting the grand constitutional balance between the federal and the state governments. ¹⁵² That is why he was so eager to strike down any statute of "even doubtful constitutionality." ¹⁵³

Unfortunately, these genuine substantive concerns were not incorporated into a careful analysis of the error costs of alternative jurisdictional rules. Instead the debate focused on the question whether the regulation had an impact on interstate commerce that was "direct or immediate" or "remote or indirect."¹⁵⁴ These abstract, largely nondescriptive terms simply could not carry the vast institutional weight placed upon them in future years. The *E. C. Knight* opinions, in retrospect, seem in large part to be simple word games or metaphysical abstractions rather than debates about important principles.

[*1436] The difference between the two sides, moreover, was not as great as might be supposed. The substantial common ground between Chief Justice Fuller and Justice Harlan is clearly borne out by looking at the next important case in the line, *Addyston Pipe & Steel Co. v. United States*,¹⁵⁵ written for a unanimous Supreme Court by Justice Peckham, who is today largely remembered for his opinion in *Lochner v. New York* striking down New York's ten-hour maximum daily labor law for bakers.¹⁵⁶ *Addyston Pipe* upheld a federal attack on an explicit contract by cast-iron pipe producers to divide the territorial market for their product among themselves in order to create a set of local monopolies.¹⁵⁷ At one level the case appears indistinguishable from *E. C. Knight*, from which it differed solely by the method chosen by the parties to obtain their monopoly prices. A merger of manufacturing businesses was the method of choice in *E. C. Knight*, while an explicit cartelization was chosen in *Addyston Pipe*. If the sole question was whether there was a "direct" or "indirect" effect upon commerce, whether by the price or volume of goods shipped, the two cases could hardly be distinguished. If a merger designed to raise prices has only an "indirect" effect upon commerce, then so too does a cartel arrangement with that same purpose and effect.

[*1437] Yet if the distinction between the two cases is viewed in light of the underlying substantive concerns motivating the Court, then it makes perfect sense. *E. C. Knight* raised two questions: first, whether a preliminary step (be it merger or cartel) toward a proposed sale of goods in interstate commerce was itself part of interstate commerce; and second, even if a preliminary step was part of interstate commerce, could Congress reach it by regulating manufacture, which everyone conceded was not part of interstate commerce? Chief Justice Fuller found *E. C. Knight* an easy case because he was prepared to answer the second question in the negative, given his doubts about the first. Yet in *Addyston Pipe* the second question vanished, because the cartel arrangement reached only planned interstate sales and had no influence at all upon manufacturing. Only the first question had to be addressed. The difficult choice between necessary over- and necessary under-inclusion did not arise in *Addyston*. To apply the Sherman Act, it needed only to be said that preliminary agreements, designed by the parties to regulate their private sales in interstate commerce, were themselves part of interstate commerce.¹⁵⁸ It did not take a very inventive reading of *Gibbons* to say that these outward-looking contracts were not part of the purely internal commerce of the state. This refinement of *E. C. Knight* therefore did not challenge the view that manufacture and commerce were distinct spheres. Despite giving Congress its head in *Addyston Pipe*, the Court did not intrude upon the basic principle that the power to regulate commerce among the several states was only one of a list of enumerated powers. *Addyston Pipe* therefore hardly broke with the past. The Court reached a unanimous decision (with Fuller still Chief Justice) because the risk of excessive congressional power was not present.

The same can be said about the two other major early antitrust decisions that invoked the commerce clause. The issue in *Northern Securities Co. v. United States*¹⁵⁹ was whether Congress could reach a stock merger of two railroad lines. Congressional power was sustained by a five-four vote, with Justice Harlan writing for the Court and with Chief Justice Fuller and Justice Peckham (joined by Justices Holmes and White) in dissent. The latent disagreement **[*1438]** that divided the Court in *E. C. Knight* again came to the fore, albeit in somewhat different form. Justice Harlan's basic posture was unchanged. If a merger of gigantic manufacturing concerns was of federal concern because of its direct influence on prices, he had no reason to pause simply because the antitrust laws were applied to a transaction in shares of stock that was local in origin and governed by state law.¹⁶⁰ Indeed,

the fact that the underlying assets were two interstate railroads could have only strengthened Justice Harlan's view that the transaction had to be reached by the antitrust laws. It was no longer necessary, after all, to tiptoe along the narrow line between manufacture and commerce, for the merger did not involve any regulation of manufacturing. If Congress could regulate the rates on interstate lines, then why should it not be able to stop the merger?

The four dissenting Justices took a very different position. To them, the appropriate balance between state and federal power was as primary an issue as it had been to Chief Justice Fuller in *E. C. Knight*, given that the regulation of state corporate ownership, a local matter, was inseparable from the regulation of interstate transport.¹⁶¹ A passage from Justice Holmes' dissent shows the interplay between two dominant motifs of the early decisions:

The point decided in [*E. C. Knight*] was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.¹⁶²

In a single passage, Justice Holmes was able to merge and confuse two distinct ideas: first, that Congress could not regulate absent direct effects on interstate commerce; and second, that the federal-state balance of power under the founders' plan required that the commerce clause be given some effective limits, lest the independent powers of the states be undermined. In a sense the five-four [*1439] vote in *Northern Securities* is explained in that the case was a more powerful one for congressional action under the commerce power than was *E. C. Knight*. But the differences between the majority and dissent on the question of principle were minor, and at best *Northern Securities* identified the tipping point at which the interstate elements start to dominate the overall transaction.

In *Swift & Co. v. United States*¹⁶³ decided a year later, the consensus of *Addyston Pipe* reasserted itself. In *Swift*, the government brought an antitrust case against fresh food dealers who sought to organize bidding in livestock markets across the United States.¹⁶⁴ The distinction between this cartel and the one in *Addyston Pipe* was not worth pursuing, so Justice Holmes came out of his dissent in *Northern Securities* and wrote for a unanimous Court condemning this cartel for its effect on interstate commerce:

[I]t is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like [*E. C. Knight*], where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales.¹⁶⁵

Holmes's distinction between direct and indirect consequences is unpersuasive. To use a tort analogy, it was an effort to smuggle all the limitations on liability into the rules on remoteness of damages, without recognizing the independent status of the standard excuses and justifications in tort law. Imagine, to push the analogy, what tort law would look like without the defenses of consent, self-defense, contributory negligence, or assumption of risk. In tort, the consequence of this approach is to place incredible stress upon the idea of causation, with a consequent loss of analytical clarity. In constitutional law too the burden upon the idea of direct consequences was too great. What was needed was an explicit acknowledgment that the doctrine of enumerated powers played, in constitutional [*1440] discourse, a role parallel to the one that affirmative defenses play under tort law.

Whatever the weaknesses in basic theory, *Swift* and its predecessors articulated a set of

boundary lines that was reasonably easy to apply. The Court read *Swift* as the decisive precedent in favor of federal power in both *Stafford v. Wallace* ¹⁶⁶ and *Chicago Board of Trade v. Olsen*. ¹⁶⁷ In neither case was the line between manufacture and commerce tested, let alone overthrown.

In *Stafford*, the court upheld the constitutionality of the Packers and Stockyards Act of 1921, ¹⁶⁸ which regulated the middlemen who arranged the sale and shipment of cattle from the West to purchasers in the Chicago stockyards. ¹⁶⁹ The Act gave to the Secretary of Agriculture the power to set maximum and minimum prices and to prohibit discriminatory and deceptive trade practices. ¹⁷⁰ The Court relied heavily on an analogy to the "instrumentalities of interstate commerce":

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. ¹⁷¹

Olsen upheld the Grain Futures Act, ¹⁷² which regulated the sale of grain for future delivery on boards of trade under the rationale that manipulation of futures prices had burdened and obstructed interstate commerce. ¹⁷³ Chief Justice Taft again emphasized the [*1441] link between trade in goods and the railroads. ¹⁷⁴

These two decisions, by involving matters ancillary to the actual shipment of goods by the railroads, clearly expanded the scope of the commerce power. General concern about fraud and manipulation (both of which are wrongs under state law) is not an obvious reason to allow federal regulation. It is possible therefore to argue that the statutes themselves were unconstitutional, despite the unanimous decisions of the Supreme Court. For the purposes of this Article, however, it is sufficient to note that *nothing* in either case challenged *E. C. Knight's* distinction between manufacture or production on the one hand, and interstate commerce on the other. As late as 1935 in *Schechter Poultry Corp. v. United States*, ¹⁷⁵ Chief Justice Hughes wrote, in limiting the jurisdiction of Congress under the commerce clause, "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act," and then used the distinction to strike down the National Industrial Recovery Act. ¹⁷⁶ The next year, in *Carter v. Carter Coal Co.*, ¹⁷⁷ a majority of the Supreme Court struck down various provisions of the Bituminous Coal Conservation Act of 1935 ¹⁷⁸ on the ground that the commerce clause did not allow the federal government to regulate the terms of employment within the mines. ¹⁷⁹ The *Carter* Court correctly distinguished *Stafford* as a "flow of commerce" case, in which Congress had regulated the "throat" of interstate commerce, and nothing more. ¹⁸⁰ Elsewhere [*1442] in his majority opinion, Justice Sutherland wrote categorically that "[t]he relation of employer and employee is a local relation." ¹⁸¹

E. C. Knight's basic distinction between manufacture and commerce thus held firm as late as *Carter* in 1936. The emerging pattern said, for example, that the Ford Motor Company did not manufacture goods in interstate commerce, but the Northern Pacific Railroad shipped them in interstate commerce. As constitutional principles go, this line was relatively clear. It is just the line that is observed today in the dormant commerce clause cases, ¹⁸² and it is as intelligible with the affirmative power cases as with the dormant power cases.

This third line of cases under the commerce clause added to congressional power, but it surely did not lead to the conclusion that Congress should have the comprehensive power to regulate the entire business of life. The Court had expanded the reach of earlier cases involving the "instrumentalities of interstate commerce." This broadened scope to the

commerce power allowed Congress to regulate matters actually outside the scope of commerce in order to regulate what fell within its admitted power. But the over-breadth doctrine was applied only in cases that did not involve common carriers. And Congress' power to prohibit the shipment of certain kinds of goods in commerce was sharply, but correctly, limited by *Hammer v. Dagenhart* to those things noxious in themselves.¹⁸³ The totality of commerce clause jurisprudence as it emerged before the New Deal may not have been perfect; indeed it probably yielded a bit too much to federal power, at least under the power to regulate instrumentalities of commerce and the power to regulate the type of goods shipped in interstate commerce. But the set of rules was surely workable. This state of affairs was to change in the 1930's. The final Part of this Article will trace the rapid decline of the old distinctions, and will briefly note the regrettable social consequences that followed in the wake of departures from sound constitutional principle.

[*1443] V. THE NEW DEAL TRANSFORMATION OF THE COMMERCE CLAUSE

The New Deal cases systematically removed each of the previous limitations on the scope of the commerce clause. This expansion of federal power was not driven by any textual necessity. Instead, it is better understood, but hardly justified, as a response to two separate but related forces. First, the 1936 Roosevelt mandate and the prospect of court packing could hardly have been lost on the Court.¹⁸⁴ Second, a narrow majority of the Court was in sympathy with the dominant intellectual belief of the time that national problems required national responses. The New Deal cases worked a revolution in constitutional theory as well as in textual interpretation. The original theory of the Constitution was based on the belief that government was not an unrequited good, but was at best a necessary evil. The system of enumerated powers allowed state governments to compete among themselves, thus limiting the risks of governmental abuse even absent explicit, substantive limitations on the laws that states could pass. The various limitations upon the federal power helped achieve this end. The New Deal conception, on the other hand, saw no virtue in competition, whether between states or between firms. The old barriers were stripped away; in their place has emerged the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state.

The first major case to test the traditional analysis of the commerce clause was *NLRB v. Jones & Laughlin Steel Corp.*,¹⁸⁵ which involved a challenge to the National Labor Relations Act (Wagner Act).¹⁸⁶ The Wagner Act in essence removed employers' power to hire and fire at will, instead requiring extensive collective bargaining in good faith between employers and unions if the union is approved by a majority of employees.¹⁸⁷ The unions were selected by a majority of workers, but had the power to bind workers who dissented.¹⁸⁸ Individual contracts inconsistent with the master agreement [*1444] were unenforceable, lest the union's power be undermined by dissatisfied workers.¹⁸⁹

The Wagner Act was based squarely upon the commerce clause. The draftsmen sought to meet the fundamental challenge of jurisdiction by providing that federal jurisdiction extended not only to cases of "commerce" but also to cases "affecting commerce": "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."¹⁹⁰

This extended definition proves that Congress used a legal fiction to expand federal jurisdiction beyond its original grant. The commerce clause does not say "Congress shall have the power to regulate commerce, and all matters affecting commerce with foreign nations, among the several states, and with the Indian tribes." The statutory text, moreover, invited a favorable outcome on the jurisdictional question by smuggling into its expanded definition of commerce the desirable effects that the labor statute was intended to achieve. Yet there was no real evidence that local regulation of employment markets was incapable of achieving desired economic goals. It was only the distinct New Deal bias for worker monopolies

protected by explicit barriers to entry (here, against rival workers who would work for less) that could have led to the conclusion that the Wagner Act would improve the free flow of commerce. How cartelization of labor markets would remove barriers or obstructions to interstate commerce has never been explained. Labor cartelization generally raises the level of wages and reduces the quantity of goods produced. When a cartel is legally protected against new entrants into its market, the new entrants are no longer able to take advantage of the price "umbrella" that an unregulated cartel necessarily creates for enterprising rivals. The Wagner Act surely had an effect on commerce, and that effect was negative.

A system of limited government keeps local governments in competition with each other. This sensible institutional arrangement was wholly undermined by Congress' decision, in the teeth of the commerce clause, to subject all employment markets to nationally [*1445] uniform regulation. As in the case of child labor laws, the power of states to impose collective bargaining requirements on firms is effectively limited by the ability of old firms to leave the state and of new ones not to enter it. Also, since domestic firms can escape whatever misguided tariff barriers may be thrown up against international suppliers of goods and services, the level of state regulation is effectively curtailed, and the volume of goods and services in commerce increases.

The transformation in legislative and judicial thinking about the commerce clause is revealed by the reversal in substantive outcomes. *Gibbons v. Ogden* ensured free trade by overturning a state-granted legal monopoly.¹⁹¹ The Sherman Act cases were also directed against private monopolies -- a lesser peril -- which were seen improperly as "regulating" interstate commerce.¹⁹² Both *Gibbons* and the Sherman Act cases were attempts to facilitate free trade in open markets -- one at the constitutional, the other at the statutory, level. With the later expansion of congressional jurisdiction by such laws as the Transportation Act of 1920, however, the commerce clause became an instrument to suppress competition, rather than one to further it.¹⁹³ It is only if one thinks that government can neutrally determine when there is too much competition as well as when there is too little that the broader interpretation of the commerce power becomes plausible. And it is clear that the New Deal thinkers thought they understood the vices of competition.¹⁹⁴

It is always, however, a precarious venture for judges to make independent normative judgments about the desirability of certain social arrangements when passing on the constitutionality of certain acts. In a sense, the task of interpretation should depend, as Chief Justice Marshall did in *Gibbons v. Ogden*, on the natural and ordinary sense of the word.¹⁹⁵ The approach also leads, however, to [*1446] the conclusion that the Wagner Act goes beyond the scope of the commerce clause under the authority of *E. C. Knight* and, most notably, *Carter*.¹⁹⁶ The three decisions of the United States Courts of Appeals that passed upon the Wagner Act declared it unconstitutional by applying the precedents mechanically.¹⁹⁷ Recall that the hard question in *E. C. Knight* was whether prospective restraints of trade in interstate markets could justify an intrusion into manufacture, an area normally regulated by the states. *Jones & Laughlin*, of course, involved no effort to monopolize an interstate market. Quite the opposite; the contracts at issue concerned only matters of local employment which, as the Court's opinion in *Carter* had confirmed, had never been thought a federal matter under any prior conception of the commerce clause.¹⁹⁸

To respond to this difficulty, the Court in *Jones & Laughlin* resurrected the losing argument of *Carter* -- that anything which had a substantial effect upon interstate commerce could be regulated regardless of its source.¹⁹⁹ In so doing, the Court in effect borrowed the language of those cases concerned with the instrumentalities of interstate commerce²⁰⁰ and applied it generally, as if the original subject-matter restriction had not been integral to the earlier decisions. Manufacture was no longer distinguishable from commerce, because the manufacturing process involved "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel

products into the consuming centers of the country -- a definite and well-understood course of business." ²⁰¹

To be sure, Chief Justice Hughes acknowledged in *Jones & Laughlin* that some "internal concerns" of the state remained [*1447] outside the power of Congress to regulate. ²⁰² But it was all lip service; the companion cases to *Jones & Laughlin* showed that the "internal concerns of a state" had become an empty vessel. *NLRB v. Fruehauf Co.* applied the Wagner Act to a manufacturer of commercial trailers that obtained more than fifty percent of its material out of state and sold eighty percent of its output to out-of-state customers. ²⁰³ *NLRB v. Friedman-Harry Marks Clothing Co.* used the same logic, applying the statute to a clothing manufacturer that purchased most of its raw cloth out of state, and sold a majority of its finished garments there as well. ²⁰⁴ The commerce clause was thus hardly limited to the integrated multistate firms like *Jones & Laughlin*. And beneath the legal analysis lay the ultimate policy reason for the decisions: Congress and the NLRB believed that industry-wide unionizations could not succeed without federal assistance, and the Court accepted this belief, and the desirability of the substantive conclusion, at face value. ²⁰⁵

The cases that followed *Jones & Laughlin* continued to sustain the power of the federal government to regulate interstate commerce expansively, on the ground that any competition among states necessarily restricted the scope of government action. The government's argument in *United States v. Darby* ²⁰⁶ in defense of the Fair Labor Standards Act (FLSA), ²⁰⁷ for example, was essentially identical to that made unsuccessfully a generation before in [*1448] *Hammer v. Dagenhart*:

No State, acting alone, could require labor standards substantially higher than those obtaining in other States whose producers and manufacturers competed in the interstate market. Employers with lower labor standards possess an unfair advantage in interstate competition, and only the national government can deal with the problem. ²⁰⁸

The Court's unanimous decision upholding the FLSA accepted the substantive case for the statute at face value, and regarded the FLSA as essentially public interest rather than interest-group legislation. ²⁰⁹ Arguments in favor of *Hammer's* limits on federal power were curtly dismissed: "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." ²¹⁰

There remained only the question whether federal power extended to those goods of local manufacture which were not shipped in interstate commerce. In this regard Justice Stone cited the *Shreveport Rate Case* to support the proposition that a "familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled." ²¹¹ Justice Stone omitted any reference to the desire to fight local discrimination against interstate commerce that was so critical to the earlier decision, or to any recognition that the *Shreveport Rate Case* did not apply to all "intrastate transactions" but only to the "instrumentalities" of interstate commerce -- in particular to interstate railroad operations. ²¹² Nor did Justice Stone acknowledge that the *Shreveport Rate Case* never challenged the distinction between commerce and manufacture defended in *E. C. Knight*. Justice Holmes in his *Hammer* dissent defending federal authority still recognized that some manufacture [*1449] was part of the purely internal commerce of the state. ²¹³ Yet such was the strength of the federal tide that Justice Stone abandoned that vestige of state autonomy in *Darby*. ²¹⁴ The question of state autonomy, so critical to *E. C. Knight*, also received back-of-the-hand treatment in *Darby*; the Court brushed aside the tenth amendment, and the principle of enumerated powers that it articulated, as "but a truism that all is retained which has not been surrendered." ²¹⁵

Justice Stone's cavalier treatment of jurisdictional objections to the FLSA resulted from his powerful belief in the soundness of the basic social legislation involved. ²¹⁶ To him, the suppression of "unfair" competition from exploited labor was the dominant "evil" the FLSA attacked. ²¹⁷ The possibility that the minimum wage law could be a barrier to the entry of unskilled labor into the labor market, and hence the very evil to be avoided, was never assessed. What failed in *Darby* was not the language of the Constitution, but the willingness of the Justices to accept the theory of limited government upon which it rested.

The same failure was repeated in cases that sustained the powerful system of agricultural price supports and acreage restrictions that was introduced by the New Deal. The question in *United States v. Wrightwood Dairy* ²¹⁸ was whether Congress could authorize the Secretary of Agriculture to set minimum prices for milk that was produced and consumed within a single state. The usual language which spoke of a transaction "which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof," was duly set out in the statutory language. ²¹⁹ Ironically, the anticompetitive effect of federal interstate milk regulation became the justification for a further expansion of federal power:

As the court below recognized, and as seems not to be disputed, the marketing of intrastate milk which competes with that shipped [*1450] interstate would tend seriously to break down price regulation of the latter. Under the conditions prevailing in the milk industry, as the record shows, the unregulated sale of the intrastate milk tends to reduce the sales price received by handlers and the amount which they in turn pay to producers." ²²⁰

Even after *Wrightwood* plugged the loophole of intrastate sales, another obstacle remained to comprehensive federal agricultural regulation. Farmers could still influence the price of agricultural products in interstate commerce simply by keeping and using them on their own farms. The scope of agricultural regulation expanded to meet this challenge. *Wickard v. Filburn* ²²¹ upheld the statutory authority of the Secretary of Agriculture to limit the consumption of wheat on the very farms that grew it. Here there was no sale transaction at all, but this did not matter to the Court. The government's ability to maintain artificially high regulated prices for goods shipped across interstate lines would surely have been compromised if local consumption had been allowed to expand supply to meet demand. The economic interdependence of the various activities was held to preclude any watertight division between production and commerce. ²²² The Court regarded the distinction between direct and indirect effects on interstate commerce as quite beside the point (as indeed it was), and the entire issue of enumerated powers and state autonomy disappeared from view. ²²³ Once the Court decided to ignore the limitations of the *Shreveport Rate Case*, ²²⁴ it saw *Wickard* as a natural extension of the *Shreveport Rate Case* doctrine. This is just the approach that Justice Jackson took:

The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." ²²⁵

[*1451] Carefully excised from the quotation was the beginning of Justice Hughes's sentence: "[Congress'] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters" ²²⁶ This excision, doubtless deliberate, completed the transformation of the commerce clause.

The question then arises as to how is it possible to stand a clause of the Constitution upon its head. I do not think that the explanation comes from any vagueness in the language of the commerce clause. ²²⁷ If a Court innocent of political theory or of any predilection on the

merits of the underlying legislation approached a commerce case, it could not possibly parse the words of the clause so as to reach the extravagant interpretations of federal power accepted in *Jones & Laughlin*, *Darby*, *Wrightwood*, and *Wickard*. Could anyone say with a straight face that the consumption of home-grown wheat is "commerce among the several states?" A powerful principle must have led to so fanciful a conclusion. That principle has to go to the idea of what kind of government and social organization is thought to be just and proper for society at large.

I have no doubt that the Justices of the Supreme Court who forged so powerful a doctrine had such a conception in mind. At one level they rejected the idea of limited federal government and decentralized power. That idea only made sense if there was a risk that governments could misbehave. If it was thought that they always acted in the public interest, then any effort to deny them substantive power would have hobbled the forces of virtue and enhanced those of wickedness. It is noticeable that all the key New Deal commerce clause opinions took the substantive findings of Congress at face value. None was prepared to identify the powerful interest group politics that were so evident in both the labor and agricultural cases -- the very policy areas in which the commerce clause reached its present scope. Once government is thought to be the source of risk, however, then competition between governments makes sense, and there is good reason to uphold the ideas of limited [*1452] government and enumerated federal powers that were part of the original design. The New Deal's change in attitude toward the commerce clause thus depended upon a radical reorientation of judicial views toward the role of government that in the end overwhelmed the relatively clean lines of the commerce clause.

In addition, the key federal laws of the New Deal cartelized either labor or product markets that would otherwise have been highly competitive absent government regulation. ²²⁸ Indeed, there were substantive challenges to each of these laws, usually under the due process clause. ²²⁹ These developments were not unrelated, for jurisdictional limitations upon the power of Congress only made sense if there was reason to think that use of the power would have been harmful. Yet once the idea that markets performed useful functions was cast aside, the jurisdictional limitations ceased to make any sense. The war cry became a call for Congress to act because, in an age of economic interdependence, national problems demanded national solutions. ²³⁰

Yet the point about economic interdependence mistakes the disease for the cure. It is precisely because markets are interdependent that there is reason to fear comprehensive federal regulation. ²³¹ Competitive markets are the best way to allocate scarce [*1453] goods and services. They promise to bring price into line with the marginal cost of production, and they hold out some hope that all the possible gains from trade will be achieved by voluntary transactions. Markets are not just a good in themselves. They are powerful instruments for human happiness and well-being.

Legal monopolies have precisely the opposite effect. They raise price above marginal cost and they prevent many voluntary transactions from taking place, so that the total social output is reduced by the deadweight loss that they cause. Worse still, the ability to obtain legal protection against competition invites individuals and groups to spend valuable resources in order to obtain (or resist obtaining) economic rents. ²³² Even though no market is an ideal competitive market, there is absolutely no reason to impose economic regulations, such as minimum price laws or cartelization of labor markets, whose only effect is to drive quantity and price further from the competitive equilibrium. When viewed from this perspective, the Wagner Act, the Fair Labor Standards Act, and the Agricultural Marketing Acts appear to be long-standing social disasters that could not long have survived with their present vigor solely at the state level.

There is a dangerous tendency to assume that competitive injury and physical injury form part of a seamless web, so that the power to regulate the one necessarily confers the

authority to regulate the other. It is as though the power to protect interstate commerce against robbers and thieves ²³³ is sufficient warrant for the far more extensive social controls that treat competitive activities undertaken within different states, when the social consequences of violence and competition are so radically different. ²³⁴ The ability to conceive of competitive injury as a justification for the exercise of federal power lies at the root of all the modern commerce clause [*1454] decisions. The ability to perceive the essential difference between violence and competition is *all* that is needed to respect the limitation on federal power that is implicit in the commerce clause.

VI. CONCLUSION

I thus return to my original theme: Although questions of jurisdiction and substantive rights appear to be distinct, the unfortunate history of decisionmaking under the commerce clause shows how unbreakable is the link between them. The very distinction between violence and competitive harm that is necessary for organizing the private and public substantive law is critical to an understanding of the proper principles of federal jurisdiction. Hamilton may not have had it all correct when he said that sound limitations on government jurisdiction obviated the need for a bill of rights. ²³⁵ But he was surely correct when he said that the maintenance of those jurisdictional limitations is one essential bulwark to sound constitutional government. ²³⁶

The problem of sovereignty remains: How do the people compel the holders of governmental monopoly power to act as though they could only obtain a competitive return for their services? ²³⁷ Federalism facilitates a solution by allowing easy exit, as well as by allowing voice. National regulation prevents unhealthy types of competition among jurisdictions, such as were present in *Gibbons*. Under this view, the old construction of the commerce clause makes sense; it facilitates national markets by preventing state balkanization. This was the achievement of *Gibbons*. The great peril of national regulation is that it may be taken too far, to impose national uniformity which frustrates, rather than facilitates markets. This was the New Deal. I cannot help thinking that a sound view of the commerce clause is one that returns to *Gibbons*. The affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states.

I realize that this conclusion seems radical because of the way [*1455] the clock has turned. One is hesitant to require dismantling of large portions of the modern federal government, given the enormous reliance interests that have been created. And I do not have, nor do I know of anyone who has, a good theory that explains when it is appropriate to correct past errors that have become embedded in the legal system. It is far easier to keep power from the hands of government officials than it is to wrest it back from them once it has been conferred. We had our chance with the commerce clause, and we have lost it.

Still, the argument from principle seems clear enough, even if one is left at a loss as to what should be done about it. And in a sense that is just the point. Congress and the courts can proceed merrily on their way if they are convinced that the basis for an extensive federal commerce power is rooted firmly in the original constitutional text or structure. But uneasiness necessarily creeps into the legislative picture if, as I have argued, the commerce clause is far narrower in scope than modern courts have held. There is a powerful tension between the legacy of the past fifty years and the original constitutional understanding. It is a tension that we must face, even if we cannot resolve it.

FOOTNOTES:

↑n1 U.S. Const. art. I, § 8.

↑n2 More accurately, the inquiry might be stated: How should the grant to Congress be

understood when the commerce clause is construed in light of the necessary and proper clause? See *infra* notes 22-28 and accompanying text.

¶n3 This theme of limited and enumerated powers was central to the distinction between a federal and national government. It is evident on the face of article I, which begins with the words "All legislative powers herein granted" (without specifying who the grantor was), and it was reiterated in all the ratification debates. See, e.g., 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 435-36, 454, 540 (J. Elliot 2d ed. 1836) (dialogue of Wilson and McKean); 3 *id.* at 95, 246, 444, 553 (dialogue of Madison, Nicholas, and Marshall); 4 *id.* at 147-49, 259-60 (dialogue of Iredell and Pinckney).

¶n4 See, D. Hume, *Of Commerce* (1752), *reprinted in* *Essays: Moral, Political, and Literary* 252, 263-64 (Liberty Classics ed. 1985). Hume's basic theory was that nations that tolerate foreign commerce are able to realize gains from trade that permit them to accumulate greater wealth, and to achieve greater prosperity and political stability, than those that rely upon domestic manufacture and agriculture alone. Hume's essay mixes historical example with analytical propositions in a style that anticipates the Federalist.

¶n5 The Federalist No. 11 (A. Hamilton) ("Concerning Commerce and a Navy"). The opposition between commerce on the one hand, and agriculture and manufacture on the other, seems clear enough. Thus in speaking of the control over foreign commerce, Hamilton wrote:

By prohibitory regulations, extending, at the same Time throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets. This assertion will not appear chimerical to those who are able to appreciate the importance of the markets of three millions of people -- increasing in rapid progression, for the most part exclusively addicted to agriculture, and likely from local circumstances to remain so -- to any manufacturing nation.

Id. at 63 (Modern Library College ed. 1937).

¶n6 See, e.g., T. Hobbes, *Leviathan* (Everyman's Library ed. 1950) (1651); D. Hume, *supra* note 4; J. Locke, *An Essay Concerning Human Understanding* (R. Wilburn ed. 1947) (1689); Montesquieu, *The Spirit of Laws* (T. Nugent trans. 1949) (1748).

¶n7 The Federalist No. 84 (A. Hamilton). Hamilton continued:

I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

Id. at 559 (Modern Library College ed. 1937). Hamilton's argument presupposes that the doctrine of enumerated powers places substantial limitations upon all grants of power to the federal government, including those under the commerce power.

¶n8 Thus Hamilton thought that the principle of freedom of speech could not protect the press from arbitrary taxation:

It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. . . . And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general declarations respecting the liberty of the press, will give it no greater security than it will have without them.

Id. at 560 n.

Hamilton was clearly wrong on this issue. It may not be possible to use the first amendment to insist that the press be free of all general taxes, but it is possible to limit the nature of the taxes that are imposed, so that special taxes placed upon the press, but not other industries, are prohibited, or that special taxes placed on some portions of the press, but not others, are prohibited. Courts have intervened to prevent disproportionate taxation when public opinion has failed to do so. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936). *Grosjean* has had little development because its holding was clear enough to stop most forms of abusive taxes in their tracks.

†n9 Some sense of the twist of history is found in Patrick Henry's speech in opposition to the ratification of the Constitution in the Virginia debates:

[W]hat right had they to say, We, the People? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of, We, the People instead of We, the States? States are the characteristics, and the soul of a confederation. If the states be not the agents of this compact, it must be one great consolidated National Government of the people of all the States.

H. Storing, *What the Antifederalists Were For* 12 (1981) (quoting Henry). Henry was a better prophet than even his supporters would have allowed at the time. Storing rightly notes that the Anti-Federalists were on their strongest ground when they used a principle of ratification that put the Constitution into effect, at least as between the parties, when nine states ratified it. Under the Articles of the Confederation, each state had a blocking position against the changes, and Rhode Island had not bothered to send a delegate to the Philadelphia Convention.

†n10 See A. Ekirch, *Progressivism in America: A Study of the Era from Theodore Roosevelt to Woodrow Wilson* (1974).

†n11 It is no coincidence, for example, that West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage law for women), was decided in the same term as NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), discussed *infra* notes 185-202 and accompanying text.

†n12 See, e.g., Cohen, *The Inevitable Constitutional Revolution of 1937* (speech to the AALS Constitutional Law Meeting, Washington, D.C., Oct. 8, 1987), written in response to my short paper, R. Epstein, *Why the Revolution of 1937 Was a Mistake*. Cohen places heavy reliance upon the Roosevelt landslide of 1936 as justification for the expanded construction of the commerce clause.

†n13 U.S. Const. art. I, § 8.

†n14 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824). Chief Justice Marshall continued:

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive of a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Id. at 189-90. Chief Justice Marshall may well have borrowed the term "intercourse" from Hamilton, who in speaking of "The importance of the Union, in a commercial light," also spoke of "our intercourse with foreign countries as well as with each other." *The Federalist* No. 11, at 62 (A. Hamilton) (Modern Library College ed. 1937). Note too that in *The Federalist* No. 11, Hamilton repeatedly stressed that navigation was comprehended in

commerce, the very point that Chief Justice Marshall had emphasized in his decision.

¶15 This point was stressed by Hamilton in *The Federalist* No. 11, as in the sentence quoted *supra* note 5. For those of us who believe in free trade, the powers given Congress seem far too broad, as the debates over the current protectionist trade bills reveal. See also Kitch, *Regulation and the American Common Market*, in *Regulation, Federalism, and Interstate Commerce* 16, 51 (A. Tarlock ed. 1981).

¶16 U.S. Const. art. I, § 9.

¶17 *Id.* preamble.

¶18 See *id.* art. VII.

¶19 317 U.S. 111 (1942). For further elaboration, see *infra* notes 221-26 and accompanying text.

¶20 See S. Morrison, H. Commager & W. Leuchtenburg, *A Concise History of the American Republic* 188-91 (1977).

¶21 See, for one illustration of this escape, a superb new casebook:

The Civil War and its aftermath inaugurated an era in which Congress began to act more vigorously. The very success of the national economy created problems. The economy became obviously interconnected; problems were no longer localized, so that it became difficult to imagine a purely internal commerce that affected no other states.

G. Stone, L. Seidman, C. Sunstein & M. Tushnet, *Constitutional Law* 138 (1986).

¶22 U.S. Const. art. I, § 8.

¶23 See *infra* notes 83-88 and accompanying text.

¶24 See *The Federalist* No. 33, in which Hamilton gives a relatively narrow reading of the necessary and proper clause, when he tries to allay the fear that the necessary and proper clause will allow the national government to run roughshod over the states:

But SUSPICION may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. *The Federalist* No. 33, at 200 (A. Hamilton) (Modern Library College ed. 1937). In the subsequent dispute over the clause in connection with the creation of a national bank, Hamilton gave a broader interpretation, similar to that put forward by Chief Justice Marshall. See D. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 160-69.

¶25 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

¶26 *Id.* at 406.

¶27 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824). Note too that Chief Justice Marshall addressed the necessary and proper clause in order to show that it does not *require* a rule of strict construction.

¶28 Thus Professor Tribe gives but one brief connection between the two clauses, where they are discussed in connection with the so-called protective principle, which allows Congress to reach matters outside the scope of the commerce clause in order to govern those

matters that fall within it. See L. Tribe, *American Constitutional Law* § 5-7, at 240 (1978). The threat this principle poses to the doctrine of enumerated powers is ignored by Professor Tribe, but is discussed herein. See *infra* notes 69-73 and accompanying text.

¶n29 See, e.g., L. Tribe, *supra* note 28, § 5-4, at 232-35.

¶n30 See *id.*

¶n31 156 U.S. 1 (1895).

¶n32 L. Tribe, *supra* note 28, § 5-4, at 234-35. He continued: "But with its watershed decision in NLRB v. Jones & Laughlin Steel Corp. [301 U.S. 1 (1937)], the Court acceded to political pressure and to its own sense of its doctrine's irrelevance and manipulability, abandoning the formally analytical approach to the commerce clause, and returning to Chief Justice Marshall's original empiricism." *Id.* at 235. Professor Tribe was not the first to develop this line of thought. It was documented in great detail in Stern, *The Commerce Clause and the National Economy 1933-1946*, 59 Harv. L. Rev. 645 (1946), a highly readable and happily partisan defense of the New Deal decisions written by a member of the Solicitor General's office, who had participated actively on the government's side.

¶n33 22 U.S. (9 Wheat.) 1 (1824).

¶n34 See Chief Justice Marshall's discussion in *McCulloch*, where his famous phrase, "we must never forget, that it is a *constitution* we are expounding," was designed to show only the opposition between a document which spoke in great outlines and the detailed positions of, say, a commercial code. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). See also his dissent in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (Marshall, C.J., dissenting), where his argument for the *prospective* application of the contract clause rested in part on his vision that individuals preserve in civil society the rights to contract that they have in the state of nature. *Id.* at 345-49. Chief Justice Marshall also wrote:

In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate. But if the construction for which the plaintiff's counsel contend be the true one [i.e. retroactive legislation only], the constitution will have imposed a restriction in language indicating perpetuity, which every State in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retroactive laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. *Id.* at 355.

It is at least a little ironic that Chief Justice Hughes refers to the Chief Justice Marshall of *McCulloch* in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934), while ignoring the Chief Justice Marshall of *Ogden*.

I have given a modified defense of Chief Justice Marshall's position in Epstein, *Toward a Revitalization of the Commerce Clause*, 51 U. Chi. L. Rev. 703, 723-30 (1984). For criticism, see Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 557-59 (1987).

¶n35 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 1-2 (1824). Ogden was the assignee of the original franchisees, Robert Livingston and Robert Fulton.

¶n36 *Id.* at 4-5 (argument of Daniel Webster for appellant).

¶n37 Also at issue was whether the exclusive franchise was an impairment of contract by the

state of New York. The conclusion that it was would seem quite plausible if the contracts clause was given the prospective interpretation that Chief Justice Marshall urged three years after *Gibbons*. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354-56 (1827) (Marshall, C.J., dissenting). But Chief Justice Marshall was in dissent in *Saunders* and the interpretation was lost. One might also note that *Gibbons* involved the conversion of public property (to which access is open and equal) to private property. It was a taking, albeit of public and not private property. The public trust issue surfaced in *Livingston v. Van Ingen*, 9 Johns. 507, 572-573 (N.Y. 1812), in which New York Chief Justice Kent brushed aside the argument there was an impropriety in the grant under state law doctrine. On the vexing use of the public trust doctrine, see *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. Chi. L. Rev. 711 (1986); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). For my views, see Epstein, *The Public Trust Doctrine*, 7 Cato J. (forthcoming 1987).

†n38 *Gibbons*, 22 U.S. (9 Wheat.) at 190-91, 213-17.

†n39 L. Tribe, *supra* note 28, § 5-4, at 232 (footnotes omitted).

†n40 *Gibbons*, 22 U.S. (9 Wheat.) at 195 (emphasis added).

†n41 *Id.* Stern used the same selective powers of quotation, stating that "the Commerce Clause comprehended 'that commerce which concerns more states than one.'" Stern, *supra* note 32, at 648 (quoting *Gibbons*, 22 U.S. at 194-95). He then dropped the rest of the material quoted above and continued with the remainder of the passage, beginning "[t]he 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." *Id.* The passage reads more broadly without the omitted language.

†n42 Marshall emphasized this point elsewhere in *Gibbons*:

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right.
Gibbons, 22 U.S. at 195. Note that Marshall assigned to commerce a uniform meaning with regard both to commerce with foreign nations and to that among the several states.

†n43 *Gibbons*, 22 U.S. (9 Wheat.) at 196.

†n44 *Id.* at 197.

†n45 Chief Justice Marshall wrote:

What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.

Id. at 188.

¶n46 Farnsworth writes: "An especially common rule of construction is that if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party who supplied the language is preferred." E. Farnsworth, *Contracts* § 7.11, at 499 (1982). The rule is widely used with standard form contracts, and even beyond them. Its major cost is that it biases the way in which the original documents are drafted, rendering them more complicated and less clear than they would under a rule of ordinary and natural meaning, without the presumption.

¶n47 *Gibbons*, 22 U.S. (9 Wheat.) at 187; see supra notes 22-28 for a discussion of the clause.

¶n48 *Gibbons*, 22 U.S. (9 Wheat.) at 194.

¶n49 9 Johns. 506 (N.Y. 1812).

¶n50 New York Chief Justice Kent wrote:

Our turnpike roads, our toll-bridges, the exclusive grant to run stage-wagons, our laws relating to paupers from other states, our *Sunday* laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licences to retail spiritous liquors, the laws to restrain hawkers and pedlars; what are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other states, as between our own citizens.

Id. at 579.

¶n51 See *Gibbons*, 22 U.S. (9 Wheat.) at 203.

¶n52 Id.

¶n53 *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

¶n54 One new casebook states: "Under the *formal* approach, the Court examines the statute and the regulated activity to determine whether certain objective criteria are satisfied. . . . In contrast, the *realist* approach attempts to determine the actual economic impact of the regulation or the actual motivation of Congress." G. Stone, L. Seidman, C. Sunstein & M. Tushnet, supra note 21, at 139.

¶n55 *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, 1929 App. Cas. 358, 371 (H.L.). The passage continues:

When you come to the facts it may well be that there is great difficulty -- such difficulty as may give rise to difference of judicial opinion -- in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, "bare licensees," "pure trespassers" and so on, has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls.

Id. at 371-72.

¶n56 The key case is still *Rowland v. Christian*, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *Rowland* was in a sense wholly gratuitous, as recovery could have been awarded under the traditional view holding hosts responsible for latent defects causing harm under ordinary usage. See *id.* at 115, 443 P.2d at 566, 70 Cal. Rptr. at 102. For a criticism of the modern tendency of balancing in the tort area, see Epstein, *The Risks of Risk/Utility*, 47 Ohio

St. L.J. (forthcoming 1987).

¶n57 312 U.S. 100 (1941); see discussion *infra* notes 206-17 and accompanying text. Note too that *Darby's* view of the clause makes hash of the reserved powers clause of the tenth amendment. If jurisdiction under the commerce clause is both plenary and unlimited, then there is nothing left to reserve. The tenth amendment thus really becomes a truism. Yet the amendment sharply confirms that the federal government has only delegated powers: "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. Why bother with the amendment if *Darby* is correct? By contrast, the tenth amendment makes good sense if Chief Justice Marshall's view in *Gibbons* is followed.

¶n58 317 U.S. 111 (1942); see discussion *infra* notes 221-27 and accompanying text.

¶n59 *Id.* at 120. Justice Jackson went on to note that Chief Justice Marshall in *Gibbons* warned that "effective restraints on its exercise must proceed from political rather than from judicial processes." *Id.* The passage in *Gibbons* reads in full:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New-York, and act upon the very waters to which the prohibition now under consideration applies.

Gibbons, 22 U.S. (9 Wheat.) at 197. Justice Jackson thus confused two points. First, the need for political decisions for matters properly within the scope of the commerce powers, and, second, the scope of the clause itself. The latter was only held to "comprehend navigation" in New York waters, not all productive activities within the state.

¶n60 Justice Johnson wrote:

The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. . . . And I cannot overcome the conviction, that if the licensing act was repealed to-morrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license. *Gibbons*, 22 U.S. at 227-32 (Johnson, J., concurring).

¶n61 It is strange to think of how little the commerce power moved in the decades that followed *Gibbons*. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), stood for the principle that the federal jurisdiction under the commerce clause comes in two parts. For those matters, such as pilotage in local waters, that fall within interstate commerce but that are of great local concern as well, the federal and state jurisdictions are concurrent. *Id.* at 319-20. For those matters for which there should be a uniform rule, the power of Congress is

exclusive. *Id.* at 319. This delicate compromise is somewhat tricky to reconcile with the constitutional text, even if greater feats of legerdemain have been done in the name of constitutional construction. The power granted by the commerce clause seems to be unitary for all objects that fall within it; how then can federal jurisdiction be exclusive for some areas and concurrent for others?

Nonetheless the *Coolley* solution does have a structural sense that makes it more durable than might appear at first blush. Local conditions easily could demand separate treatments, which do not threaten interstate commerce in the same way as did the New York statute at issue in *Gibbons*. Local practices shown to discriminate against outsiders could be addressed by the privileges and immunities clause of the Constitution, and arguably by other substantive provisions as well. U.S. Const. art. IV, § 2, cl. 1

¶n62 In analyzing this division, I do not discuss in depth *United States v. Coombs*, 37 U.S. (13 Pet.) 71 (1838), which upheld the constitutionality of a statute that imposed criminal penalties against "any person who shall plunder, steal or destroy any money, goods," etc. from a ship under the admiralty jurisdiction of the United States. Justice Story sustained the constitutionality of that statute, writing that the commerce clause "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states." *Id.* at 78. Note that there are actions outside of interstate commerce that have evident effects upon interstate commerce. Yet the decision does little to threaten the system of enumerated powers found in the constitution, because the train of physical effects is quite limited, and do not involve the federal government in the operations of the local economies. *Coombs* is another case for which the necessary and proper clause could sensibly make the difference. But, given its limited extent, it is not surprising that *Coombs* was not invoked in the subsequent expansionary period of the commerce clause.

¶n63 Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C.A. §§ 10101-11917 (Supp. 1987)).

¶n64 301 U.S. 1 (1937).

¶n65 *Gibbons*, 22 U.S. (9 Wheat.) at 194-95.

¶n66 77 U.S. (10 Wall.) 557 (1870).

¶n67 *Id.* at 562 (argument of appellant).

¶n68 *Id.* at 566.

¶n69 See *infra* notes 22-28; L. Tribe, *supra* note 28, § 5-6, at 238-39.

¶n70 118 U.S. 557 (1886).

¶n71 *Id.* at 577.

¶n72 Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C.A. §§ 10101-11917 (Supp. 1987)). Section 4 of the statute provided:

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance.

Id. § 4, 24 Stat. at 380.

A proviso to the section then gave the ICC the power to relieve carriers from this obligation "in special cases," but did not set out any standards which indicated when this general obligation should be suspended, and none are apparent as a general matter. Section 3 of the Act contained a prohibition against undue preferences, and § 5 prevented certain kinds of pooling of freight.

¶n73 Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)); see *infra* notes 93-101 and accompanying text. For a general account of the early changes in the Interstate Commerce Act, see Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 Geo. Wash. L. Rev. 289 (1937).

¶n74 169 U.S. 466 (1898) (holding state railroad regulations to be violations of the 14th amendment).

¶n75 See Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)).

¶n76 234 U.S. 342 (1914). I am most indebted to Professor Edmund Kitch for pointing out to me the genuine complexities that this case raises, and for insisting that I deal more fully with the matter.

¶n77 Id. at 346.

¶n78 Id.

¶n79 Id. at 345. One example of the discrimination was that "a rate of 60 cents carried first class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport." Id. at 346.

¶n80 Id. at 346-47.

¶n81 Id. at 347.

¶n82 Id. at 351-52.

¶n83 Id. at 352.

¶n84 222 U.S. 20 (1911).

¶n85 Ch. 196, 27 Stat. 531 (1893) (current version at 45 U.S.C. §§ 1-7 (1982)).

¶n86 223 U.S. 1 (1912).

¶n87 See *supra* notes 65-69 and accompanying text.

¶n88 See *supra* notes 22-28 and accompanying text.

¶n89 301 U.S. 1 (1937); see *infra* notes 185-205 and accompanying text.

¶n90 *The Shreveport Rate Case*, 234 U.S. at 352.

¶n91 The actual language of the Interstate Commerce Act appears to have precluded the regulations that were sustained in the case. Section 3, which prevented "undue or unreasonable preference or advantage" to one person over another, was subject to a proviso that read:

Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country or to any State or Territory as aforesaid.

The Shreveport Rate Case, 234 U.S. at 356-57 (quoting the Interstate Commerce Act).

Yet this remnant of Chief Justice Marshall's "internal commerce" of the several states did not long survive. The Court concluded that the proviso did not apply "when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act." *Id.* at 358. Certainly there was no reference to unjust discrimination in the proviso, which would have been wholly redundant if it reached only those cases in which no discrimination was present, for these were precisely the cases lacking conduct which the ICC could find unlawful.

↑n92 *Id.* at 355.

↑n93 257 U.S. 563 (1922).

↑n94 Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)).

↑n95 "The . . . most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation." *Wisconsin R.R. Comm'n*, 257 U.S. at 584. This is merely a nice way to describe cartelization of the railroad industry.

↑n96 See *id.* at 579-80.

↑n97 See *id.* at 583. Typically, expanded government authority during the First World War set the stage for expanded government authority after peace had returned.

↑n98 The Court wrote:

Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear.
Id. at 589-90.

↑n99 "Capture," whether by railroads wishing to cartelize their industry, or by shippers wishing to ship their goods below cost, is an inherent risk of all forms of regulation. The basic insight here is that regulation of all forms constitutes an implicit transfer of wealth among private individuals. The difficult question is to determine which interest group or groups will be able to take over, or capture the process. See McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987); Peltzman, Toward a More General Theory of Regulation, 19 J. Law & Econ. 211 (1976); Posner, Taxation by Regulation, 2 Bell J. Econ. & Mgmt. Sci. 22 (1971); Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

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Cases 

Terms: ("jones" and "united states") and lopez (Edit Search)

*529 U.S. 848, *; 120 S. Ct. 1904, **;
2000 U.S. LEXIS 3426, ***; 146 L. Ed. 2d 902*

DEWEY J. JONES v. UNITED STATES

No. 99-5739

SUPREME COURT OF THE UNITED STATES

529 U.S. 848; 120 S. Ct. 1904; 2000 U.S. LEXIS 3426; 146 L. Ed. 2d 902; 68 U.S.L.W. 4422; 2000 Cal. Daily Op. Service 3961; 2000 Daily Journal DAR 5293; 2000 Colo. J. C.A.R. 2791; 13 Fla. L. Weekly Fed. S 356

March 21, 2000, Argued
May 22, 2000, Decided

NOTICE: [*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE **UNITED STATES** COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: 178 F.3d 479, reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner sought review of the decision of the Court of Appeals for the Seventh Circuit affirming the judgment of the district court which convicted him of arson in violation of 18 U.S.C.S. § 844(i) (Supp. IV 1994).

OVERVIEW: Petitioner criminal defendant tossed a Molotov cocktail through a window into a home owned and occupied by his cousin. Petitioner was convicted of arson, in violation of 18 U.S.C.S. § 844(i) (Supp. IV 1994) and related crimes. The Court of Appeals for the Seventh Circuit affirmed the judgment. On appeal, petitioner argued the statute did not apply to buildings not used for commercial purposes, and challenged the constitutionality of such an application. Respondent argued the residence was "used" in the "activity" of receiving natural gas, a mortgage, and an insurance policy. The court avoided the constitutional question that would have arose if the statute were read to render the traditionally local criminal conduct a matter for federal enforcement. The court held that the provision covered only property currently used in commerce or in an activity affecting commerce and an owner-occupied residence not used for any commercial purpose did not qualify.

OUTCOME: Judgment reversed because the federal arson statute did not cover the arson of an owner-occupied dwelling not used for any commercial purpose; petitioner's conviction under the federal arson statute vacated; case remanded for further proceedings.

CORE TERMS: commerce, arson, owner-occupied, interstate, explosive, interstate commerce, foreign commerce, homeowner, destroy, natural gas, dwelling, damaged, cousin,

commerce-affecting, interpretive, expansive, everyday, mortgage, occupied, doubtful, rental, dwelling place, real estate, federal-state, destruction, reinforced, destroyed, convicted, cocktail, firearm

CORE CONCEPTS - ♦ Hide Concepts

 Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson

↓ See 18 U.S.C.S. § 844(i) (Supp. IV 1994).

 Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson

↓ In determining a violation of 18 U.S.C.S. § 844(i) (Supp. IV 1994), the proper inquiry is into the function of the building itself, and then a determination of whether that function affects interstate commerce.

 Governments : Legislation : Construction & Interpretation

↓ The word "use," in legislation as in conversation, ordinarily signifies active employment.

 Governments : Legislation : Construction & Interpretation

↓ When terms used in a statute are undefined, the court gives them their ordinary meaning.

 Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson

↓ By its terms, 18 U.S.C.S. § 844(i) (Supp. IV 1994) applies only to property that is "used" in an "activity" that affects commerce.

 Governments : Legislation : Construction & Interpretation

↓ Judges should hesitate to treat statutory terms in any setting as surplusage, and resistance should be heightened when the words describe an element of a criminal offense.

 Governments : Legislation : Construction & Interpretation

↓ Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the court's duty is to adopt the latter.

 Governments : Legislation : Construction & Interpretation

↓ Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.

 Governments : Legislation : Construction & Interpretation

↓ When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before the court chooses the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

 Governments : Legislation : Construction & Interpretation

↓ Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.

 Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson

↓ 18 U.S.C.S. § 844(i) (Supp. IV 1994) covers only property currently used in commerce or in an activity affecting commerce. The statute does not cover the arson of an owner-occupied dwelling used for everyday family living.

♦ Show Lawyers' Edition Display

SYLLABUS: Petitioner **Jones** tossed a Molotov cocktail into a home owned and occupied by his cousin as a dwelling place for everyday family living. The ensuing fire severely damaged the home. **Jones** was convicted in the District Court of violating, *inter alia*, 18 U.S.C. § 844 (i), which makes it a federal crime to "maliciously damage or destroy, . . . by means of fire or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The Seventh Circuit affirmed, rejecting **Jones's** contention that § 844(i), when applied to the arson of a [***2] private residence, exceeds the authority vested in Congress under the Commerce Clause.

Held: Because an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity, arson of such a dwelling is not subject to federal prosecution under § 844(i). Pp. 3-10.

(a) In support of its argument that § 844(i) reaches the arson of an owner-occupied private residence, the Government relies principally on the breadth of the statutory term "affecting . . . commerce," words that, when unqualified, signal Congress' intent to invoke its full Commerce Clause authority. But § 844(i) contains the qualifying words "used in" a commerce-affecting activity. The key word is "used." Congress did not define the crime as the explosion of a building whose damage or destruction might affect interstate commerce, but required that the damaged or destroyed property itself have been used in commerce or in an activity affecting commerce. The proper inquiry, therefore, is into the function of the building itself, and then into whether that function affects interstate commerce. The Court rejects the Government's argument that [***3] the Indiana residence involved in this case was constantly "used" in at least three "activities affecting commerce": (1) it was "used" as collateral to obtain and secure a mortgage from an Oklahoma lender, who, in turn, "used" it as security for the loan; (2) it was "used" to obtain from a Wisconsin insurer a casualty insurance policy, which safeguarded the interests of the homeowner and the mortgagee; and (3) it was "used" to receive natural gas from sources outside Indiana. Section 844(i)'s use-in-commerce requirement is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce. See, e.g., *Bailey v. United States*, 516 U.S. 137, 143, 145, 133 L. Ed. 2d 472, 116 S. Ct. 501. It 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. Cf. *id.*, at 145. The Government does not allege that the residence here served as a home office or the locus of any commercial undertaking. The home's only "active employment," so far as the record reveals, was for the everyday living of **Jones's** cousin and his family. [***4] *Russell v. United States*, 471 U.S. 858, 862, 85 L. Ed. 2d 829, 105 S. Ct. 2455 -- in which the Court held that particular property was being used in an "activity affecting commerce" under § 844 (i) because its owner was renting it to tenants at the time he attempted to destroy it by fire -- does not warrant a less "use"-centered reading of § 844(i) in this case. The Court there observed that "by its terms," § 844(i) applies only to "property that is 'used' in an 'activity' that affects commerce," and ruled that "the rental of real estate" fits that description, *ibid.* Here, the homeowner did not use his residence in any trade or business. Were the Court to adopt the Government's expansive interpretation, hardly a building in the land would fall outside § 844(i)'s domain, and the statute's limiting language, "used in," would have no office. Judges should hesitate to treat statutory terms in any setting as surplusage, particularly when the words describe an element of a crime. E.g., *Ratzlaf v. United States*, 510 U.S. 135, 140-141. Pp. 3-8, 126 L. Ed. 2d 615, 114 S. Ct. 655.

(b) The foregoing reading is in harmony with the guiding principle that where a statute is susceptible of two constructions, by [***5] one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392. In holding that a

statute making it a federal crime to possess a firearm within 1,000 feet of a school exceeded Congress' power to regulate commerce, this Court, in ***United States v. Lopez***, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624, stressed that the area was one of traditional state concern, see, e.g., *id.*, at 561, n. 3, and that the legislation aimed at activity in which neither the actors nor their conduct had a commercial character, e.g., 514 U.S. at 560-562. Given the concerns brought to the fore in ***Lopez***, it is appropriate to avoid the constitutional question that would arise were the Court to read § 844(i) to render the traditionally local criminal conduct in which **Jones** engaged a matter for federal enforcement. ***United States v. Bass***, 404 U.S. 336, 350, 30 L. Ed. 2d 488, 92 S. Ct. 515. The Court's comprehension of § 844(i) is additionally reinforced by other interpretive guides. **[***6]** Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, ***Rewis v. United States***, 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056, and when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite, ***United States v. Universal C. I. T. Credit Corp.***, 344 U.S. 218, 221-222, 97 L. Ed. 260, 73 S. Ct. 227. Moreover, unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes. ***Bass***, 404 U.S. at 349. To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. Pp. 8-9.

178 F.3d 479, reversed and remanded.

COUNSEL: Donald M. Falk argued the cause for petitioner.

Michael R. Dreeben argued the cause for respondent.

JUDGES: GINSBURG, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which THOMAS, J., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined.

OPINIONBY: GINSBURG

OPINION: **[*850]** **[**1907]**

JUSTICE GINSBURG delivered the opinion of the Court.

[1A]

It is a federal **[***7]** crime under 18 U.S.C. § 844(i) (1994 ed., Supp. IV) to damage or destroy, "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." **[**1908]** This case presents the question whether arson of an owner-occupied private residence falls within § 844(i)'s compass. Construing the statute's text, we hold that an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or **[*851]** commerce-affecting activity; arson of such a dwelling, therefore, is not subject to federal prosecution under § 844(i). Our construction of § 844(i) is reinforced by the Court's opinion in ***United States v. Lopez***, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided where possible, see ***Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council***, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

I

[2A]

On February 23, 1998, petitioner Dewey **Jones** tossed a Molotov cocktail through a window into a home in Fort Wayne, Indiana, owned and occupied by his cousin. No one was **[***8]** injured in the ensuing fire, but the blaze severely damaged the home. A federal grand jury

returned a three-count indictment charging **Jones** with arson, 18 U.S.C. § 844(i) (1994 ed., Supp. IV); using a destructive device during and in relation to a crime of violence (the arson), 18 U.S.C. § 924(c); and making an illegal destructive device, 26 U.S.C. § 5861(f). **Jones** was tried under that indictment in the Northern District of Indiana and convicted by a jury on all three counts. n1 The District Court sentenced him, pursuant to the Sentencing Reform Act of 1984, to a total prison term of 35 years, to be followed by five years of supervised release. The court also ordered **Jones** to pay \$ 77,396.87 to the insurer of the damaged home as restitution for its loss. **Jones** appealed, and the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. 178 F.3d 479 (1999).

[2B]

-----Footnotes-----

n1 The question on which we granted review refers solely to **Jones's** § 844(i) conviction. See *infra*, at 3. We therefore do not address his § 924(c) and § 5861(f) convictions.

-----End Footnotes----- [***9]

[1B]

Jones unsuccessfully urged, both before the District Court and on appeal to the Seventh Circuit, that § 844(i), when applied to the arson of a private residence, exceeds the authority vested in Congress under the Commerce Clause of the [***852] Constitution, Art. I, § 8, cl. 3. Courts of Appeals have divided both on the question whether § 844(i) applies to buildings not used for commercial purposes, n2 and on the constitutionality of such an application. n3 We granted certiorari, 528 U.S. 1002 (1999), and framed as the question presented:

[***10]

"Whether, in light of *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988), 18 U.S.C. § 844(i) applies to the arson of a private residence; [***1909] and if so, whether its application to the private residence in the present case is constitutional."

Satisfied that § 844(i) does not reach an owner-occupied residence that is not used for any commercial purpose, we reverse the Court of Appeals' judgment.

-----Footnotes-----

n2 Compare *United States v. Gaydos*, 108 F.3d 505 (CA3 1997) (vacant, uninhabitable house formerly rented not covered by statute), *United States v. Denalli*, 73 F.3d 328 (CA11) (owner-occupied residence not covered), modified on other grounds, 90 F.3d 444 (1996) (*per curiam*), *United States v. Mennuti*, 639 F.2d 107 (CA2 1981) (same), with *United States v. Ryan*, 41 F.3d 361 (CA8 1994) (en banc) (vacant former commercial property covered), cert. denied, 514 U.S. 1082, 131 L. Ed. 2d 721, 115 S. Ct. 1793 (1995), *United States v. Ramey*, 24 F.3d 602 (CA4 1994) (owner-occupied residence covered), cert. denied, 514 U.S. 1103, 131 L. Ed. 2d 757, 115 S. Ct. 1838 (1995), and *United States v. Stillwell*, 900 F.2d 1104 (CA7) (same), cert. denied, 498 U.S. 838, 112 L. Ed. 2d 81, 111 S. Ct. 111 (1990).

n3 Compare *United States v. Pappadopoulos*, 64 F.3d 522 (CA9 1995) (application to owner-occupied residence unconstitutional), with 178 F.3d 479 (CA7 1999) (decision below), and *Ramey*, 24 F.3d at 602 (application constitutional).

-----End Footnotes-----

II

Congress enacted 18 U.S.C. § 844(i) as part of Title XI of the Organized Crime Control Act of 1970, Pub. L. 91-452, § 1102, 84 Stat. 952, "because [***11] of the need 'to curb the use, transportation, and possession of explosives.'" *Russell v. [*853] United States*, 471 U.S. 858, 860, n. 5, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985) (citation omitted). The word "fire," which did not appear in § 844(i) as originally composed, was introduced by statutory amendment in 1982. n4 As now worded, § 844(i) (1994 ed., Supp. IV) reads in relevant part:

"Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire [***12] or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both"

-----Footnotes-----

n4 See Pub. L. 97-298, § 2(c), 96 Stat. 1319 (amending § 844(i) to insert the words "fire or" before the words "an explosive"). The House Report accompanying the 1982 legislation explained that the original measure, which was confined to damage caused by "an explosive," had resulted in problems of practical application. H. R. Rep. No. 678, 97th Cong., 2d Sess., 2 (1982). In particular, the Report noted a Circuit conflict on the question whether the measure covered use of gasoline or other flammable liquids to ignite a fire. *Id.*, at 2, and nn. 5-6.

-----End Footnotes-----

We previously construed § 844(i) in *Russell v. United States*, 471 U.S. 858, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985), and there held that § 844(i) applies to a building "used as rental property," *ibid.* The petitioner-defendant in *Russell* had unsuccessfully attempted to set fire to a two-unit apartment building he owned. He earned rental income from the property and "treated it as business property for tax purposes." *Id.*, at 859. Our decision stated as the dispositive fact: "Petitioner was renting his apartment building to tenants at the time he attempted to destroy it by fire." *Id.*, at 862. It followed from that fact, the *Russell* opinion concluded, that "the property was . . . being used in an activity affecting commerce within the meaning of § 844(i)." *Ibid.* n5

-----Footnotes-----

n5 We noted in *Russell* that the original version of the bill that became § 844(i) applied to destruction, by means of explosives, of property used "for business purposes." *Russell*, 471 U.S. at 860, n. 5. After some House members indicated that they thought the provision should apply to the bombings of schools, police stations, and places of worship, the words "for business purposes" were omitted. 471 U.S. at 860-861. The House Report accompanying the final bill, we further noted in *Russell*, described § 844(i) as "a very broad provision covering substantially all business property." *Id.*, at 861, and n. 8 (citing H. R. Rep. No. 91-1549, pp. 69-70 (1970)).

-----End Footnotes----- [*854] [***13]

We now confront a question that was not before the Court in *Russell*: Does § 844(i) cover property occupied and used by its owner not for any commercial venture, but as a private residence. Is such a dwelling place, in the words of § 844(i), "used in . . . any activity affecting . . . commerce"?

[1C]

[3]

[4A]

[5]

In support of its argument that § 844(i) reaches the arson of an owner-occupied private residence, the Government relies principally on the breadth of the statutory term "affecting . . . commerce," see Brief for **United States** 10, 16-17, words that, when unqualified, signal Congress' intent to invoke its full authority under the Commerce Clause. But § 844(i) contains the qualifying words "used in" a commerce-affecting activity. The key word is "used." "Congress did not define the crime described in § 844(i) as the explosion [**1910] of a building whose damage or destruction might affect interstate commerce" **United States v. Mennuti**, 639 F.2d 107, 110 (CA2 1981) (Friendly, J.). n6 Congress "required that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce." *Ibid.* ¶ The proper inquiry, we agree, "is into [***14] the function of the building itself, and then a determination of whether that function affects interstate commerce." [**855] **United States v. Ryan**, 9 F.3d 660, 675 (CA8 1993) (Arnold, C. J., concurring in part and dissenting in part). n7

[4B]

-----Footnotes-----

n6 The defendants in *Mennuti* destroyed two buildings. One was the residence of the owner and her family, the other was a rental property. See 639 F.2d at 108-109, n. 1. The Second Circuit affirmed the District Court's dismissal of the entire indictment. Our decision in *Russell v. United States*, 471 U.S. 858, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985), supersedes *Mennuti* with respect to the building held for rental. Regarding the family residence, we find *Mennuti*'s reasoning persuasive.

n7 In *Ryan*, Chief Judge Arnold dissented from a panel decision holding that the arson of a permanently closed fitness center fell within § 844(i)'s prohibition. The panel majority considered adequate either of two interstate commerce connections: the building was owned and leased by out-of-state parties, and received natural gas from across state borders. The panel added, however, that it would not extend the decision "to property which is purely private in nature, such as a privately owned home, used solely for residential purposes." 9 F.3d at 666-667. Sitting en banc, the Eighth Circuit affirmed the panel's judgment. See **United States v. Ryan**, 41 F.3d 361 (1994), cert. denied, 514 U.S. 1082, 131 L. Ed. 2d 721, 115 S. Ct. 1793 (1995).

-----End Footnotes----- [***15]

The Government urges that the Fort Wayne, Indiana residence into which **Jones** tossed a Molotov cocktail was constantly "used" in at least three "activities affecting commerce." First, the homeowner "used" the dwelling as collateral to obtain and secure a mortgage from an Oklahoma lender; the lender, in turn, "used" the property as security for the home loan. Second, the homeowner "used" the residence to obtain a casualty insurance policy from a Wisconsin insurer. That policy, the Government points out, safeguarded the interests of the homeowner and the mortgagee. Third, the homeowner "used" the dwelling to receive natural gas from sources outside Indiana. See Brief for **United States** 19-23.

[1D]

[6]

The Government correctly observes that § 844(i) excludes no particular type of building (it covers "any building"); the provision does, however, require that the building be "used" in an activity affecting commerce. That qualification is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce. Although "variously defined," ¶ the word "use," in legislation as in conversation, ordinarily signifies "active employment." [***16] *Bailey v. United States*,

516 U.S. 137, 143, 145, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995); see also *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 130 L. Ed. 2d 682, 115 S. Ct. 788 (1995) ¶("When terms used in a statute are undefined, we give them their ordinary meaning."). [*856]

[1E]

It 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. Cf. *Bailey*, 516 U.S. at 145 (interpreting the word "use," as it appears in 18 U.S.C. § 924(c)(1), to mean active employment of a firearm and rejecting the Government's argument that a gun is "used" whenever its presence "protects drugs" or "emboldens" a drug dealer). The Government does not allege that the Indiana residence involved in this case served as a home office or the locus of any commercial undertaking. The home's only "active employment," so far as the record reveals, was for the everyday living of **Jones's** cousin and his family. [**1911]

Our decision in *Russell* does not warrant a less "use"-centered reading of § 844(i). In that case, which involved the arson of property rented out by its owner, see *supra*, at 4, the Court [***17] referred to the recognized distinction between legislation limited to activities "in commerce" and legislation invoking Congress' full power over activity substantially "affecting . . . commerce." 471 U.S. at 859-860 and n. 4. The *Russell* opinion went on to observe, however, that ¶"by its terms," § 844(i) applies only to "property that is 'used' in an 'activity' that affects commerce." 471 U.S. at 862. "The rental of real estate," the Court then stated, "is unquestionably such an activity." *Ibid.* n8 Here, as earlier emphasized, the owner used the property as his home, the center of his family life. He did not use the residence in any trade or business.

-----Footnotes-----

n8 Notably, the Court in *Russell* did not rest its holding on the expansive interpretation advanced by the Government both in *Russell* and in this case. Compare Brief for **United States** in *Russell v. United States*, O.T. 1984, No. 435, p. 15 ("Petitioner used his building on South Union Street in an activity affecting interstate commerce by heating it with gas that moved interstate."), with *Russell*, 471 U.S. at 862 (focusing instead on fact that "the rental of real estate is unquestionably . . . an activity" affecting commerce).

-----End Footnotes----- [*857] [***18]

Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. See, e.g., *FERC v. Mississippi*, 456 U.S. 742, 757, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) (observing that electric energy is consumed "in virtually every home" and that "no State relies solely on its own resources" to meet its inhabitants' demand for the product). If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office. See *United States v. Monholland*, 607 F.2d 1311, 1316 (CA10 1979) (finding in § 844(i) no indication that Congress intended to include "everybody and everything"). ¶"Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe [***19] an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140-141, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994); accord, *Bailey*, 516 U.S. at 145.

III

[1F]

Our reading of § 844(i) is in harmony with the guiding principle that ¶"where a statute is

susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 53 L. Ed. 836, 29 S. Ct. 527 (1909), quoted in *Jones v. United States*, 526 U.S. 227, 239, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999); see also *DeBartolo*, 485 U.S. at 575; *Ashwander v. TVA*, 297 U.S. 288, 348, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J., concurring). In *Lopez*, this Court invalidated the Gun-Free School Zones Act, former 18 U.S.C. § 922(q) (1988 ed., Supp. V), which made it a federal crime to possess a firearm within [*858] 1,000 feet of a school. The defendant in that case, a 12th-grade student, had been convicted for knowingly possessing a concealed handgun and bullets at his San Antonio, Texas, high school, in violation of the federal [***20] Act. Holding that the Act exceeded Congress' power to regulate commerce, the Court stressed that the area was one of traditional state concern, see 514 U.S. at 561, n. 3, 567; *id.* at 577 (KENNEDY, J., concurring), and that the legislation aimed at activity in which "neither the [**1912] actors nor their conduct has a commercial character," *id.* at 580 (KENNEDY, J., concurring); *id.* at 560-562 (opinion of the Court).

Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the "traditionally local criminal conduct" in which petitioner *Jones* engaged "a matter for federal enforcement." *United States v. Bass*, 404 U.S. 336, 350, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971). Our comprehension of § 844(i) is additionally reinforced by other interpretive guides. We have instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis v. United States*, 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971), and that "when choice has to be made between two readings of what conduct Congress has made a crime, [***21] it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite," *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222, 97 L. Ed. 260, 73 S. Ct. 227 (1952). We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes. *Bass*, 404 U.S. at 349. To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. See generally Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986). [*859]

IV

[1G]

[7A]

We conclude that § 844(i) is not soundly read to make virtually every arson in the country a federal offense. We hold that the provision covers only property currently used in commerce or in an activity affecting commerce. The home owned and occupied by petitioner *Jones's* cousin was not so used -- it was a dwelling place used for everyday family living. As we read § 844(i), Congress left cases of this genre to the law enforcement authorities of the States. [***22]

[7B]

Our holding that § 844(i) does not cover the arson of an owner-occupied dwelling means that *Jones's* § 844(i) conviction must be vacated. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCURBY: STEVENS; THOMAS

CONCUR: JUSTICE STEVENS, with whom JUSTICE THOMAS joins, concurring.

Part II of the Court's opinion convincingly explains why its construction of 18 U.S.C. § 844(i) better fits the text and context of the provision than the Government's expansive reading. It also seems appropriate, however, to emphasize the kinship between our well-established presumption against federal pre-emption of state law, see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978), and our reluctance to "believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this." *United States v. Altobella*, 442 F.2d 310, 316 (CA7 1971). The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years, Ind. Code [***23] §§ 35-43-1-1, 35-50-2-5 (1993), illustrates how a criminal law like this may effectively displace a policy choice made by the State. Even when Congress has undoubted power to pre-empt local law, [*860] we have wisely decided that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971). For this reason, I reiterate my firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless [**1913] congressional intention to assert its jurisdiction is plain. *

-----Footnotes-----

* See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 700, n. 2, 85 L. Ed. 2d 692, 105 S. Ct. 2297 (1985) (STEVENS, J., dissenting); *Bennett v. New Jersey*, 470 U.S. 632, 654-655, n. 16, 84 L. Ed. 2d 572, 105 S. Ct. 1555 (1985) (STEVENS, J., dissenting); *Garcia v. United States*, 469 U.S. 70, 89-90, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984) (STEVENS, J., dissenting); *Bell v. United States*, 462 U.S. 356, 363, 76 L. Ed. 2d 638, 103 S. Ct. 2398 (1983) (STEVENS, J., dissenting); *McElroy v. United States*, 455 U.S. 642, 675, 71 L. Ed. 2d 522, 102 S. Ct. 1332 (1982) (STEVENS, J., dissenting).

-----End Footnotes----- [***24]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

In joining the Court's opinion, I express no view on the question whether the federal arson statute, 18 U.S.C. § 844(i) (1994 ed., Supp. IV), as there construed, is constitutional in its application to all buildings used for commercial activities.

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*529 U.S. 598, *; 120 S. Ct. 1740, **;
2000 U.S. LEXIS 3422, ***; 146 L. Ed. 2d 658*

UNITED STATES v. ANTONIO J. MORRISON, ET AL.; AND CHRISTY BRZONKALA v. ANTONIO J. MORRISON, ET AL.

Nos. 99-5 and 99-29

SUPREME COURT OF THE UNITED STATES

529 U.S. 598; 120 S. Ct. 1740; 2000 U.S. LEXIS 3422; 146 L. Ed. 2d 658; 68 U.S.L.W. 4351; 82 Fair Empl. Prac. Cas. (BNA) 1313; 77 Empl. Prac. Dec. (CCH) P46,376; 2000 Cal. Daily Op. Service 3788; 2000 Daily Journal DAR 5061; 2000 Colo. J. C.A.R. 2583; 13 Fla. L. Weekly Fed. S 287

January 11, 2000, Argued
May 15, 2000, * Decided

* Together with No. 99-29, Brzonkala v. Morrison et al., also on certiorari to the same court.

NOTICE: [*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 169 F.3d 820, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner victim appealed the judgment of the United States Court of Appeals for the Fourth Circuit declaring unconstitutional 42 U.S.C.S. § 13981, which provided a civil remedy for the victims of gender-motivated violence, on the ground that Congress lacked the authority to enact the statute under either the Commerce Clause or U.S. Const. amend. XIV, § 5.

OVERVIEW: Petitioner victim brought an action against respondent offender under 42 U.S.C.S. § 13981, which provided a federal civil remedy for the victims of gender-motivated violence. The lower court struck down § 13981 and concluded that Congress lacked constitutional authority to enact the statute under either the Commerce Clause or U.S. Const. amend. XIV, § 5. The court rejected petitioners' argument that § 13981 was a regulation of activity that substantially affected interstate commerce. The court affirmed the decision of the lower court and held that gender-motivated crimes of violence were not considered economic activity, and therefore, the Commerce Clause did not vest Congress with the authority to enact a statute regulating such. Moreover, the court affirmed that the civil remedy contained in § 13981 should be struck down as it was outside Congress's remedial power under U.S. Const. amend. XIV, § 5. The civil remedy was not found to be corrective in its character nor adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers. Instead, the subject statute redressed private discrimination and was outside Congress' power to enact.

OUTCOME: The court affirmed and held that Congress lacked the authority to enact the subject statute under the Commerce Clause because the statute did not involve economic activity or interstate commerce. The court also affirmed that Congress lacked authority to enact said statute under U.S. Const. amend. XIV since the statute governed the conduct of private individuals instead of harm caused by the state.

CORE TERMS: interstate commerce, violence, commerce, commerce power, Fourteenth Amendment, gender-motivated, gender, regulation, interstate, rape, violent crime, federalism, intrastate, noneconomic, categorical, enact, domestic violence, framers, aggregate, gender bias, consumption, regulating, state regulation, federalist, plenary, gun, economic activity, national economy, state action, regulated

CORE CONCEPTS - ♦ [Hide Concepts](#)

 Constitutional Law : Substantive Due Process : Equal Protection : Sex

 See 42 U.S.C.S. § 13981(b)-(e).

 Constitutional Law : Congressional Powers & Duties

 Every law enacted by Congress must be based on one or more of its powers enumerated in the U.S. Constitution.

 Constitutional Law : The Judiciary : Case or Controversy : Constitutionality of Legislation

 Due respect for the decisions of a coordinate branch of Government demands that the Court invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.

 Constitutional Law : Congressional Powers & Duties : Commerce Clause

 Even modern-era precedents which have expanded congressional power under the Commerce Clause confirm that Congress' regulatory authority is subject to outer limits. The scope of the interstate commerce power must be considered in the light of the dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

 Constitutional Law : Congressional Powers & Duties : Commerce Clause

 Modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, namely, those activities that substantially affect interstate commerce.

 Constitutional Law : Congressional Powers & Duties : Commerce Clause

 Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

 Constitutional Law : Congressional Powers & Duties : Commerce Clause

- ✚ Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, but the existence of such findings may enable the Court to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect is visible to the naked eye.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

📄 Constitutional Law : Substantive Due Process : Equal Protection : Sex

- ✚ Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

- ✚ Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by the Court.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

- ✚ Congress may not regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The U.S. Constitution requires a distinction between what is truly national and what is truly local. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce is the province of the states.

📄 Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection

- ✚ See U.S. Const. amend. XIV, § 5.

📄 Constitutional Law : Substantive Due Process : Equal Protection : Sex

- ✚ State-sponsored gender discrimination violates equal protection unless it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives.

📄 Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection

- ✚ U.S. Const. amend. XIV, by its very terms, prohibits only state action. U.S. Const. amend. XIV erects no shield against merely private conduct, however discriminatory or wrongful.

📄 Constitutional Law : Congressional Powers & Duties

- ✚ Where a subject has not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

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SYLLABUS:

Petitioner Brzonkala filed suit, alleging, *inter alia*, that she was raped by respondents while the three were students at the Virginia Polytechnic Institute, and that this attack violated 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. Respondents moved to dismiss on the grounds that the complaint failed to state a

claim and that § 13981's civil remedy is unconstitutional. Petitioner United States intervened to defend the section's constitutionality. In dismissing the complaint, the District Court held that it stated a claim against respondents, [***2] but that Congress lacked authority to enact § 13981 under either § 8 of the Commerce Clause or § 5 of the Fourteenth Amendment, which Congress had explicitly identified as the sources of federal authority for § 13981. The en banc Fourth Circuit affirmed.

Held: Section 13981 cannot be sustained under the Commerce Clause or § 5 of the Fourteenth Amendment. Pp. 7-28.

(a) The Commerce Clause does not provide Congress with authority to enact § 13981's federal civil remedy. A congressional enactment will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez*, 514 U.S. 549, 568, 577-578, 131 L. Ed. 2d 626, 115 S. Ct. 1624. Petitioners assert that § 13981 can be sustained under Congress' commerce power as a regulation of activity that substantially affects interstate commerce. The proper framework for analyzing such a claim is provided by the principles the Court set out in *Lopez*. First, in *Lopez*, the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court's conclusion that Congress lacks authority to regulate such possession. Similarly, gender-motivated crimes of violence [***3] are not, in any sense, economic activity. Second, like the statute at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' regulation of interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce to come within Congress' authority, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime. Third, although § 13981, unlike the *Lopez* statute, is supported by numerous findings regarding the serious impact of gender-motivated violence on victims and their families, these findings are substantially weakened by the fact that they rely on reasoning that this Court has rejected, namely a but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. If accepted, this reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption. Moreover, such reasoning will not limit Congress [***4] to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. Pp. 7-19.

(b) Section 5 of the Fourteenth Amendment, which permits Congress to enforce by appropriate legislation the constitutional guarantee that no State shall deprive any person of life, liberty, or property, without due process or deny any person equal protection of the laws, *City of Boerne v. Flores*, 521 U.S. 507, 517, 138 L. Ed. 2d 624, 117 S. Ct. 2157, also does not give Congress the authority to enact § 13981. Petitioners' assertion that there is pervasive bias in various state justice systems against victims of [***5] gender-motivated violence is supported by a voluminous congressional record. However, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct. This was the conclusion reached in *United States v. Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601, and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18, which were both decided shortly after the Amendment's adoption. The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption. Neither *United States v. Guest*, 383 U.S. 745, 16 L. Ed. 2d 239, 86

S. Ct. 1170, nor *District of Columbia v. Carter*, 409 U.S. 418, 34 L. Ed. 2d 613, 93 S. Ct. 602, casts any doubt on the enduring vitality of the *Civil Rights Cases* and *Harris*. Assuming that there has been gender-based disparate treatment by state authorities in this case, it would not be enough to save § 13981's [***6] civil remedy, which is directed not at a State or state actor but at individuals who have committed criminal acts motivated by gender bias. Section 13981 visits no consequence on any Virginia public official involved in investigating or prosecuting Brzonkala's assault, and it is thus unlike any of the § 5 remedies this Court has previously upheld. See e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803. Section 13981 is also different from previously upheld remedies in that it applies uniformly throughout the Nation, even though Congress' findings indicate that the problem addressed does not exist in all, or even most, States. In contrast, the § 5 remedy in *Katzenbach* was directed only to those States in which Congress found that there had been discrimination. Pp. 19-27.

169 F.3d 820, affirmed.

COUNSEL: Julie Goldscheid argued the cause for petitioner in No. 99-29.

Seth P. Waxman argued the cause for the United States in No. 99-5.

Michael E. Rosman argued the cause for respondents.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, and in which SOUTER and GINSBURG, [***7] JJ., joined as to Part I-A.

OPINIONBY: REHNQUIST

OPINION: [*601] [**1745]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A]

In these cases we consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the [*602] victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that these cases are controlled by our decisions in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), *United States v. Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), we affirm.

I

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who [**1746] were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly [***8] told Brzonkala, "You better not have any . . . diseases." Complaint P22. In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he "liked" to get girls drunk and" *Id.*, P31. The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed **[*603]** antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for **[***9]** two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2-semester suspension. This time, however, the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21, 1995, Virginia Tech's senior vice president and provost set aside Morrison's punishment. She concluded that it was "excessive when compared with other cases where there has been a finding of violation of **[***10]** the Abusive Conduct Policy," 132 F.3d 949, 955 (CA4 1997). Virginia Tech did not inform Brzonkala of this decision. After learning from a **[*604]** newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated § 13981 and that Virginia Tech's handling of her complaint violated Title IX of the Education Amendments of 1972, 86 Stat. 373-375, 20 U.S.C. §§ 1681-1688. Morrison and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States, petitioner in No. 99-5, intervened to defend § 13981's constitutionality.

The District Court dismissed Brzonkala's Title IX claims against Virginia Tech for failure to state a claim upon which relief can be granted. See *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 772 (WD Va. 1996). It then held that Brzonkala's **[***11]** complaint stated a claim against Morrison and Crawford under § 13981, but dismissed the complaint because **[**1747]** it concluded that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779 (WD Va. 1996).

A divided panel of the Court of Appeals reversed the District Court, reinstating Brzonkala's § 13981 claim and her Title IX hostile environment claim. n1 *Brzonkala v. Virginia Polytechnic and State Univ.*, 132 F.3d 949 (CA4 1997). The full Court of Appeals vacated the panel's opinion and reheard the case en banc. The en banc court then issued an opinion affirming the District Court's conclusion that Brzonkala stated a claim under § 13981 because her complaint alleged a crime of violence and the allegations of Morrison's crude and derogatory statements regarding his **[*605]** treatment of women sufficiently indicated that his crime was motivated by gender animus. n2 Nevertheless, the court by a divided vote affirmed the District Court's conclusion that Congress lacked constitutional authority to enact § 13981's civil remedy. *Brzonkala v. Virginia Polytechnic and State Univ.*, 169 F.3d 820 (CA4

1999). *****12]** Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari. 527 U.S. 1068 (1999).

-----Footnotes-----

n1 The panel affirmed the dismissal of Brzonkala's Title IX disparate treatment claim. See 132 F.3d at 961-962.

n2 The en banc Court of Appeals affirmed the District Court's conclusion that Brzonkala failed to state a claim alleging disparate treatment under Title IX, but vacated the District Court's dismissal of her hostile environment claim and remanded with instructions for the District Court to hold the claim in abeyance pending this Court's decision in Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999). **Brzonkala v. Virginia Polytechnic and State Univ., 169 F.3d 820, 827, n. 2 (CA4 1999)**. Our grant of certiorari did not encompass Brzonkala's Title IX claims, and we thus do not consider them in this opinion.

-----End Footnotes-----

Section 13981 was part of the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942. *****13]** It states that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). To enforce that right, subsection (c) declares:

"A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

Section 13981 defines a "crime" of violence motivated by "gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an **[*606]** animus based on the victim's gender." § 13981(d)(1). It also provides that the term "crime of violence" includes any

"(A) . . . act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that *****14]** would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

"(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken." § 13981(d)(2).

*****1748]**

Further clarifying the broad scope of § 13981's civil remedy, subsection (e)(2) states that

"nothing" in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." And subsection (e)(3) provides a § 13981 litigant with a choice of forums: Federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section.

Although the foregoing language of § 13981 covers a wide swath of criminal conduct, Congress placed some limitations on the section's federal civil remedy. Subsection (e)(1) states *****15** that "nothing" in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender." Subsection (e)(4) further states that § 13981 shall not be construed "to confer on the courts of the United States jurisdiction over any State law claim seeking ***607** the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."

[2A]

✦Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 176, 2 L. Ed. 60 (1803) (Marshall, C. J.). Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said that a "federal civil rights cause of action" is established "pursuant" to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of *****16** the Constitution." 42 U.S.C. § 13981(a). We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

II

[2B]

✦Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez*, 514 U.S. at 568, 577-578 (KENNEDY, J., concurring); *United States v. Harris*, 106 U.S. at 635. With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution. Brzonkala and the United States rely upon the third clause of the Article, which gives Congress power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[3]

As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. See *Lopez*, 514 U.S. at 552-557; *id.*, at 568-574 (KENNEDY, J., concurring); *id.*, at 584, 593-599 (THOMAS, J., *****17** concurring). We need not repeat that detailed review of ***608** the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. See *Lopez*, 514 U.S. at 555-556; *id.*, at 573-574 (KENNEDY, J., concurring).

Lopez emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.

Id., at 557.

✦Even [our] modern-era precedents which have expanded congressional power ****1749** under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate

commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between [***18] what is national and what is local and create a completely centralized government." *Id.*, at 556-557 (quoting *Jones & Laughlin Steel, supra*, at 37). n3

-----Footnotes-----

n3 JUSTICE SOUTER's dissent takes us to task for allegedly abandoning *Jones & Laughlin Steel* in favor of an inadequate "federalism of some earlier time." *Post*, at 15-17, 29. As the foregoing language from *Jones & Laughlin Steel* makes clear however, this Court has always recognized a limit on the commerce power inherent in "our dual system of government." 301 U.S. at 37. It is the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries that disregards the Court's caution in *Jones & Laughlin Steel* against allowing that power to "effectually obliterate the distinction between what is national and what is local." *Ibid.*

-----End Footnotes-----

[4]

As we observed in *Lopez*, modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate [***19] under its commerce power." [*609] 514 U.S. at 558 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); *Perez v. United States*, 402 U.S. 146, 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)). "First, Congress may regulate the use of the channels of interstate commerce." 514 U.S. at 558 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); *United States v. Darby*, 312 U.S. 100, 114, 85 L. Ed. 609, 61 S. Ct. 451 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558 (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R. Co. v. United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72 (1911); *Perez, supra*, at 150). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." 514 U.S. at 558-559 [***20] (citing *Jones & Laughlin Steel, supra*, at 37).

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

[5A]

[6A]

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981. In *Lopez*, we held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. See 514 U.S. at 551. Several significant considerations contributed to our decision. [*610]

First, we observed that § 922(q) was "a criminal statute that by its terms has nothing [***21] to do with 'commerce' or any sort of economic enterprise, however [**1750]

broadly one might define those terms." 514 U.S. at 561. Reviewing our case law, we noted that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." 514 U.S. at 559. Although we cited only a few examples, including *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942); *Hodel, supra*; *Perez, supra*; *Katzenbach v. McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964); and *Heart of Atlanta Motel, supra*, we stated that the pattern of analysis is clear. *Lopez*, 514 U.S. at 559-560. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 514 U.S. at 560.

[5B]

Both petitioners and JUSTICE SOUTER's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. See, *****22** e.g., *id.*, at 551 ("The Act [does not] 'regulate a commercial activity'", 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not"), 561 ("Section 922(q) is not an essential part of a larger regulation of economic activity"), 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty'"), 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition **611** elsewhere, substantially affect any sort of interstate commerce"); see also *id.*, at 573-574 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress *****23** may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"), 577 ("Were 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, the boundaries between the spheres of federal and state authority would blur"), 580 ("Unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far" (citation omitted)). *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic *****24** endeavor. See *id.*, at 559-560. n4

-----Footnotes-----

n4 JUSTICE SOUTER's dissent does not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside. See *post*, at 10-16. However, the dissent cannot persuasively contradict *Lopez*'s conclusion that, in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character. See, e.g., *Lopez*, 514 U.S. at 559-560, 580.

-----End Footnotes-----

[6B]

The second consideration that we found important in analyzing § 922(q) was that **1751** the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have **612** an explicit

connection with or effect on interstate commerce." *Id.*, at 562. Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

[6C]

[7]

Third, we noted that neither § 922(q) "nor *****25** its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Ibid.* (quoting Brief for United States, O.T. 1994, No. 93-1260, pp. 5-6). While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," 514 U.S. at 562 (citing *McClung*, 379 U.S. at 304; *Perez*, 402 U.S. at 156), the existence of such findings may "enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect [is] visible to the naked eye." 514 U.S. at 563.

[6D]

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. *Id.*, at 563-567. The United States argued that the possession of guns may lead to violent crime, and that violent crime "can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the *****26** mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." *Id.*, at 563-564 (citation omitted). The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce. *Ibid.*

We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress ***613** to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.*, at 564. We noted that, under this but-for reasoning:

"Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under these theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law *****27** enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Ibid.*

[5C]

[8]

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. See, e.g., *id.*, at 559-560, and the cases cited therein.

[6E]

[9]

Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 **[**1752]** is sufficiently tied to **[***28]** interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime. n5

-----Footnotes-----

n5 Title 42 U.S.C. § 13981 is not the sole provision of the Violence Against Women Act of 1994 to provide a federal remedy for gender-motivated crime. Section 40221(a) of the Act creates a federal criminal remedy to punish "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." S. Rep. No. 103-138, p. 43 (1993). That criminal provision has been codified at 18 U.S.C. § 2261(a)(1), which states:

"A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b)."

The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress' Commerce Clause authority, reasoning that the provision properly falls within the first of *Lopez*'s categories as it regulates the use of channels of interstate commerce -- i.e., the use of the interstate transportation routes through which persons and goods move." *United States v. Lankford*, 196 F.3d 563, 571-572 (CA5 1999) (collecting cases) (internal quotation marks omitted).

-----End Footnotes----- **[*614]** **[***29]**

[6F]

[10]

In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, e.g., H. R. Conf. Rep. No. 103-711, p. 385 (1994); S. Rep. No. 103-138, p. 40 (1993); S. Rep. No. 101-545, p. 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "¶ Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." 514 U.S. at 557, n. 2 (quoting *Hodel*, 452 U.S. at 311 (REHNQUIST, J., concurring in judgment)). Rather, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." 514 U.S. at 557, n. 2 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)). **[*615]**

In these cases, Congress' **[***30]** findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

"by deterring potential victims from traveling interstate, from engaging in

employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H. R. Conf. Rep. No. 103-711, at 385.

Accord, S. Rep. No. 103-138, at 54. Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez, supra*, at 564. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' *****31** police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial ****1753** effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

[11A]

[12A]

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of ***616** marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. n6 See 42 U.S.C. § 13981(e)(4). Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace. n7 *****32** See *Lopez, supra*, at 575-579 (KENNEDY, J., concurring); *Marbury*, 1 Cranch at 176-178.

[11B]

[12B]

-----Footnotes-----

n6 We are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area. In *Lopez*, 514 U.S. at 567, we quoted Justice Cardozo's concurring opinion in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935):

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" *Id.*, at 554 (quoting *United States v. A. L. A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).

n7 JUSTICE SOUTER's dissent theory that *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824), *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), and the Seventeenth Amendment provide the answer to these cases, see *post*, at 19-26, is remarkable because it undermines this central principle of our constitutional system. As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 30, 131 L. Ed. 2d 34, 115 S. Ct. 1185 (1995) (GINSBURG,

J., dissenting); *Gregory v. Ashcroft*, 501 U.S. 452, 458-459, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (cataloging the benefits of the federal design); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'" (quoting *Garcia, supra*, at 572 (Powell, J., dissenting))). Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 176, 2 L. Ed. 60 (1803) (Marshall, C. J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written"). It is thus a "permanent and indispensable feature of our constitutional system" that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Miller v. Johnson*, 515 U.S. 900, 922-923, 132 L. Ed. 2d 762, 115 S. Ct. 2475 (1995) (quoting *Cooper v. Aaron*, 358 U.S. 1, 18, 3 L. Ed. 2d 5, 78 S. Ct. 1401 (1958)).

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974), "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* . . . that 'it is emphatically the province and duty of the judicial department to say what the law is.'" *Id.*, at 703 (citation omitted).

Contrary to JUSTICE SOUTER's suggestion, see *post*, at 19-21, and n. 14, *Gibbons* did not exempt the commerce power from this cardinal rule of constitutional law. His assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds*. As the language surrounding that relied upon by JUSTICE SOUTER makes clear, *Gibbons* did not remove from this Court the authority to define that boundary. See *Gibbons, supra*, at 194-195 ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State").

-----End Footnotes----- [*617] [***33] ↑
 [**1754]

[13A]

[14A]

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is [*618] truly national and what is truly local. *Lopez*, 514 U.S. at 568 (citing *Jones & Laughlin Steel*, 301 U.S. at 30). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the

province of the States. See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 426, 428, 5 L. Ed. 257 (1821) (Marshall, C. J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. n8 See, e.g., *****34** *Lopez*, 514 U.S. at 566 ("The Constitution . . . withholds from Congress a plenary police power"); *id.*, at 584-585 (THOMAS, J., concurring) ("We *always* have rejected readings ***619** of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596-597, and n. 6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

[14B]

-----Footnotes-----

n8 JUSTICE SOUTER disputes our assertion that the Constitution reserves the general police power to the States, noting that the Founders failed to adopt several proposals for additional guarantees against federal encroachment on state authority. See *post*, at 19-22, and n. 14. This argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate. See, e.g., *New York v. United States*, 505 U.S. 144, 156-157, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). And, as discussed above, the Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review. See n. 7, *supra*. Moreover, the principle that "the Constitution created a Federal Government of limited powers," while reserving a generalized police power to the States is deeply ingrained in our constitutional history. *New York, supra*, at 155 (quoting *Gregory v. Ashcroft, supra*, at 457; see also *Lopez*, 514 U.S. at 584-599 (THOMAS, J., concurring) (discussing the history of the debates surrounding the adoption of the Commerce Clause and our subsequent interpretation of the Clause); *Maryland v. Wirtz*, 392 U.S. 183, 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968).

-----End Footnotes----- *****35**

III

[1B]

[13B]

Because we conclude that the Commerce Clause does not provide Congress ****1755** with authority to enact § 13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under § 5 of the Fourteenth Amendment. As noted above, Congress expressly invoked the Fourteenth Amendment as a source of authority to enact § 13981.

[15]

The principles governing an analysis of congressional legislation under § 5 are well settled. Section 5 states that Congress may "enforce," by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty or property, without due process of law," nor deny any person "equal protection of the laws." *City of Boerne v. Flores*, 521 U.S. 507, 517, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). Section 5 is "a positive grant of legislative power," *Katzenbach v. Morgan*, 384 U.S. 641, 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966), that includes authority to "prohibit conduct which is not itself unconstitutional and [to] intrude into 'legislative spheres of autonomy previously reserved to the States.'" *Flores, supra*, at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 49 L. Ed. 2d 614, 96

S. Ct. 2666 (1976)); *****36** see also *Kimel v. Florida Bd. of Regents*, 528 U.S. , (2000) (slip op., at 16). However, as broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970); see also *Kimel*, *supra*, at - (slip op., at 16-17). In fact, as we discuss in detail below, several limitations inherent in § 5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted.

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion ***620** is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. See *****37** H. R. Conf. Rep. No. 103-711, at 385-386; S. Rep. No. 103-138, at 38, 41-55; S. Rep. No. 102-197, at 33-35, 41, 43-47. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

[16]

As our cases have established, "state-sponsored gender discrimination violates equal protection unless it "serves "important governmental objectives and . . . the discriminatory means employed" are "substantially related to the achievement of those objectives." " *United States v. Virginia*, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), in turn quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980)). See also *Craig v. Boren*, 429 U.S. 190, 198-199, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack *****38** discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. See *Flores*, 521 U.S. at 520-524 (reviewing the history of the Fourteenth Amendment's enactment and discussing the contemporary belief

****1756** that the Amendment "does ***621** not concentrate power in the general government for any purpose of police government within the States") (quoting T. Cooley, *Constitutional Limitations* 294, n. 1 (2d ed. 1871)). Foremost among these limitations is the time-honored principle that "the Fourteenth Amendment, by its very terms, prohibits only state action. The principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 68 S. Ct. 836, and n. 12 (1948).

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, *****39** *United States v. Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883). In *Harris*, the Court considered a challenge to § 2 of the Civil Rights Act of 1871. That section sought to punish "private persons" for "conspiring to deprive any one of the equal protection of the laws enacted by the State." 106 U.S. at 639. We concluded that this law exceeded Congress' § 5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." 106 U.S. at 640. In so doing, we reemphasized our statement from *Virginia v. Rives*, 100 U.S. 313, 318, 25 L. Ed. 667 (1880), that "these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals."

Harris, supra, at 639 (misquotation in *Harris*).

We reached a similar conclusion in the *Civil Rights Cases*. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope [***40] of the § 5 enforcement power. 109 U.S. at 11 ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment. See also, e.g., *Romer v. [**622] Evans*, 517 U.S. 620, 628, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) (It was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations"); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power"); *Blum v. Yaretsky*, 457 U.S. 991, 1002, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); *United States v. Cruikshank*, 92 U.S. 542, 554, 23 L. Ed. 588 (1876) ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the [***41] States upon the fundamental rights which belong to every citizen as a member of society").

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur -- and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Petitioners contend that two more recent decisions have in effect overruled this longstanding limitation on Congress' § 5 authority. They rely on *United States v. [**1757] Guest*, 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966), for the proposition that the rule laid down in the *Civil Rights Cases* is no longer good law. In *Guest*, the Court reversed the construction of an indictment under 18 U.S.C. § 241, saying in the course of its opinion that "we deal here with issues of statutory construction, not with issues of constitutional power." 383 U.S. at 749. Three Members of the Court, in a separate opinion [***42] by Justice Brennan, expressed the view that the *Civil Rights Cases* [**623] were wrongly decided, and that Congress could under § 5 prohibit actions by private individuals. 383 U.S. at 774 (opinion concurring in part and dissenting in part). Three other Members of the Court, who joined the opinion of the Court, joined a separate opinion by Justice Clark which in two or three sentences stated the conclusion that Congress could punish all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." *Id.* at 762 (concurring opinion). Justice Harlan, in another separate opinion, commented with respect to the statement by these Justices:

"The action of three of the Justices who joined the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary." *Id.*, at 762, n. 1 (opinion concurring in part and dissenting in part).

Though these three Justices saw fit to opine on matters not before the Court in *Guest*, the Court had no occasion to revisit the *Civil Rights* [***43] *Cases* and *Harris*, having determined "the indictment [charging private individuals with conspiring to deprive blacks of equal access to state facilities] in fact contained an express allegation of state involvement." 383 U.S. at 756. The Court concluded that the implicit allegation of "active connivance by

agents of the State" eliminated any need to decide "the threshold level that state action must attain in order to create rights under the Equal Protection Clause." *Ibid.* All of this Justice Clark explicitly acknowledged. See *id.*, at 762 (concurring opinion) ("The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities"). [*624]

To accept petitioners' argument, moreover, one must add to the three Justices joining Justice Brennan's reasoned explanation for his belief that the *Civil Rights Cases* were wrongly decided, the three Justices joining Justice Clark's opinion who gave no explanation whatever for their similar view. This is simply not the way [***44] that reasoned constitutional adjudication proceeds. We accordingly have no hesitation in saying that it would take more than the naked dicta contained in Justice Clark's opinion, when added to Justice Brennan's opinion, to cast any doubt upon the enduring vitality of the *Civil Rights Cases* and *Harris*.

Petitioners also rely on *District of Columbia v. Carter*, 409 U.S. 418, 34 L. Ed. 2d 613, 93 S. Ct. 602 (1973). *Carter* was a case addressing the question whether the District of Columbia was a "State" within the meaning of Rev. Stat. § 1979, 42 U.S.C. § 1983 -- a section which by its terms requires state action before it may be employed. A footnote in that opinion recites the same litany respecting *Guest* that petitioners rely on. This litany is of course entirely dicta, and in any event cannot rise above its source. We believe that the description of the § 5 power contained in the *Civil Rights Cases* is correct:

"♣But where a subject has not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference [***45] to that subject, the power given is limited [**1758] by its object, any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." 109 U.S. at 18.

Petitioners alternatively argue that, unlike the situation in the *Civil Rights Cases*, here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action. There is [*625] abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. The statement of Representative Garfield in the House and that of Senator Sumner in the Senate are representative:

The chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to [***46] enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42d Cong., 1st Sess., App. 153 (1871) (statement of Rep. Garfield).

"The Legislature of South Carolina has passed a law giving precisely the rights contained in your 'supplementary civil rights bill.' But such a law remains a dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it." Cong. Globe, 42d Cong., 2d Sess., 430 (1872) (statement of Sen. Sumner).

See also, *e.g.*, Cong. Globe, 42d Cong., 1st Sess., at 653 (statement of Sen. Osborn); *id.*, at 457 (statement of Rep. Coburn); *id.*, at App. 78 (statement of Rep. Perry); 2 Cong. Rec. 457 (1874) (statement of Rep. Butler); 3 Cong. Rec. 945 (1875) (statement of Rep. Lynch).

[17]

But even if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." *Civil Rights Cases*, 109 U.S. at 18. Or, as we have phrased [***47] it in more recent cases, prophylactic legislation under § 5 must have a "congruence [*626] and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Flores*, 521 U.S. at 526. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld. For example, in *Katzenbach v. Morgan*, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966), Congress prohibited New York from imposing literacy tests as a prerequisite for voting because it found that such a requirement disenfranchised thousands of Puerto Rican immigrants who had been educated in the Spanish language of their home territory. That [***48] law, which we upheld, was directed at New York officials who administered the State's election law and prohibited them from using a provision of that law. In *South Carolina v. Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966), Congress imposed voting rights requirements on States that, Congress found, had a history of discriminating against blacks in voting. [**1759] The remedy was also directed at state officials in those States. Similarly, in *Ex parte Virginia*, 100 U.S. 339, 25 L. Ed. 676 (1880), Congress criminally punished state officials who intentionally discriminated in jury selection; again, the remedy was directed to the culpable state official.

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan*, *supra*, [*627] was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach*, *supra*, the remedy was directed [***49] only to those States in which Congress found that there had been discrimination.

[1C]

For these reasons, we conclude that Congress' power under § 5 does not extend to the enactment of § 13981.

IV

[1D]

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

CONCURBY: THOMAS

CONCUR: *JUSTICE THOMAS*, concurring.

The majority opinion correctly applies our decision in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and I join it in full. I write separately only to express my view 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. By *****50** continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

DISSENTBY: SOUTER; BREYER

DISSENT: **[*628]**

JUSTICE SOUTER, with whom *JUSTICE STEVENS*, *JUSTICE GINSBURG*, and *JUSTICE BREYER* join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.
n1

-----Footnotes-----

n1 Finding the law a valid exercise of Commerce Clause power, I have no occasion to reach the question whether it might also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.

-----End Footnotes----- *****51**

I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard v. Filburn*, 317 U.S. 111, 124-128, 87 L. Ed. 122, 63 S. Ct. 82 (1942); *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.*, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ****1760** ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid.* Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead *****52** to only one conclusion.

One obvious difference from *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), is the mountain of data assembled by Congress, **[*629]** here showing the effects of violence against women on interstate commerce. n2 Passage of the Act in 1994 was preceded by four years of hearings, n3 which included testimony from physicians and law

professors; n4 from survivors **[*630]** of rape and domestic violence; n5 and from representatives of state law enforcement and private business. n6 The record includes reports on gender bias from task forces in 21 States, n7 and we have the benefit of specific factual findings **[*631]** in **[**1761]** the eight separate Reports issued by Congress and its committees over the long course leading to enactment. n8 Compare *Hodel*, 452 U.S. at 278-279 (noting "extended hearings," "vast amounts of testimony and documentary evidence," and "years of the most thorough legislative consideration"). **[***53]** **[***54]** **[***55]**

-----Footnotes-----

n2 It is true that these data relate to the effects of violence against women generally, while the civil rights remedy limits its scope to "crimes of violence motivated by gender" -- presumably a somewhat narrower subset of acts. See 42 U.S.C. § 13981(b). But the meaning of "motivated by gender" has not been elucidated by lower courts, much less by this one, so the degree to which the findings rely on acts not redressable by the civil rights remedy is unclear. As will appear, however, much of the data seems to indicate behavior with just such motivation. In any event, adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 81 L. Ed. 893, 57 S. Ct. 615 (1937). Having identified the problem of violence against women, Congress may address what it sees as the most threatening manifestation; "reform may take one step at a time." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1955).

n3 See, e.g., Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990) (S. Hearing 101-897); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102-369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-596); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-726); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-878); Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

n4 See, e.g., S. Hearing 103-596, at 1-4 (testimony of Northeastern Univ. Law School Professor Clare Dalton); S. Hearing 102-369, at 103-105 (testimony of Univ. of Chicago Professor Cass Sunstein); S. Hearing 103-878, at 7-11 (testimony of American Medical Assn. president-elect Robert McAfee).

n5 See, e.g., *id.*, at 13-17 (testimony of Lisa); *id.* at 40-42 (testimony of Jennifer Tescher).

n6 See, e.g., S. Hearing 102-369, at 24-36, 71-87 (testimony of attorneys general of Iowa and Illinois); *id.*, at 235-245 (testimony of National Federation of Business and Professional Women); S. Hearing No. 103-596, at 15-17 (statement of James Hardeman, Manager, Counseling Dept., Polaroid Corp.).

n7 See Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts (July 1996) (edited

version of 1990 report); Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender and Justice in the Colorado Courts (1990); Connecticut Task Force on Gender, Justice and the Courts, Report to the Chief Justice (Sept. 1991); Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990); Supreme Court of Georgia, Commission on Gender Bias in the Judicial System, Gender and Justice in the Courts (1991), reprinted in 8 Ga. St. U. L. Rev. 539 (1992); Report of the Illinois Task Force on Gender Bias in the Courts (1990); Equality in the Courts Task Force, State of Iowa, Final Report (Feb. 1993); Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (Jan. 1992); Louisiana Task Force on Women in the Courts, Final Report (1992); Maryland Special Joint Comm., Gender Bias in the Courts (May 1989); Massachusetts Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, Final Report (Dec. 1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), reprinted in 15 Wm. Mitchell L. Rev. 825 (1989); Nevada Supreme Court Gender Bias Task Force, Justice For Women (1988); New Jersey Supreme Court Task Force on Women in the Courts, Report of the First Year (June 1984); Report of the New York Task Force on Women in the Courts (Mar. 1986); Final Report of the Rhode Island Supreme Court Committee on Women in the Courts (June 1987); Utah Task Force on Gender and Justice, Report to the Utah Judicial Council (Mar. 1990); Vermont Supreme Court and Vermont Bar Assn., Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System (Jan. 1991); Washington State Task Force on Gender and Justice in the Courts, Final Report (1989); Wisconsin Equal Justice Task Force, Final Report (Jan. 1991).

n8 See S. Rep. No. 101-545 (1990); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: The Increase of Rape in America, 102d Cong., 1st Sess. (Comm. Print 1991); S. Rep. No. 102-197 (1991); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: A Week in the Life of America, 102d Cong., 2d Sess. (Comm. Print 1992); S. Rep. No. 103-138 (1993); Majority Staff of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess. (Comm. Print 1993); H. R. Rep. No. 103-395 (1993); H. R. Conf. Rep. No. 103-711 (1994).

-----End Footnotes-----

With respect to domestic violence, Congress received evidence for the following findings:

"Three out of four American women will be victims of violent crimes sometime during their life." H. R. Rep. No. 103-395 p. 25 (1993) (citing U.S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed. 1988)).

"Violence is the leading cause of injuries to women ages 15 to 44" S. Rep. No. 103-138, p. 38 (1993) (citing Surgeon General Antonia Novello, From the Surgeon General, *****56** U.S. Public Health Services, 267 JAMA 3132 (1992)).

"As many as 50 percent of homeless women and children are fleeing domestic violence." S. Rep. No. 101-545, p. 37 (1990) (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990)).

"Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others." S. Rep. No. 101-545, **[*632]** at 30 (citing Bureau of Justice Statistics, Criminal Victimization in the United States (1974) (Table 5)).

"Battering 'is the single largest cause of injury to women in the United States.'"

S. Rep. No. 101-545, at 37 (quoting Van Hightower & McManus, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 Pub. Admin. Rev. 269 (May/June 1989)).

"An estimated 4 million American women are battered each year by their **[**1762]** husbands or partners." H. R. Rep. No. 103-395, at 26 (citing Council on Scientific Affairs, American Medical Assn., Violence Against Women: Relevance for Medical Practitioners, 267 JAMA 3184, 3185 (1992)).

"Over 1 million women in the United States seek medical assistance **[***57]** each year for injuries sustained [from] their husbands or other partners." S. Rep. No. 101-545, at 37 (citing Stark & Flitcraft, Medical Therapy as Repression: The Case of the Battered Woman, Health & Medicine (Summer/Fall 1982)).

"Between 2,000 and 4,000 women die every year from [domestic] abuse." S. Rep. No. 101-545, at 36 (citing Schneider, *supra*).

"Arrest rates may be as low as 1 for every 100 domestic assaults." S. Rep. No. 101-545, at 38 (citing Dutton, Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis, 3 Violence and Victims 5-30 (1988)).

"Partial estimates show that violent crime against women costs this country at least 3 billion -- not million, but billion -- dollars a year." S. Rep. No. 101-545, at 33 (citing Schneider, *supra*, at 4).

"Estimates suggest that we spend \$ 5 to \$ 10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at **[*633]** 41 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, Trial 56 (June 1993)).

The evidence as to rape was similarly extensive, supporting these conclusions:

"[The incidence of] rape rose four times as fast as the total national **[***58]** crime rate over the past 10 years." S. Rep. No. 101-545, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)).

"According to one study, close to half a million girls now in high school will be raped before they graduate." S. Rep. No. 101-545, at 31 (citing R. Warshaw, I Never Called it Rape 117 (1988)).

"[One hundred twenty-five thousand] college women can expect to be raped during this -- or any -- year." S. Rep. No. 101-545, at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990).

"Three-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason." S. Rep. No. 102-197, p. 38 (1991) (citing M. Gordon & S. Riger, The Female Fear 15 (1989)).

"[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims." S. Rep. No. 102-197, at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender Justice in the Colorado Courts 91 (1990)).

"Less than 1 percent of all [rape] victims have collected damages." S. Rep. No. 102-197, at [***59] 44 (citing report by Jury Verdict Research, Inc.).

"An individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense." S. Rep. No. 101-545, at 33, n. 30 [*634] (quoting H. Feild & L. Bienen, *Jurors and Rape: A Study in Psychology and Law* 95 (1980)).

"Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months." S. Rep. No. 103-138, at 38 (citing Majority Staff Report of Senate Committee on the Judiciary, *The Response to Rape: Detours on the Road to Equal Justice*, 103d Cong., 1st Sess., 2 (Comm. Print 1993)).

"Almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S. Rep. No. 102-197, at 53 (citing Ellis, Atkeson, & Calhoun, *An Assessment of Long-Term Reaction to Rape*, 90 J. Abnormal Psych., No. 3, p. 264 (1981). [**1763]

Based on the data thus partially summarized, Congress found that

"crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate [***60] business, and from transacting with business, and in places involved, in interstate commerce . . . [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products" H. R. Conf. Rep. No. 103-711, p. 385 (1994).

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. Cf. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 199, 137 L. Ed. 2d 369, 117 S. Ct. 1174 (1997) [*635] ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process").

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964), [***61] and *Katzenbach v. McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. See *Civil Rights -- Public Accommodations*, Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., App. V, pp. 1383-1387 (1963). Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference. H. R. Rep. No. 88-914, pt. 2, pp. 9-10, and Table II (1963) (Additional Views on H. R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell).

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual **[***62]** assault, citing annual costs of \$ 3 billion in 1990, see S. Rep. 101-545, and \$ 5 to \$ 10 billion in 1993, see S. Rep. No. 103-138, at 41. n9 Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial **[*636]** discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, gender-based violence bars its most likely targets -- women -- from full participation in the national economy." *Id.*, at 54.

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n9 In other cases, we have accepted dramatically smaller figures. See, e.g., *Hodel v. Indiana*, 452 U.S. 314, 325, n. 11, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981) (stating that corn production with a value of \$ 5.16 million "surely is not an insignificant amount of commerce").

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If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard*, we upheld the application of the Agricultural Adjustment Act to the planting and **[***63]** consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat **[**1764]** grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. See 317 U.S. at 127-129. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, see S. Rep. No. 101-545, at 36, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit, see *id.*, at 56, H. R. Rep. No. 103-395, at 25-26. Violence against women may be found to affect interstate commerce and affect it substantially. n10

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n10 It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. See Hearings before a Subcommittee of the House Committee on Appropriations, 104th Cong., 1st Sess., pt. 7, pp. 13-14 (1995) (testimony of JUSTICE KENNEDY); Hearings on H. R. 4603 before a Subcommittee of the Senate Committee on Appropriations, 103d Cong., 2d Sess., 100-107 (1994) (testimony of JUSTICES KENNEDY and SOUTER). The Judicial Conference of the United States originally opposed the Act, though after the original bill was amended to include the gender-based animus requirement, the objection was withdrawn for reasons that are not apparent. See Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 70-71 (1993).

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II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the

Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I, § 8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra*, at 258; *McClung, supra*, at 301-305, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrongs," *Heart of Atlanta, supra*, at 257.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence [***65] has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review. [**638]

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante*, at 14. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence. [**1765]

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to [***66] rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. See *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 195, 6 L. Ed. 23 (1824); *ante*, at 10; The Federalist No. 45, p. 313 (J. Cooke ed. 1961) (J. Madison). n11 The majority stresses that Art. I, § 8, enumerates [**639] the powers of Congress, including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation, [***67] see *Lopez*, 514 U.S. at 566. *Ante*, at 16.

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n11 The claim that powers not granted were withheld was the chief Federalist argument against the necessity of a bill of rights. Bills of rights, Hamilton claimed, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84, at 578. James Wilson went further in the Pennsylvania ratifying convention, asserting that an enumeration of rights was positively dangerous because it suggested, conversely, that every right not reserved was surrendered. See 2 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 436-437 (2d ed. 1863) (hereinafter *Elliot's Debates*). The Federalists did not, of course, prevail on this point; most States voted for the Constitution only after proposing amendments and the First Congress speedily

adopted a Bill of Rights. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 569, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (Powell, J., dissenting). While that document protected a range of specific individual rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.

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The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, § 8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress. n12 My disagreement [*640] with the majority is not, however, confined to logic, for history has [**1766] shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

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n12 To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme. See, e.g., *Lake Shore & Michigan Southern R. Co. v. Ohio*, 173 U.S. 285, 297-298, 43 L. Ed. 702, 19 S. Ct. 465 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government"); *United States v. California*, 297 U.S. 175, 185, 80 L. Ed. 567, 56 S. Ct. 421 (1936) ("We look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce").

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A

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare "noncommercial" primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Article I, § 8, authorizing Congress to make "all Laws . . . necessary and proper" to give effect to its enumerated powers such as commerce. See *United States v. Darby*, 312 U.S. 100, 118, 85 L. Ed. 609, 61 S. Ct. 451 (1941) ("The power of Congress . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce"). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial [***70] effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation. [*641]

Chief Justice Marshall's seminal opinion in *Gibbons v. Ogden*, *supra*, at 193-194, construed

the commerce power from the start with "a breadth never yet exceeded," *Wickard v. Filburn*, 317 U.S. at 120. In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, "which do not affect other States," *Gibbons*, 9 Wheat. at 195. This plenary view of the power has either prevailed or been acknowledged by this Court at every stage [***71] of our jurisprudence. See, e.g., *id.*, at 197; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U.S. 96, 99-100, 32 L. Ed. 352, 9 S. Ct. 28 (1888); *Lottery Case*, 188 U.S. 321, 353, 47 L. Ed. 492, 23 S. Ct. 321 (1903); *Minnesota Rate Cases*, 230 U.S. 352, 398, 57 L. Ed. 1511, 33 S. Ct. 729 (1913); *United States v. California*, 297 U.S. 175, 185, 80 L. Ed. 567, 56 S. Ct. 421 (1936); *United States v. Darby*, 312 U.S. 100, 115, 85 L. Ed. 609, 61 S. Ct. 451 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 255; *Hodel v. Indiana*, 452 U.S. at 324. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez*, as summed up by Justice Harlan: "Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Maryland v. Wirtz*, 392 U.S. 183, 190, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968) (quoting *Katzenbach v. McClung*, 379 U.S. at 303-304). [***72]

Justice Harlan spoke with the benefit of hindsight, for he had seen the result of rejecting the plenary view, and today's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed [**1767] comes with the pedigree of near-tragedy that I outlined in [**642] *United States v. Lopez*, *supra*, at 603 (dissenting opinion). In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences. See, e.g., *United States v. E. C. Knight Co.*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between "commerce" and "manufacture"); *In re Heff*, 197 U.S. 488, 505-506, 49 L. Ed. 848, 25 S. Ct. 506 (1905) (stating that Congress could not regulate the intrastate [***73] sale of liquor); *The Employers' Liability Cases*, 207 U.S. 463, 495-496, 52 L. Ed. 297, 28 S. Ct. 141 (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect); *Adair v. United States*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908) (holding that labor union membership fell outside "commerce"); *Hammer v. Dagenhart*, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of "manufacture"); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 545-548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (invalidating regulation of activities that only "indirectly" affected commerce); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 368-369, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (holding that regulation of unfair labor practices in mining regulated "production," not "commerce").

Since adherence to these formalistically contrived confines [***74] of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB v. Jones & Laughlin Steel Corp.*, [**643] 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated

that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, see *Lopez, supra*, at 580 (opinion of KENNEDY, J.), is cousin to the intent-based analysis employed in *Hammer, supra*, at 271-272 but rejected for Commerce Clause purposes in *Heart of Atlanta, supra*, at 257 and *Darby, supra*, at 115.

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was [***75] not "commerce" in the common vocabulary, n13 but that did not [**1768] matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before [**644] *Wickard*, however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though *Carter Coal Co., supra*, had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. See *Lopez, supra*, at 605-606 (SOUTER, J., dissenting). The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic [***76] commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

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n13 Contrary to the Court's suggestion, *ante*, at 11, n. 4, *Wickard* applied the substantial effects test to domestic agricultural production for domestic consumption, an activity that cannot fairly be described as commercial, despite its commercial consequences in affecting or being affected by the demand for agricultural products in the commercial market. The *Wickard* Court admitted that Filburn's activity "may not be regarded as commerce" but insisted that "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" 317 U.S. at 125. The characterization of home wheat production as "commerce" or not is, however, ultimately beside the point. For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? Cf., e.g., *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 258, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994) ("An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Court's answer is that it makes a difference to federalism, and the legitimacy of the Court's new judicially derived federalism is the crux of our disagreement. See *infra*, at 18-19.

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If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual [**645] States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity,

then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This [***78] conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. *Ante*, at 9. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. It was disapproved in *Darby*, 312 U.S. at 123-124, and held insufficient standing alone to limit [***1769] the commerce power in *Hodel*, 452 U.S. at 276-277. In the particular context of the Fair Labor Standards Act it was rejected in *Maryland v. Wirtz*, 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968), with the recognition that there is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." *Id.*, at 195 [***79] (internal quotation marks omitted). The Court held it to be "clear that the Federal Government, when acting within delegated power, may override countervailing state interests, whether these be described as 'governmental' or 'proprietary' in character." *Ibid.* While *Wirtz* was later overruled by *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 [***646] (1976), that case was itself repudiated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), which held that the concept of "traditional governmental function" (as an element of the immunity doctrine under *Hodel*) was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other. 469 U.S. at 546-547. The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons's* explanation of the national commerce power as being as "absolute as it would be in a single government," 9 *Wheat*. at 197. n14

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n14 The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, § 9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, § 9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, § 2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding "matters of internal police" met Gouverneur Morris's response that "the internal police . . . ought to be infringed in many cases" and was voted down eight to two. 2 Records of the Federal Convention of 1787, pp. 25-26 (M. Farrand ed. 1911) (hereinafter Farrand). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that "no state shall . . . be affected in its internal police." 5 Elliot's Debates 551-552. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 Farrand 493 ("As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution"). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by

the substantial effects test is to deny our constitutional history.

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The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy. n15
 [**1770] Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

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n15 That the national economy and the national legislative power expand in tandem is not a recent discovery. This Court accepted the prospect well over 100 years ago, noting that the commerce powers "are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 9, 24 L. Ed. 708 (1878). See also, e.g., *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 211-212, 74 L. Ed. 371, 50 S. Ct. 98 (1930) ("Primitive conditions have passed; business is now transacted on a national scale").

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Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties), n16 Madison himself must have sensed the potential scope of some of the powers granted (such as the authority to regulate commerce), for he [**648] took care in The Federalist No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, at 319. James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 Elliot's Debates 438-439. n17 The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth [***82] Amendment without any provision comparable to the specific guarantees proposed for individual liberties. n18 In any case, this Court recognized the political component of federalism in the seminal *Gibbons* opinion. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise:

[**649]

"The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

Gibbons, supra, at 197.

[***83]

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n16 As mentioned n. 11, *supra*, many state conventions voted in favor of the Constitution only after proposing amendments. See 1 Elliot's Debates 322-323 (Massachusetts), 325 (South Carolina), 325-327 (New Hampshire), 327 (Virginia), 327-331 (New York), 331-332 (North Carolina), 334-337 (Rhode Island).

n17 Statements to similar effect pervade the ratification debates. See, e.g., 2 *id.*, at 166-170 (Massachusetts, remarks of Samuel Stillman); *id.*, at 251-253 (New York, remarks of Alexander Hamilton); 4 *id.*, at 95-98 (North Carolina, remarks of James Iredell).

n18 The majority's special solicitude for "areas of traditional state regulation," *ante*, at 15, is thus founded not on the text of the Constitution but on what has been termed the "spirit of the Tenth Amendment," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. at 585 (O'CONNOR, J., dissenting) (emphasis in original). Susceptibility to what Justice Holmes more bluntly called "some invisible radiation from the general terms of the Tenth Amendment," *Missouri v. Holland*, 252 U.S. 416, 434, 64 L. Ed. 641, 40 S. Ct. 382 (1920), has increased in recent years, in disregard of his admonition that "we must consider what this country has become in deciding what that Amendment has reserved." *Ibid.*

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Politics as the moderator of the congressional employment of the commerce power was the theme [***84] many years later in *Wickard*, for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that "he made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard*, [**1771] 317 U.S. at 120 (citation omitted). Hence, "conflicts of economic interest . . . are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." *Id.*, at 129 (footnote omitted).

As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally accepted concepts. After [***85] confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, *Garcia*, 469 U.S. at 550-552, the Court disposed of the possibility of identifying "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely [*650] by relying on *a priori* definitions of state sovereignty," *id.*, at 548. It concluded that

"the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.*, at 552.

The *Garcia* Court's rejection of "judicially created limitations" in favor of the intended reliance on national politics was all the more powerful owing to the Court's explicit recognition that in the centuries since the framing the relative powers of [***86] the two sovereign systems have markedly changed. Nationwide economic integration is the norm, the national political power has been augmented by its vast revenues, and the power of the States has been drawn down by the Seventeenth Amendment, eliminating selection of senators by state legislature in favor of direct election.

The *Garcia* majority recognized that economic growth and the burgeoning of federal revenue have not amended the Constitution, which contains no circuit breaker to preclude the political consequences of these developments. Nor is there any justification for attempts to nullify the natural political impact of the particular amendment that was adopted. The significance for state political power of ending state legislative selection of senators was no secret in 1913, and the amendment was approved despite public comment on that very issue. Representative Franklin Bartlett, after quoting Madison's Federalist No. 62, as well as remarks by George Mason and John Dickinson during the Constitutional Convention, concluded, "It follows, therefore, that the [*651] framers of the Constitution, were they present in this House to-day, would inevitably regard this resolution as a most [***87] direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance." 26 Cong. Rec. 7774 (1894). Massachusetts Senator George Hoar likewise defended indirect election of the Senate as "a great security for the rights of the States." S. Doc. No. 232, 59th Cong., 1st Sess., 21 (1906). And Elihu Root warned that if the selection of senators should be taken from state legislatures, "the tide that now sets toward the Federal Government will swell in volume and power." 46 Cong. Rec. 2243 (1911). "The time will come," he continued, "when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered [**1772] power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States." *Ibid.* These warnings did not kill the proposal; the Amendment was ratified, and today it is only the ratification, not the predictions, which this Court can legitimately heed. n19

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n19 The majority tries to deflect the objection that it blocks an intended political process by explaining that the Framers intended politics to set the federal balance only within the sphere of permissible commerce legislation, whereas we are looking to politics to define that sphere (in derogation even of *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)), *ante*, at 16-17. But we all accept the view that politics is the arbiter of state interests only within the realm of legitimate congressional action under the commerce power. Neither Madison nor Wilson nor Marshall, nor the *Jones & Laughlin*, *Darby*, *Wickard*, or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. Politics has legitimate authority, for all of us on both sides of the disagreement, only within the legitimate compass of the commerce power. The majority claims merely to be engaging in the judicial task of patrolling the outer boundaries of that congressional authority. See *ante*, at 16, n. 7. That assertion cannot be reconciled with our statements of the substantial effects test, which have not drawn the categorical distinctions the majority favors. See, e.g., *Wickard*, 317 U.S. at 125; *Darby*, 312 U.S. at 118-119. The majority's attempt to circumscribe the commerce power by defining it in terms of categorical exceptions can only be seen as a revival of similar efforts that led to near tragedy for the Court and incoherence for the law. If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally

dealt with it, should be a political choice and only a political choice.

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Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power.

C

The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery*. In explaining that there was no inconsistency between declaring the States immune to the commerce power exercised in the Fair Labor Standards Act, but subject to it under the Economic Stabilization Act of 1970, as decided in *Fry v. United States*, 421 U.S. 542, 44 L. Ed. 2d 363, 95 S. Ct. 1792 (1975), the Court spoke of the latter statute as dealing with a serious threat affecting all the political components of the federal **[*653]** system, "which only collective action by the National **[***89]** Government might forestall." *Usery*, 426 U.S. at 853. Today's majority, however, finds no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential. n20

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n20 See n. 7, *supra*. The point here is not that I take the position that the States are incapable of dealing adequately with domestic violence if their political leaders have the will to do so; it is simply that the Congress had evidence from which it could find a national statute necessary, so that its passage obviously survives Commerce Clause scrutiny.

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The National Association of Attorneys General supported the Act unanimously, see Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37-38 (1991), and Attorneys **[**1773]** General from 38 States urged Congress to enact the Civil Rights **[***90]** Remedy, representing that "the current system for dealing with violence against women is inadequate," see Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34-36 (1993). It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence. See Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess., 2 (1990) (statement of Sen. Biden) (noting importance of federal forum). n21 The Act accordingly offers a federal civil rights remedy aimed exactly **[*654]** at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces. See S. Rep. No. 101-545, at 45 (noting difficulty of fitting gender-motivated crimes into common-law categories). As the 1993 Senate Report put it, "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the **[***91]** resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical" S. Rep. No. 103-138, at 38.

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n21 The majority's concerns about accountability strike me as entirely misplaced. Individuals, such as the defendants in this action, haled into federal court and sued under the United States Code, are quite aware of which of our dual sovereignties is attempting to regulate their behavior. Had Congress chosen, in the exercise of its powers under § 5 of the Fourteenth Amendment, to proceed instead by regulating the States, rather than private individuals, this accountability would be far less plain.

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The collective opinion of state officials that the Act was needed continues virtually unchanged, and when the Civil Rights Remedy was challenged in court, the States came to its defense. Thirty-six of them and the Commonwealth of Puerto Rico have filed an *amicus* brief in support of petitioners in these cases, and only one State has taken respondents' side. It *****92** is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not. For with the Court's decision today, Antonio Morrison, like *Carter Coal*'s James Carter before him, has "won the states' rights plea against the states themselves." R. Jackson, *The Struggle for Judicial Supremacy* 160 (1941).

III

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal*, *Schechter*, and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly ***655** a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967) *****93** (*per curiam*), and *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. See *id.*, at 22, n. 3; *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 706-708, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968) (Harlan, J., dissenting). As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional ****1774** capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "the first call of a theory of law is that it should fit the facts." O. Holmes, *The Common Law* 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account *****94** for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Part I-A, dissenting.

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty -- both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home. The question is how the judiciary can best implement that ***656** original federalist understanding where the Commerce Clause is at issue.

I

The majority holds that the federal commerce power does not extend to such "noneconomic" activities as "noneconomic, violent criminal conduct" that significantly affects interstate commerce only if we "aggregate" the interstate "effects" of individual instances. *Ante*, at 17-18. JUSTICE SOUTER explains why history, precedent, and legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone [***95] -- a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

A

Consider the problems. The "economic/noneconomic" distinction is not easy to apply. Does the local street corner mugger engage in "economic" activity or "noneconomic" activity when he mugs for money? See *Perez v. United States*, 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971) (aggregating local "loan sharking" instances); *United States v. Lopez*, 514 U.S. 549, 559, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) (loan sharking is economic because it consists of "intrastate extortionate credit transactions"); *ante*, at 9. Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute? See United States General Accounting Office, Health, Education, and Human Services Division, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 7-8 (Nov. 1998); Brief for Equal Rights Advocates, *et al.* as *Amicus Curiae* 10-12.

The line becomes yet harder to draw given the need for exceptions. The Court itself would [***96] permit Congress to aggregate, hence regulate, "noneconomic" activity taking place [*657] at economic establishments. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) (upholding civil rights laws forbidding discrimination at local motels); *Katzenbach v. McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964) (same for restaurants); *Lopez, supra*, at 559 (recognizing congressional power to aggregate, hence forbid, noneconomically motivated discrimination at public accommodations); *ante*, at 9-10 (same). And it would permit Congress to regulate where that regulation is [**1775] "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez, supra*, at 561; cf. Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law [***97] by including it, or much of it, in a broader "Safe Transport" or "Workplace Safety" act?

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce . . . among the several States," and to make laws "necessary and proper" to implement that power. Art. I, § 8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38-39, 81 L. Ed. 893, 57 S. Ct. 615 (1937) (focusing upon interstate effects); *Wickard v. Filburn*, 317 U.S. 111, 125, 87 L. Ed. 122, 63 S. Ct. 82 (1942) (aggregating [*658] interstate effects of wheat grown for home consumption); *Heart of Atlanta Motel, supra*, at 258 [***98] ("If it is interstate commerce that feels the pinch, it does not matter how

local the operation which applies the squeeze" (quoting *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949))). Nothing in the Constitution's language, or that of earlier cases prior to *Lopez*, explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how "local" it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how "economic" it is).

Most important, the Court's complex rules seem unlikely to help secure the very object that they seek, namely, the protection of "areas of traditional state regulation" from federal intrusion. *Ante*, at 15. The Court's rules, even if broadly interpreted, are underinclusive. The local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault. Regardless, the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite -- for example, that some item relevant to the federally *****99** regulated activity has at some time crossed a state line. *Ante*, at 8-9, 11, 13, and n. 5; *Lopez, supra*, at 558; *Heart of Atlanta Motel, supra*, at 256 ("The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question" (quoting *Caminetti v. United States*, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917))); see also *United States v. Bass*, 404 U.S. 336, 347-350, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) (saving ambiguous felon-in-possession statute by requiring gun to have crossed state line); *Scarborough v. United States*, 431 U.S. 563, 575, 52 L. Ed. 2d 582, 97 S. Ct. 1963 (1977) (interpreting same statute to require only that gun passed "in interstate commerce" "at some time," without questioning constitutionality); cf., e.g., 18 U.S.C. § 2261(a)(1) (making it a federal crime for a person to cross state lines to commit ***659** a crime of violence against a spouse or intimate partner); § 1951(a) (federal crime to commit ****1776** robbery, extortion, physical violence or threat thereof, where "article or commodity in commerce" is affected, obstructed or delayed); *****100** § 2315 (making unlawful the knowing receipt or possession of certain stolen items that have "crossed a State . . . boundary"); § 922(g)(1) (prohibiting felons from shipping, transporting, receiving, or possessing firearms "in interstate . . . commerce").

And in 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. See, e.g., Child Support Recovery Act of 1992, 18 U.S.C. § 228. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of "An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce"? Complex Commerce Clause rules *****101** creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard, supra*, at 120; *United States v. Darby*, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941); *Jones & Laughlin Steel Corp., supra*, at 37.

The majority, aware of these difficulties, is nonetheless concerned with what it sees as an important contrary consideration. To determine the lawfulness of statutes simply by asking whether Congress could reasonably have found that *aggregated* local instances significantly affect interstate commerce will allow Congress to regulate almost anything. ***660** Virtually all local activity, when instances are aggregated, can have "substantial effects on employment, production, transit, or consumption." Hence Congress could "regulate any crime," and perhaps "marriage, divorce, and childrearing" as well, obliterating the "Constitution's distinction between national and local authority." *Ante*, at 15; *Lopez*, 514 U.S. at 558; cf. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) *****102** (need for distinction between "direct" and "indirect"

effects lest there "be virtually no limit to the federal power"); *Hammer v. Dagenhart*, 247 U.S. 251, 276, 62 L. Ed. 1101, 38 S. Ct. 529 (1918) (similar observation).

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State -- at least when considered in the aggregate. *Heart of Atlanta Motel*, 379 U.S. at 251. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause "aggregation" rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, the "defect" means that, within the bounds of the rational, Congress, not the courts, [***103] must remain primarily responsible for striking the appropriate state/federal balance. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985); *ante*, at 19-24 (SOUTER, J., dissenting); [**1777] *Kimel v. Florida Bd. of Regents*, 528 U.S. , (2000) (slip op., at 2) (STEVENS, J., dissenting) (Framers designed important structural safeguards to ensure that, when Congress legislates, "the normal operation of the legislative process itself would adequately defend [*661] state interests from undue infringement"); see also Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000) (focusing on role of political process and political parties in protecting state interests). Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, e.g., Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). Moreover, Congress often can [***104] better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories. See, e.g., 42 U.S.C. § 7543(b) (Clean Air Act); 33 U.S.C. § 1251 *et seq.* (Clean Water Act); see also *New York v. United States*, 505 U.S. 144, 167-168, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) (collecting other examples of "cooperative federalism"). Not surprisingly, the bulk of American law is still state law, and overwhelmingly so.

B

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an "area of traditional state regulation." *Ante*, at 15. And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that "our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." [***105] *Id.*, at 34-36; see also Violence Against Women: Victims of [*662] the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37-38 (1991) (unanimous resolution of the National Association of Attorneys General); but cf. Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 77-84 (1993) (Conference of Chief Justices opposing legislation).

Moreover, as JUSTICE SOUTER has pointed out, Congress compiled a "mountain of data" explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. *Ante*, at 2-8, 27-28 (dissenting opinion). After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or

child custody. 42 U.S.C. § 13981(e)(4). Consequently, the law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged [***106] national problem. Cf. §§ 300w-10, 3796gg, 3796hh, 10409, 13931 (providing federal moneys to encourage state and local initiatives to combat gender-motivated violence).

I call attention to the legislative process leading up to enactment of this statute because, as the majority recognizes, *ante*, at 14, it far surpasses that which led to the enactment of the statute we considered in *Lopez*. And even were I to accept *Lopez* as an accurate statement of the law, which I do not, that distinction provides a possible basis for upholding the law here. This Court on occasion has pointed to the importance of procedural limitations in [***1778] keeping the power of Congress in check. See *Garcia*, 469 U.S. at 554 ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy'" (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983))); see [***663] also *Gregory v. Ashcroft*, 501 U.S. 452, 460-461, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (insisting upon [***107] a "plain statement" of congressional intent when Congress legislates "in areas traditionally regulated by the States"); cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-105, 114-117, 48 L. Ed. 2d 495, 96 S. Ct. 1895 (1976); *Fullilove v. Klutznick*, 448 U.S. 448, 548-554, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (STEVENS, J., dissenting).

Commentators also have suggested that the thoroughness of legislative procedures -- e.g., whether Congress took a "hard look" -- might sometimes make a determinative difference in a Commerce Clause case, say when Congress legislates in an area of traditional state regulation. See, e.g., Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2231-2245 (1998); Gardbaum, *Rethinking Constitutional Federalism*, 74 Texas L. Rev. 795, 812-828, 830-832 (1996); Lessig, *Translating Federalism: United States v. Lopez*, 1995 S. Ct. Rev. 125, 194-214 (1995); see also Treaty Establishing the European Community Art. 5; Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 331, 378-403 (1994) (arguing for similar limitation [***108] in respect to somewhat analogous principle of subsidiarity for European Community); Gardbaum, *supra*, at 833-837 (applying subsidiarity principles to American federalism). Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach. See *supra*, at 2-7.

I continue to agree with JUSTICE SOUTER that the Court's traditional "rational basis" approach is sufficient. *Ante*, at 1-2 (dissenting opinion); see also *Lopez*, 514 U.S. at 603-615 (SOUTER, J., dissenting); *id.*, at 615-631 (BREYER, J., dissenting). But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority [***664] of Congress' own procedural approach -- in which case the law may evolve towards a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

For these reasons, as [***109] well as those set forth by JUSTICE SOUTER, this statute falls well within Congress's Commerce Clause authority, and I dissent from the Court's contrary conclusion.

II

Given my conclusion on the Commerce Clause question, I need not consider Congress' authority under § 5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. The Court points out that in *United States v.*

Harris, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), the Court held that § 5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of *private persons*. *Ante*, at 21-23. That is certainly so. The Federal Government's argument, however, is that Congress used § 5 to remedy the actions of *state actors*, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide **[**1779]** adequate (or any) state remedies for women injured by gender-motivated violence -- a failure that the States, and Congress, documented in depth. See *ante*, at 3-4, n. 7, 27-28 (SOUTER, J., dissenting) (collecting sources). **[***110]**

Neither *Harris* nor the *Civil Rights Cases* considered this kind of claim. The Court in *Harris* specifically said that it treated the federal laws in question as "directed *exclusively* against the action of private persons, without reference to the laws of the State, or their administration by her officers." 106 U.S. at 640 (emphasis added); see also *Civil Rights Cases*, 109 U.S. at 14 (observing that the statute did "not profess to be corrective of any constitutional wrong committed by the States" and that it established "rules for the conduct **[*665]** of individuals in society towards each other, . . . without referring in any manner to any supposed action of the State or its authorities").

The Court responds directly to the relevant "state actor" claim by finding that the present law lacks "'congruence and proportionality'" to the state discrimination that it purports to remedy. *Ante*, at 26; see *City of Boerne v. Flores*, 521 U.S. 507, 526, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated **[***111]** in jury selection, *Katzenbach v. Morgan*, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966); *Ex parte Virginia*, 100 U.S. 339, 25 L. Ed. 676 (1880), is not "directed . . . at any State or state actor." *Ante*, at 26.

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "legislation . . . [that] prohibits conduct which is not itself unconstitutional." *Flores*, 521 U.S. at 518; see also *Katzenbach v. Morgan*, *supra*, at 651; *South Carolina v. Katzenbach*, *supra*, at 308. The statutory remedy does not in any sense purport to "determine what constitutes a constitutional violation." *Flores*, *supra*, at 519. It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why **[***112]** is the remedy "disproportionate"? And given the relation between remedy and violation -- the creation of a federal remedy to substitute for constitutionally inadequate state remedies -- where is the lack of "congruence"?

The majority adds that Congress found that the problem of inadequacy of state remedies "does not exist in all States, **[*666]** or even most States." *Ante*, at 27. But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. See, e.g., S. Rep. No. 103-138, pp. 38, 41-42, 44-47 (1993); S. Rep. No. 102-197, pp. 39, 44-49 (1991); H. R. Conf. Rep. No. 103-711, p. 385 (1994). The record nowhere reveals a congressional finding that the problem "does not exist" elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress' chosen remedy under § 5, *Flores*, *supra*, at 536, **[***113]** suggests that any such requirement would be inappropriate.

Despite my doubts about the majority's § 5 reasoning, I need not, and do not, **[**1780]** answer the § 5 question, which I would leave for more thorough analysis if necessary on

another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the "necessary and proper" exercise of legislative power granted to Congress by that Clause.

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*514 U.S. 549, *; 115 S. Ct. 1624, **;
1995 U.S. LEXIS 3039, ***; 131 L. Ed. 2d 626*

UNITED STATES, PETITIONER v. ALFONSO LOPEZ, JR.

No. 93-1260

SUPREME COURT OF THE UNITED STATES

514 U.S. 549; 115 S. Ct. 1624; 1995 U.S. LEXIS 3039; 131 L. Ed. 2d 626; 63 U.S.L.W.
4343; 95 Cal. Daily Op. Service 3074; 8 Fla. L. Weekly Fed. S 752

November 8, 1994, Argued
April 26, 1995, Decided

PRIOR HISTORY: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: 2 F.3d 1342, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant sought review of reversal by the Court of Appeals for the Fifth Circuit of respondent's conviction under the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C.S. § 922(q)(1)(A) (1988).

OVERVIEW: Respondent was convicted of violating the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C.S. § 922(q)(1)(A) (1988) after carrying a concealed handgun and bullets to school. Respondent's conviction was reversed on appeal. In upholding the reversal, the court held the GFSZA was invalid as it was beyond the power of congress under the commerce clause, U.S. Const. art. I, § 8, cl. 3. The GFSZA had nothing to do with commerce or any economic activity, and therefore could not be sustained as a regulation of activity arising out of or connected with a commercial transaction, which viewed in the aggregate, substantially affected interstate commerce.

OUTCOME: Reversal of respondent's conviction upheld because GFSZA was invalid; it was not a regulation of activity arising out of or connected with a commercial transaction which substantially affected interstate commerce, and was thus beyond the power of congress under the commerce clause.

CORE TERMS: commerce, interstate commerce, commerce clause, gun, commerce power, regulation, federal government, interstate, firearm, intrastate, regulated, manufacturing, agriculture, wheat, violence, zone, manufacture, substantially affect, skills, power to regulate, rational basis, enumerated, learning, enact, indirect, classroom, violent crime, productivity, regulating, federalism

CORE CONCEPTS - ♦ [Hide Concepts](#)

 [Constitutional Law : Congressional Powers & Duties : Commerce Clause](#)

 See U.S. Const. art. I, § 8, cl. 3.

 [Constitutional Law : Congressional Powers & Duties : Commerce Clause](#)

✚ The commerce power, U.S. Const. art. I, § 8, cl. 3, is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

✚ Where the interstate and intrastate aspects of commerce are so mingled together that full regulation of interstate commerce requires incidental regulation of intrastate commerce, the commerce clause, U.S. Const. art. I, § 8, cl. 3, authorizes such regulation.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

✚ The power of congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of congress to regulate interstate commerce.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

✚ Even if an activity is local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

✚ The scope of the interstate commerce power, U.S. Const. art. I, § 8, cl. 3, must be considered in the light of the dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce and activity that exerts a substantial economic effect on interstate commerce. The court decides whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

✚ There are three broad categories of activity that congress may regulate under its commerce power, U.S. Const. art. I, § 8, cl. 3. First, congress may regulate the use of the channels of interstate commerce. Second, congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

✚ The proper test of whether an activity substantially affects interstate commerce requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

📄 Criminal Law & Procedure : Criminal Offenses : Weapons Offenses : Possession Offenses

✚ The Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C.S. § 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. The GFSZA is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained as a regulation of activity that arises out of or is connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

✚ The Gun-Free School Zones Act of 1990, 18 U.S.C.S. § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.

📄 Constitutional Law : Congressional Powers & Duties : Commerce Clause

📄 Governments : Legislation : Construction & Interpretation

✚ As part of the court's independent evaluation of constitutionality under the commerce clause, U.S. Const. amend. I, § 8, cl. 3, the court considers legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce.

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SYLLABUS:

After respondent, then a 12th-grade student, carried a concealed handgun into his high school, he was charged with violating the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. § 922(q)(1)(A). The District Court denied his motion to dismiss the indictment, concluding that § 922(q) is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. In reversing, the Court of Appeals held that, in light of what it characterized as insufficient congressional findings and legislative history, § 922(q) is invalid as beyond Congress' power under the Commerce Clause.

Held: The Act exceeds Congress' Commerce Clause authority. First, although this Court has upheld a wide variety [***2] of congressional Acts regulating intrastate economic activity that substantially affected interstate commerce, the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce. Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms are defined. Nor is it an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under the Court's cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce. Second, § 922(q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question has the requisite nexus with interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement [***3] that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contention that § 922(q) is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States. Pp. 552-568.

COUNSEL: Solicitor General Days argued the cause for the United States. With him on the

briefs were Assistant Attorney General Harris, Deputy Solicitor General Wallace, Malcolm L. Stewart, and John F. De Pue.

John R. Carter argued the cause for respondent. With him on the brief were Lucien B. Campbell, Henry J. Bemporad, Carter G. Phillips, and Adam D. Hirsh. *

* Briefs of amici curiae urging reversal were filed for 16 Members of the United States Senate et al. by Debra A. Valentine, Brady C. Williamson, and Jeffrey J. Kassel; for the State of Ohio et al. by Lee Fisher, Attorney General of Ohio, John P. Ware, Assistant Attorney General, Richard A. Cordray, State Solicitor, Simon B. Karas, G. Oliver Koppell, Attorney General of New York, and Vanessa Ruiz; for the Center to Prevent Handgun Violence et al. by Erwin N. Griswold, Dennis A. Henigan, and Gail A. Robinson; for Children NOW et al. by William F. Abrams; for the Clarendon Foundation by Ronald D. Maines; for the Coalition to Stop Gun Violence et al. by Brian J. Benner; and for the National School Safety Center et al. by James A. Rapp.

Briefs of amici curiae urging affirmance were filed for the National Conference of State Legislatures et al. by Richard Ruda and Barry Friedman; and for the Pacific Legal Foundation by Ronald A. Zumbrun and Anthony T. Caso.

Briefs of amici curiae were filed for Academics for the Second Amendment et al. by Patrick J. Basial, Don B. Kates, Robert Carter, Henry Mark Holzer, Nicholas J. Johnson, Joseph E. Olson, Daniel Polsby, Charles E. Rice, Wallace Rudolph, Justin Smith, Robert B. Smith, George Strickler, Richard Warner, and Robert Weisberg; and for the Texas Justice Foundation by Clayton Trotter.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, post, p. 568. THOMAS, J., filed a concurring opinion, post, p. 584. STEVENS, J., post, p. 602, and SOUTER, J., post, p. 603, filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, post, p. 615.

OPINIONBY: REHNQUIST

OPINION: [*551] [**1626] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A]

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922 [***4] (q)(1)(A) (1988 ed., Supp. V). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . ." U.S. Const., Art. I, § 8, cl. 3.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. See Tex. Penal Code Ann. § 46.03(a)(1) (Supp. 1994). The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). n1

-----Footnotes-----

n1 The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." § 921(a)(25).

-----End Footnotes-----

***5] A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone, in violation of § 922(q). Respondent moved to dismiss his federal indictment on the ground that § 922(q) "is unconstitutional as it is beyond the power of Congress to legislate control over our public schools." The District Court denied the motion, concluding that § 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting [*552] commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce." App. to Pet. for Cert. 55a. Respondent waived his right to a jury trial. The District Court conducted a bench trial, found him guilty of violating § 922(q), and sentenced him to six months' imprisonment and two years' supervised release.

On appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress' power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed respondent's conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, "section 922(q), in the full [***6] reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." 2 F.3d 1342, 1367-1368 (1993). Because of the importance of the issue, we granted certiorari, 511 U.S. 1029 (1994), and we now affirm.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "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 Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." [***7] *Ibid*.

✚The Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, [*553] cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' [***1627] commerce power in

Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189-190, 6 L. Ed. 23 (1824):

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

✚The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*, at 196. The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

"It is not intended to say that these words comprehend that commerce, which is completely internal, **[***8]** which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.*, at 194-195.

For nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. See, e. g., *Veazie v. Moor*, 55 U.S. 568, 14 How. 568, 573-575, 14 L. Ed. 545 (1853) (upholding a state-created steamboat monopoly **[*554]** because it involved regulation of wholly internal commerce); *Kidd v. Pearson*, 128 U.S. 1, 17, 20-22, 32 L. Ed. 346, 9 S. Ct. 6 (1888) (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely internal domestic **[***9]** commerce of a State which is carried on between man and man within a State or between different parts of the same State"); see also L. Tribe, *American Constitutional Law* 306 (2d ed. 1988). Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause. See *Wickard v. Filburn*, 317 U.S. 111, 121, 87 L. Ed. 122, 63 S. Ct. 82 (1942) (describing development of Commerce Clause jurisprudence).

In 1887, Congress enacted the Interstate Commerce Act, 24 Stat. 379, and in 1890, Congress enacted the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.* These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, e. g., *United States v. E. C. Knight Co.*, 156 U.S. 1, 12, 39 L. Ed. 325, 15 S. Ct. 249 (1895) ("Commerce **[***10]** succeeds to manufacture, and is not part of it"); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it"). Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation. See, e. g., *Shreveport Rate Cases*, 234 U.S. 342, 58 L. Ed. 1341, 34 S. Ct. 833 (1914).

In *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550, 79 L. Ed. 1570, 55 S. Ct. 837 (1935), the Court struck down regulations that **[*555]** fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between **[**1628]** direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." *Id.*, at 548. **[***11]** Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. *Id.*, at 546. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *Id.*, at 548.

Two years later, in the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1,

81 L. Ed. 893, 57 S. Ct. 615 (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. *Id.*, at 36-38 ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate. *Id.*, at 37.

[***12] In *United States v. Darby*, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941), the Court upheld the Fair Labor Standards Act, stating:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at 118.

[*556] See also *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 86 L. Ed. 726, 62 S. Ct. 523 (1942) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

In *Wickard v. Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. 317 U.S. at 128-129. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, [***13] stating:

"Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.*, at 125.

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127-128.

Jones & Laughlin Steel, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change [***14] also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause [*557] confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that [*1629] to embrace them, in view of our complex society, would effectually obliterate the distinction

between what is national and what is local and create a completely centralized government." 301 U.S. at 37; see also *Darby, supra*, at 119-120 (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard, supra*, at 125 (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a *****15** regulated activity sufficiently affected interstate commerce. See, e. g., *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); *Perez v. United States*, 402 U.S. 146, 155-156, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964). n2

-----Footnotes-----

n2 See also *Hodel*, 452 U.S. at 311 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so") (REHNQUIST, J., concurring in judgment); *Heart of Atlanta Motel*, 379 U.S. at 273 ("Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court") (Black, J., concurring).

-----End Footnotes-----

*****16** Similarly, in *Maryland v. Wirtz*, 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968), the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "the Court has ample power" to enforce. *Id.*, at 196, overruled on other grounds, *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit* ***558** *Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985). In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "all activities affecting commerce, even in the minutest degree, [*Wickard*], may be regulated and controlled by Congress," 392 U.S. at 204 (Douglas, J., dissenting), the *Wirtz* Court replied that the dissent had misread precedent as "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," *id.*, at 197, n. 27. Rather, "the Court has said only that where *****17** a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Ibid.* (first emphasis added).

[2A]

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *Perez, supra*, at 150; see also *Hodel, supra*, at 276-277. First, Congress may regulate the use of the channels of interstate commerce. See, e. g., *Darby*, 312 U.S. at 114; *Heart of Atlanta Motel, supra*, at 256 ("The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question" (quoting *Caminetti v. United States*, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917))). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only *****18** from intrastate activities. See, e. g., *Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *Southern R. Co. v. United States*, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez, supra*, at 150 ("For example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)"). Finally, Congress' commerce authority includes the power to regulate those activities ***559** having a substantial ****1630** relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S. at 37, i. e., those activities that substantially affect interstate commerce,

Wirtz, supra, at 196, n. 27.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare *Preseault v. ICC*, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990), with *Wirtz, supra*, at 196, [***19] n. 27 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

[1B]

We now turn to consider the power of Congress, in the light of this framework, to enact § 922 (q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

[2B]

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate [***20] commerce. Examples include the regulation of intrastate coal mining; *Hodel, supra*, intrastate extortionate credit transactions, *Perez, supra*, restaurants utilizing substantial interstate supplies, *McClung, supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel, supra*, and production [*560] and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the [***21] remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

"One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. [*561] [***22] Home-grown wheat in this

sense competes with wheat in commerce." 317 U.S. at 128.

[1C]

[3A]

¶Section 922(q) is a criminal statute that by its terms has nothing to do with **[**1631]** "commerce" or any sort of economic enterprise, however broadly one might define those terms. n3 Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

[3B]

-----Footnotes-----

n3 Under our federal system, the "States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982)); see also *Screws v. United States*, 325 U.S. 91, 109, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Enmons*, 410 U.S. 396, 411-412, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973) (quoting *United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)). The Government acknowledges that § 922(q) "displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question." Brief for United States 29, n. 18; see also Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. of Pres. Doc. 1944, 1945 (Nov. 29, 1990) ("Most egregiously, section [922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress").

-----End Footnotes-----

[23]**

[1D]

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States v. Bass*, 404 U.S. 336, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971), the Court interpreted former 18 U.S.C. § 1202(a), which made it **[*562]** a crime for a felon to "receive, posses[s], or transport in commerce or affecting commerce . . . any firearm." 404 U.S. at 337. The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.*, at 349. The *Bass* Court set aside the conviction because although the Government had demonstrated that Bass had possessed a firearm, it had failed "to show the requisite nexus with interstate commerce." *Id.*, at 347. The Court thus interpreted the statute to reserve the constitutional question whether Congress

could *****24** regulate, without more, the "mere possession" of firearms. See *id.*, at 339, n. 4; see also *United States v. Five Gambling Devices*, 346 U.S. 441, 448, 98 L. Ed. 179, 74 S. Ct. 190 (1953) (plurality opinion) ("The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative"). Unlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although ~~was~~ as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, see, e. g., *Preseault v. ICC*, 494 U.S. at 17, the Government concedes that "neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of *****25** gun possession in a school zone." Brief for United States 5-6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. See *McClung*, 379 U.S. at 304; ***563** see also *Perez*, 402 U.S. at 156 ("Congress need [not] make particularized findings in order to legislate"). But to the ****1632** extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here. n4

-----Footnotes-----

n4 We note that on September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. Section 320904 of that Act, *id.*, at 2125, amends § 922(q) to include congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce. The Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance. Tr. of Oral Arg. 25 ("We're not relying on them in the strict sense of the word, but we think that at a very minimum they indicate that reasons can be identified for why Congress wanted to regulate this particular activity").

-----End Footnotes-----

*****26**

[4]

The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 503, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (Powell, J., concurring). We agree, however, with the Fifth Circuit that importation of previous findings to justify § 922(q) is especially inappropriate here because the "prior federal enactments or Congressional findings [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation." 2 F.3d at 1366.

The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. Brief for United States 17. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs *****27** of violent ***564** crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. See *United States v. Evans*, 928 F.2d 858, 862 (CA9 1991). Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. *Heart of Atlanta Motel*, 379 U.S. at 253. The

Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See [***28] Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. JUSTICE BREYER posits that there might be some limitations on Congress' [*565] commerce power, such as family law or certain aspects of education. *Post*, at 624. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

JUSTICE BREYER focuses, for the [***29] most part, on the threat that firearm possession in [**1633] and near schools poses to the educational process and the potential economic consequences flowing from that threat. *Post*, at 619-624. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. *Post*, at 623. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," cf. *ibid.*, and that, in turn, has a substantial effect on interstate [***30] commerce.

[5]

JUSTICE BREYER rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." *Post*, at 629. Again, JUSTICE BREYER's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "falling on the commercial side of the line" because it provides a "valuable service -- namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." *Ibid.* We do not doubt that Congress [*566] has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

[6]

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those *****31** enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." *Post*, at 630. As Chief Justice Marshall stated in

McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819):
 "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Id.*, at 405.

See also *Gibbons v. Ogden*, 9 Wheat., at 195 ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See Art. I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803) *****32** (Marshall, C. J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.

In *Jones & Laughlin Steel*, 301 U.S. at 37, we held that the question of congressional power under the Commerce Clause "is necessarily one of degree." To the same effect ***567** is the concurring opinion of Justice Cardozo in *Schechter Poultry*:

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" 295 U.S. at 554 ***1634** (quoting *United States v. A. L. A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).

[1E]

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school *****33** zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra*, at 556-558. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden*, *supra*, at 195, and that there

never will be a distinction between what is [*568] truly national and what is truly local, [***34] cf. *Jones & Laughlin Steel, supra*, at 30. This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

CONCURBY: KENNEDY; THOMAS

CONCUR: JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring.

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

Chief Justice Marshall announced that the national authority reaches "that commerce which concerns more States than one" and that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 194, 196, 6 L. Ed. 23 (1824). His statements can be understood now as an early and authoritative recognition that the [***35] Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise. The progression of our Commerce Clause cases from *Gibbons* to the present was not marked, however, by a coherent or consistent course of interpretation; for neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary disputes by enduring principles.

Furthermore, for almost a century after the adoption of the Constitution, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate. Rather, [*569] the Court faced the related but quite distinct question of the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act. The simple fact was that in the early years of the Republic, Congress seldom perceived the necessity to exercise its power in circumstances where its authority would be called into question. The Court's initial task, therefore, was to elaborate the theories that would permit the States to act where Congress had not done so. Not the least part of the problem was the unresolved [***36] question whether the congressional power was exclusive, a question reserved by Chief Justice Marshall in *Gibbons v. Ogden, supra*, at 209-210.

At the midpoint of the 19th century, the Court embraced the principle that the States and the National Government both have authority to regulate certain matters absent the [**1635] congressional determination to displace local law or the necessity for the Court to invalidate local law because of the dormant national power. *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 53 U.S. 299, 12 HOW 299, 318-321, 13 L. Ed. 996 (1852). But the utility of that solution was not at once apparent, see generally F. Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (1937) (hereinafter *Frankfurter*), and difficulties of application persisted, see *Leisy v. Hardin*, 135 U.S. 100, 122-125, 34 L. Ed. 128, 10 S. Ct. 681 (1890).

One approach the Court used to inquire into the lawfulness of state authority was to draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not. For instance, in deciding that a State could prohibit the in-state [***37] manufacture of liquor intended for out-of-state shipment, it distinguished between manufacture and commerce. "No distinction is more popular to the common mind, or more clearly expressed in economic and political

literature, than that between manufacture and commerce. Manufacture is transformation -- the fashioning of raw materials [*570] into a change of form for use. The functions of commerce are different." *Kidd v. Pearson*, 128 U.S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6 (1888). Though that approach likely would not have survived even if confined to the question of a State's authority to enact legislation, it was not at all propitious when applied to the quite different question of what subjects were within the reach of the national power when Congress chose to exercise it.

This became evident when the Court began to confront federal economic regulation enacted in response to the rapid industrial development in the late 19th century. Thus, it relied upon the manufacture-commerce dichotomy in *United States v. E. C. Knight Co.*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895), where a manufacturers' combination controlling some 98% of the Nation's domestic sugar refining capacity was [***38] held to be outside the reach of the Sherman Act. Conspiracies to control manufacture, agriculture, mining, production, wages, or prices, the Court explained, had too "indirect" an effect on interstate commerce. *Id.*, at 16. And in *Adair v. United States*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908), the Court rejected the view that the commerce power might extend to activities that, although local in the sense of having originated within a single State, nevertheless had a practical effect on interstate commercial activity. The Court concluded that there was not a "legal or logical connection . . . between an employee's membership in a labor organization and the carrying on of interstate commerce," *id.*, at 178, and struck down a federal statute forbidding the discharge of an employee because of his membership in a labor organization. See also *The Employers' Liability Cases*, 207 U.S. 463, 497, 52 L. Ed. 297, 28 S. Ct. 141 (1908) (invalidating statute creating negligence action against common carriers for personal injuries of employees sustained in the course of employment, because the statute "regulates the persons [***39] because they engage in interstate commerce and does not alone regulate the business of interstate commerce").

[*571] Even before the Court committed itself to sustaining federal legislation on broad principles of economic practicality, it found it necessary to depart from these decisions. The Court disavowed *E. C. Knight's* reliance on the manufacturing-commerce distinction in *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 68-69, 55 L. Ed. 619, 31 S. Ct. 502 (1911), declaring that approach "unsound." The Court likewise rejected the rationale of *Adair* when it decided, in *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548, 570-571, 50 S. Ct. 427, 74 L. Ed. 1034 (1930), that Congress had the power to regulate matters pertaining to the organization of railroad workers.

In another line of cases, the Court addressed Congress' efforts to impede local activities it considered undesirable by prohibiting the interstate movement of some essential element. In the *Lottery Case*, 188 U.S. 321, 47 L. Ed. 492, 23 S. Ct. 321 (1903), the Court rejected the argument that Congress lacked power to prohibit the interstate movement of lottery tickets because it had power only [***40] to regulate, not to prohibit. See also [**1636] *Hipolite Egg Co. v. United States*, 220 U.S. 45, 55 L. Ed. 364, 31 S. Ct. 364 (1911); *Hoke v. United States*, 227 U.S. 308, 57 L. Ed. 523, 33 S. Ct. 281 (1913). In *Hammer v. Dagenhart*, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918), however, the Court insisted that the power to regulate commerce "is directly the contrary of the assumed right to forbid commerce from moving," *id.*, at 269-270, and struck down a prohibition on the interstate transportation of goods manufactured in violation of child labor laws.

Even while it was experiencing difficulties in finding satisfactory principles in these cases, the Court was pursuing a more sustainable and practical approach in other lines of decisions, particularly those involving the regulation of railroad rates. In the *Minnesota Rate Cases*, 230 U.S. 352, 57 L. Ed. 1511, 33 S. Ct. 729 (1913), the Court upheld a state rate order, but observed that Congress might be empowered to regulate in this area if "by reason of the interblending of the interstate and intrastate operations of interstate carriers" the regulation of interstate rates could not be maintained [***41] without restrictions on "intrastate [*572] rates which substantially affect the former." *Id.*, at 432-433. And in the *Shreveport*

Rate Cases, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914), the Court upheld an Interstate Commerce Commission order fixing railroad rates with the explanation that congressional authority, "extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Id.*, at 351.

Even the most confined interpretation of "commerce" would embrace transportation between the States, so the rate cases posed much less difficulty for the Court than cases involving manufacture or production. Nevertheless, the Court's recognition of the importance of a practical conception of the commerce power was not altogether confined to the rate [***42] cases. In *Swift & Co. v. United States*, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905), the Court upheld the application of federal antitrust law to a combination of meat dealers that occurred in one State but that restrained trade in cattle "sent for sale from a place in one State, with the expectation that they will end their transit . . . in another." *Id.*, at 398. The Court explained that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Ibid.* Chief Justice Taft followed the same approach in upholding federal regulation of stockyards in *Stafford v. Wallace*, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922). Speaking for the Court, he rejected a "nice and technical inquiry," *id.*, at 519, when the local transactions at issue could not "be separated from the movement to which they contribute," *id.*, at 516.

Reluctance of the Court to adopt that approach in all of its cases caused inconsistencies in doctrine to persist, however. In addressing New Deal legislation the Court [***43] resuscitated [*573] the abandoned abstract distinction between direct and indirect effects on interstate commerce. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 309, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (Act regulating price of coal and wages and hours for miners held to have only "secondary and indirect" effect on interstate commerce); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 368, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (compulsory retirement and pension plan for railroad carrier employees too "remote from any regulation of commerce as such"); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (wage and hour law provision of National Industrial Recovery Act had "no direct relation to interstate commerce").

The case that seems to mark the Court's definitive commitment to the practical conception of the commerce power is *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), where the Court sustained labor laws that applied to [***1637] manufacturing facilities, making no real attempt to distinguish *Carter*, *supra*, and *Schechter*, *supra*. 301 U.S. at 40-41. [***44] The deference given to Congress has since been confirmed. *United States v. Darby*, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941), overruled *Hammer v. Dagenhart*, *supra*. And in *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), the Court disapproved *E. C. Knight* and the entire line of direct-indirect and manufacture-production cases, explaining that "broader interpretations of the Commerce Clause [were] destined to supersede the earlier ones," 317 U.S. at 122, and "whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution," *id.*, at 123, n. 24. Later examples of the exercise of federal power where commercial transactions were the subject of regulation include *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964), *Katzenbach v. McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964), and *Perez v. United States*, 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971). [***45] These and like authorities are within the fair ambit [*574] of the Court's practical conception of commercial regulation and are not called in question by our decision today.

The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority [***46] to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

In referring to the whole subject of the federal and state balance, we said this just three Terms ago:

"This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such [*575] responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." *New York v. United States*, 505 U.S. 144, 157, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) (emphasis deleted).

It does [***47] not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role [**1638] in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. See, e. g., *Prize Cases*, 67 U.S. 635, 2 Black 635, 17 L. Ed. 459 (1863); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952); *United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974); *Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); [***48] *INS v. Chadha*, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983); *Bowsher v. Synar*, 478 U.S. 714, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986); *Plaut v. Spendthrift Farm, Inc.*, ante, p. 211. These standards are by now well accepted. Judicial review is also established beyond question, *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), and though we may differ when applying its principles, see, e. g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), its legitimacy is undoubted. Our role in preserving the federal balance seems more tenuous.

There is irony in this, because of the four structural elements in the Constitution just

mentioned, federalism was the unique contribution of the Framers to political science and political theory. See Friendly, *Federalism: A Foreword*, 86 [*576] Yale L. J. 1019 (1977); G. Wood, *The Creation of the American Republic, 1776-1787*, pp. 524-532, 564 (1969). Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power [***49] surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). See also *Gregory v. Ashcroft*, 501 U.S. 452, 458-459, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty"); *New York v. United States, supra*, at 181 ("The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive [***50] from the diffusion of sovereign power'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (Blackmun, J., dissenting)).

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of [*577] the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Tico Title Ins. Co.*, 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992). Were 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, the boundaries between the spheres of federal and state authority would blur and political [***51] responsibility would become illusory. Cf. *New York v. United States, supra*, at 155-169; *FERC v. Mississippi*, 456 U.S. 742, 787, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The resultant inability to hold either branch of the government answerable [**1639] to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," The Federalist No. 46, p. 295 (C. Rossiter ed. 1961), can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that "the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered, [***52] " *ibid*. Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. In the Webster-Hayne Debates, see The Great Speeches and [*578] Orations of Daniel Webster 227-272 (E. Whipple ed. 1879), and the debates over the Civil Rights Acts, see Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pts. 1-3 (1963), some Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms

of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete *****53** renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, see *Public Citizen v. Department of Justice*, 491 U.S. 440, 466, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989); *Rostker v. Goldberg*, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981), the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

In the past this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, see, e. g., *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943), the rules for determining the primacy of state law, see, e. g., *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), the doctrine of adequate and independent state grounds, see, e. g., *Murdock v. Memphis*, 87 U.S. 590, 20 Wall. 590, 22 L. Ed. 429 (1875); *****54** *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), the whole jurisprudence of pre-emption, see, e. g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and many of the rules governing our habeas jurisprudence, see, e. g., *Coleman v. Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); *McCleskey* ***579** *v. Zant*, 499 U.S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989); *Rose v. Lundy*, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977).

Our ability to preserve this principle under the Commerce Clause has presented a much greater challenge. See *supra*, at 568-574. "This clause has throughout the Court's history been the chief source of its adjudications regarding federalism," and "no other body of opinions affords a fairer or more revealing test of judicial qualities." Frankfurter 66-67. But as the branch whose distinctive duty it is to declare "what the law is," *Marbury v. Madison*, 1 Cranch, at 177, *****55** we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines. The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes. See *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines" in adjudicating constitutional rights). But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause.

Our position in enforcing the dormant Commerce Clause is instructive. The Court's doctrinal approach in that area has likewise "taken some turns." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, *ante*, at 180. Yet in contrast to the prevailing skepticism that surrounds our ability to give meaning to the *****56** explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the States. One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not ***580** impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses. See *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476

U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)). Distinguishing between regulations that do place an undue burden on interstate commerce and regulations that do not depends upon delicate judgments. True, if we invalidate a state law, Congress can in effect overturn our judgment, whereas in a case announcing that Congress has transgressed its authority, the decision is more consequential, for it stands unless Congress can revise its law to demonstrate its commercial character. This difference no doubt informs the circumspection **[***57]** with which we invalidate an Act of Congress, but it does not mitigate our duty to recognize meaningful limits on the commerce power of Congress.

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As THE CHIEF JUSTICE explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus. See *ante*, at 559-561. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. *Milliken v. Bradley*, 418 U.S. 717, 741-742, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974); **[*581]** **[***58]** *Epperson v. Arkansas*, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968). The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed. Cf. *Rice, supra*, at 230 ("We start with the assumption that the historic police powers of the States" are not displaced by a federal statute "unless that was the clear and manifest purpose of Congress"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963).

[1641]** While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); **[***59]** *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932) (Brandeis, J., dissenting).

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds. See, e. g., Alaska Stat. Ann. §§ 11.61.195(a)(2)(A), 11.61.220(a)(4)(A) (Supp. 1994); Cal. Penal Code Ann. § 626.9 (West Supp. 1994); Mass. Gen. Laws § 269:10(j) (1992); N. J. Stat. Ann. § 2C:39-5(e) (West Supp. 1994); Va. Code Ann. § 18.2-308.1 (1988); Wis. Stat. § 948.605 (1991-1992).

Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are **[*582]** charged with maintaining. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 26-30 (injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments). These might include **[***60]** inducements to inform on violators where the information leads to arrests or confiscation of the guns, see Lima, Schools May Launch Weapons Hot Line, Los Angeles Times, Ventura Cty. East ed., Jan. 13, 1995, p. B1, col. 5; Reward for Tips on Guns in Tucson

Schools, *The Arizona Republic*, Jan. 7, 1995, p. B2; programs to encourage the voluntary surrender of guns with some provision for amnesty, see Zaidan, *Akron Rallies to Save Youths*, *The Plain Dealer*, Mar. 2, 1995, p. 1B; Swift, *Legislators Consider Plan to Get Guns Off Streets*, *Hartford Courant*, Apr. 29, 1992, p. A4; penalties imposed on parents or guardians for failure to supervise the child, see, e. g., Okla. Stat., Tit. 21, § 858 (Supp. 1995) (fining parents who allow students to possess firearm at school); Tenn. Code Ann. § 39-17-1312 (Supp. 1992) (misdemeanor for parents to allow student to possess firearm at school); Straight Shooter: Gov. Casey's Reasonable Plan to Control Assault Weapons, *Pittsburgh Post-Gazette*, Mar. 14, 1994, p. B2 (proposed bill); Bailey, *Anti-Crime Measures Top Legislators' Agenda*, *Los Angeles Times*, Orange Cty. ed., Mar. 7, 1994, p. B1, col. 2 (same); Krupa, *New Gun-Control Plans Could Tighten Local Law*, *The Boston Globe*, [***61] June 20, 1993, p. 29; laws providing for suspension or expulsion of gun-toting students, see, e. g., Ala. Code § 16-1-24.1 (Supp. 1994); Ind. Code § 20-8.1-5-4(b)(1)(D) (1993); Ky. Rev. Stat. Ann. § 158.150(1)(a) (Michie 1992); Wash. Rev. Code § 9.41.280 (1994), or programs for expulsion with assignment to special facilities, see Martin, *Legislators Poised to Take Harsher Stand on Guns in Schools*, *The Seattle Times*, Feb. 1, 1995, p. B1 (automatic year-long expulsion for students with guns and intense semester-long reentry program).

[*583] The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. See U.S. Dept. of Education, National Center for Education Statistics, *Digest of Education Statistics* 73, 104 (NCES 94-115, 1994) (Tables 63, 94). Each [***62] of these now has an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property. In some communities no doubt it would be difficult to navigate without infringing on those zones. Yet throughout these areas, school officials would find their own programs for the prohibition [***1642] of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), or to organize its governmental functions in a certain way, cf. *FERC v. Mississippi*, 456 U.S. at 781 (O'CONNOR, J., concurring in judgment in part and dissenting in part). While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance [***63] the Framers designed and that this Court is obliged to enforce.

For these reasons, I join in the opinion and judgment of the Court.

[*584] JUSTICE THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub. L. 101-647, 104 Stat. 4844. Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, but also anything that has a "substantial effect" on

such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly *****64** applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. See New York v. United States, 505 U.S. 144, 155, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) ("No one disputes the proposition that 'the Constitution created a Federal Government of limited powers'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); Maryland v. Wirtz, 392 U.S. 183, 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937). Cf. Chisholm v. Georgia, 2 U.S. 419, 2 Dall. 419, 435, 1 L. Ed. 440 (1793) (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them") (emphasis deleted). Indeed, on this crucial point, the majority and JUSTICE BREYER agree in principle: The Federal ***585** Government has nothing approaching a police power. Compare *ante*, *****65** at 556-558, with *post*, at 624.

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting ****1643** our more recent Commerce Clause jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law. My goal is *****66** simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical," see *post*, at 602 (STEVENS, J., dissenting). I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government." Jones & Laughlin Steel Corp., *supra*, at 37.

I

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary ***586** of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffick"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com -- "with"; merci -- "merchandise *****67**"). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See The Federalist No. 4, p. 22 (J. Jay) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government); *id.*, No. 7, at 39-40 (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of

trade"); *id.*, No. 40, at 262 (J. Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"); Lee, Letters of a Federal Farmer No. 5, in Pamphlets on the Constitution of the United States 319 (P. Ford ed. 1888); Smith, An Address to the People of the State of New-York, in *id.*, at 107.

-----Footnotes-----

n1 All references to The Federalist are to the Jacob E. Cooke 1961 edition.

-----End Footnotes-----

As one would expect, the term "commerce" was used in contradistinction to productive *****68** activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, e. g., The Federalist No. 36, at 224 (referring to "agriculture, commerce, manufactures"); *id.*, No. 21, at 133 (distinguishing commerce, arts, and industry); *id.*, No. 12, at 74 (asserting that commerce and agriculture have shared interests). The same distinctions ***587** were made in the state ratification conventions. See, e. g., 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); *id.*, at 336 (M. Smith at New York convention).

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, *****69** but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According to that Clause, "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const., Art. I, § 9, cl. 6. Although it is possible to ****1644** conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause n2 does not state that Congress may ***588** "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." In contrast, the Constitution itself temporarily *****70** prohibited amendments that would "affect" Congress' lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. Art. V. Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" Clause had that been their objective.

-----Footnotes-----

n2 Even to speak of "the Commerce Clause" perhaps obscures the actual scope of that Clause. As an original matter, Congress did not have authority to regulate all commerce; Congress could only "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. Although the precise line between interstate/foreign commerce and purely intrastate commerce was hard to draw, the Court

attempted to adhere to such a line for the first 150 years of our Nation. See *infra*, at 593-599.

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In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power *****71** to regulate commerce among the several States. U.S. Const., Art. I, § 8, cl. 18. But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify ***589** that Congress can regulate international trade and commerce *****72** with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Art. I, § 8. n3

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n3 There are other powers granted to Congress outside of Art. I, § 8, that may become wholly superfluous as well due to our distortion of the Commerce Clause. For instance, Congress has plenary power over the District of Columbia and the territories. See U.S. Const., Art. I, § 8, cl. 17, and Art. IV, § 3, cl. 2. The grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress was not ceded plenary authority over the *whole* Nation.

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*****73** Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.

****1645** Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

***590** II

The exchanges during the ratification campaign reveal the relatively limited reach of the Commerce Clause and of federal power generally. The Founding Fathers confirmed that most

areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal [***74] Government. Such affairs would continue to be under the exclusive control of the States.

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other -- that each "substantially affected" the others. After all, items produced by farmers and manufacturers were the primary articles of commerce at the time. If commerce was more robust as a result of federal superintendence, farmers and manufacturers could benefit. Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. A Landholder No. 1, Connecticut Courant, Nov. 5, 1787, in 3 Documentary History of the Ratification of the Constitution 399 (M. Jensen ed. 1978) (hereinafter Documentary History). See also The Federalist No. 35, at 219 (A. Hamilton) ("Discerning citizens are well aware that the mechanic and manufacturing [***75] arts furnish the materials of mercantile enterprise and industry. Many of them indeed are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend"); *id.*, at 221 ("Will not the merchant . . . be disposed to cultivate . . . the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?"); A Jerseyman: To the Citizens of New Jersey, Trenton Mercury, Nov. 6, 1787, in 3 Documentary History 147 (noting that agriculture will serve as [*591] a "source of commerce"); Marcus, The New Jersey Journal, Nov. 14, 1787, *id.*, at 152 (both the mechanic and the farmer benefit from the prosperity of commerce). William Davie, a delegate to the North Carolina Convention, illustrated the close link best: "Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other." 4 Debates 20.

Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, [***76] the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns:

"The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." The Federalist No. 17, at 106.

In the unlikely event that the Federal Government would attempt to exercise authority over such matters, its effort "would be as troublesome as it would be nugatory." *Ibid.* n4

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n4 Cf. 3 Debates 40 (E. Pendleton at the Virginia convention) (The proposed Federal Government "does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia? Can [it] make a law altering the form of transferring property, or the rule of descents, in Virginia?"); *id.*, at 553 (J. Marshall at the Virginia convention) (denying that Congress could make "laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state"); The Federalist No. 33, at 206 (A. Hamilton) (denying that Congress could change laws of descent or could pre-empt a land tax); A Native of Virginia: Observations upon the Proposed Plan of Federal Government, Apr. 2, 1788, in 9 Documentary History 692 (States have sole authority

over "rules of property").

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[*592] [*77] [**1646]** The comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution. See, e. g., 2 Debates 267-268 (A. Hamilton at New York convention) (noting that there would be just cause for rejecting the Constitution if it would enable the Federal Government to "alter, or abrogate . . . [a State's] civil and criminal institutions [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"); The Federalist No. 45, at 313 (J. Madison); 3 Debates 259 (J. Madison) (Virginia convention); R. Sherman & O. Ellsworth, Letter to Governor Huntington, Sept. 26, 1787, in 3 Documentary History 352; J. Wilson, Speech in the State House Yard, Oct. 6, 1787, in 2 *id.*, at 167-168. Agriculture and manufacture, since they were not surrendered to the Federal Government, were state concerns. See The Federalist No. 34, at 212-213 (A. Hamilton) (observing that the "internal encouragement of agriculture and manufactures" was an object of *state* expenditure). Even before the passage of the Tenth Amendment, it was apparent that Congress would **[***78]** possess only those powers "herein granted" by the rest of the Constitution. Art. I, § 1.

Where the Constitution was meant to grant federal authority over an activity substantially affecting interstate commerce, the Constitution contains an enumerated power over that particular activity. Indeed, the Framers knew that many of the other enumerated powers in § 8 dealt with matters that substantially affected interstate commerce. Madison, for instance, spoke of the bankruptcy power as being "intimately connected with the regulation of commerce." The Federalist No. 42, at 287. Likewise, Hamilton urged that "if we mean to be a commercial people or even to be secure on our Atlantic side, we must endeavour as soon as possible to have a navy." *Id.*, No. 24, at 157.

In short, the Founding Fathers were well aware of what the principal dissent calls "economic . . . realities." See **[*593]** *post*, at 625 (BREYER, J.) (quoting *North American Co. v. SEC*, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946)). Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless **[***79]** respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

III

If the principal dissent's understanding of our early case law were correct, there might be some reason to doubt this view of the original understanding of the Constitution. According to that dissent, Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824), established that Congress may control all local activities that "significantly affect interstate commerce," *post*, at 615. And, "with the exception of one wrong turn subsequently corrected," this has been the "traditional" method of interpreting the Commerce Clause. *Post*, at 631 (citing *Gibbons* and *United States v. Darby*, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941)).

In my view, the dissent is wrong about the holding and reasoning of *Gibbons*. Because this error leads the dissent to characterize the first 150 years of this Court's case law as a "wrong turn," I feel compelled to put the last 50 years in proper perspective.

A

In *Gibbons*, the Court examined whether a federal law that licensed ships to engage in the "coasting **[***80]** trade" pre-empted a New York law granting a 30-year monopoly to Robert Livingston and Robert Fulton to navigate the State's waterways by steamship. In

concluding that it did, the Court noted that Congress could regulate "navigation" because "all America . . . has uniformly understood, the **[**1647]** word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." 9 Wheat., at 190. The Court also observed **[*594]** that federal power over commerce "among the several States" meant that Congress could regulate commerce conducted partly within a State. Because a portion of interstate commerce and foreign commerce would almost always take place within one or more States, federal power over interstate and foreign commerce necessarily would extend into the States. *Id.*, at 194-196.

At the same time, the Court took great pains to make clear that Congress could *not* regulate commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.*, at 194. **[***81]** Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the Court observed that "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation . . . not surrendered to a general government." *Id.*, at 203. From an early moment, the Court rejected the notion that Congress can regulate everything that affects interstate commerce. That the internal commerce of the States and the numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce cannot be doubted. Nevertheless, they were not "surrendered to the general government."

Of course, the principal dissent is not the first to misconstrue *Gibbons*. For instance, the Court has stated that *Gibbons* "described the federal commerce power with a breadth never yet exceeded." *Wickard v. Filburn*, 317 U.S. 111, 120, 87 L. Ed. 122, 63 S. Ct. 82 (1942). See also *Perez v. United States*, 402 U.S. 146, 151, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971) (claiming that with *Darby* and **[***82]** *Wickard*, "the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored"). I believe that this misreading stems from two statements in *Gibbons*.

First, the Court made the uncontroversial claim that federal power does not encompass "commerce" that "does **[*595]** not extend to or affect other States." 9 Wheat., at 194 (emphasis added). From this statement, the principal dissent infers that whenever an activity affects interstate commerce, it necessarily follows that Congress can regulate such activities. Of course, Chief Justice Marshall said no such thing and the inference the dissent makes cannot be drawn.

There is a much better interpretation of the "affect[s]" language: Because the Court had earlier noted that the commerce power did not extend to wholly intrastate commerce, the Court was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could *never* be said to be commerce "among the several States."

But even if one were to adopt the dissent's **[***83]** reading, the "affect[s]" language, at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate and foreign commerce. There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate *all* activities that affect interstate commerce. See *ibid.*

The second source of confusion stems from the Court's praise for the Constitution's division of power between the States and the Federal Government:

"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." *Id.*, at 195.

[*596] In this passage, the Court merely was making the well understood point that the Constitution commits matters of "national" concern to Congress and leaves "local" matters **[**1648]** to the States. The Court was *not* saying that whatever Congress believes **[***84]** is a national matter becomes an object of federal control. The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on. See generally Art. I, § 8. *Gibbons'* emphatic statements that Congress could not regulate many matters that affect commerce confirm that the Court did not read the Commerce Clause as granting Congress control over matters that "affect the States generally." n5 *Gibbons* simply cannot be construed as the principal dissent would have it.

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n5 None of the other Commerce Clause opinions during Chief Justice Marshall's tenure, which concerned the "dormant" Commerce Clause, even suggested that Congress had authority over all matters substantially affecting commerce. See *Brown v. Maryland*, 25 U.S. 419, 12 Wheat. 419, 6 L. Ed. 678 (1827); *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829).

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B

I am aware of no cases prior to **[***85]** the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

Even before *Gibbons*, Chief Justice Marshall, writing for the Court in *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1821), noted that Congress had "no general right to punish murder committed within any of the States," *id.*, at 426, and that it was "clear that congress cannot punish felonies generally," *id.*, at 428. The Court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers -- for instance, over the District of Columbia. *Id.*, at 426. Thus, whatever effect ordinary murders, or robbery, or gun possession might have on interstate commerce (or on any **[*597]** other subject of federal concern) was irrelevant to the question of congressional power. n6

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n6 It is worth noting that Congress, in the first federal criminal Act, did not establish nationwide prohibitions against murder and the like. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. To be sure, Congress outlawed murder, manslaughter, maiming, and larceny, but only when those acts were either committed on United States territory not part of a State or on the high seas. *Ibid.* See U.S. Const., Art. I, § 8, cl. 10 (authorizing Congress to outlaw piracy and felonies on high seas); Art. IV, § 3, cl. 2 (plenary authority over United States territory and property). When Congress did enact nationwide criminal laws, it acted pursuant to direct grants of authority found in the Constitution. Compare Act of Apr. 30, 1790, *supra*, §§ 1 and 14 (prohibitions against treason and the counterfeiting of U.S. securities), with U.S. Const., Art. I, § 8, cl. 6 (counterfeiting); Art. III, § 3, cl. 2 (treason). Notwithstanding any substantial effects that murder, kidnaping, or gun possession might have had on interstate commerce, Congress understood that it could not establish nationwide prohibitions.

Likewise, there were no laws in the early Congresses that regulated manufacturing and agriculture. Nor was there *any* statute that purported to regulate activities with "substantial effects" on interstate commerce.

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*****86** *United States v. Dewitt*, 76 U.S. 41, 9 Wall. 41, 19 L. Ed. 593 (1870), marked the first time the Court struck down a federal law as exceeding the power conveyed by the Commerce Clause. In a two-page opinion, the Court invalidated a nationwide law prohibiting all sales of naphtha and illuminating oils. In so doing, the Court remarked that the Commerce Clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *Id.*, at 44. The law in question was "plainly a regulation of police," which could have constitutional application only where Congress had exclusive authority, such as the territories. *Id.*, at 44-45. See also *License Tax Cases*, 72 U.S. 462, 5 Wall. 462, 470-471, 18 L. Ed. 497 (1867) (Congress cannot interfere with the internal commerce and business of a State); *Trade-Mark Cases*, 100 U.S. 82, 25 L. Ed. 550 (1879) (Congress ***598** cannot regulate internal commerce and thus may not establish national trademark registration).

In *United States v. E. C. Knight Co.*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895), *****87** this Court held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the Commerce Clause. ****1649** Raising echoes of the discussions of the Framers regarding the intimate relationship between commerce and manufacturing, the Court declared that "commerce succeeds to manufacture, and is not a part of it." *Id.*, at 12. The Court also approvingly quoted from

Kidd v. Pearson, 128 U.S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6 (1888):
 "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce If it be held that the term [commerce] 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 would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested . . . with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry." *E. C. Knight*, *supra*, at 14.

*****88** If federal power extended to these types of production "comparatively little of business operations and affairs would be left for state control." *Id.*, at 16. See also *Newberry v. United States*, 256 U.S. 232, 257, 65 L. Ed. 913, 41 S. Ct. 469 (1921) ("It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress"). Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.

599** As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 308, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (Congress may not regulate mine labor because "the relation of employer and employee is a local relation"); see also *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543-550, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (holding that Congress may not regulate intrastate sales **89** of sick chickens or the labor of employees involved in intrastate poultry sales). The Federal Government simply could not reach such subjects regardless of their effects on interstate

commerce.

These cases all establish a simple point: From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. n7 Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

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n7 To be sure, congressional power pursuant to the Commerce Clause was alternatively described less narrowly or more narrowly during this 150-year period. Compare *United States v. Coombs*, 12 Pet. 72, 78 (1838) (commerce power "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate [interstate and international] commerce" such as stealing goods from a beached ship), with *United States v. E. C. Knight Co.*, 156 U.S. 1, 13, 39 L. Ed. 325, 15 S. Ct. 249 (1895) ("Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities . . . may be regulated, but this is because they form part of interstate trade or commerce"). During this period, however, this Court never held that Congress could regulate everything that substantially affects commerce.

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[***90] IV

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further [*600] flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words. Tr. of Oral Arg. 5. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. *Post*, at 624. Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threatening legal uncertainty in [*1650] an area of law that . . . seemed reasonably well settled." *Post*, at 630. The one advantage of the dissent's standard is certainty: It is certain that under its analysis everything may be regulated under the guise of the Commerce Clause.

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether [***91] the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation. See *Maryland v. Wirtz*, 392 U.S. at 192-193 (if class of activities is "within the reach of federal power," courts may not excise individual applications as trivial) (quoting *Darby*, 312 U.S. at 120-121).

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently [***92] would be constitutional. [*601] Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

V

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions. n8 It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future. n9 The analysis also suggests that we ought to temper our Commerce Clause jurisprudence.

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n8 Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.

n9 Nor can the majority's opinion fairly be compared to *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905). See *post*, at 604-609 (SOUTER, J., dissenting). Unlike *Lochner* and our more recent "substantive due process" cases, to-day's decision enforces only the Constitution and not "judicial policy judgments." See *post*, at 607. Notwithstanding JUSTICE SOUTER's discussion, "'commercial' character" is not only a natural but an inevitable "ground of Commerce Clause distinction." See *post*, at 608 (emphasis added). Our invalidation of the Gun-Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself. As John Marshall put it: "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard They would declare it void." 3 Debates 553 (before the Virginia ratifying convention); see also *The Federalist* No. 44, at 305 (J. Madison) (asserting that if Congress exercises powers "not warranted by [the Constitution's] true meaning" the judiciary will defend the Constitution); *id.*, No. 78, at 526 (A. Hamilton) (asserting that the "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"). Where, as here, there is a case or controversy, there can be no "misstep," *post*, at 614, in enforcing the Constitution.

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[*602] [*93]** Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider the substantial effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be "defined" as being "'commensurate with the national needs'" or self-consciously intended **[**1651]** to let the Federal Government "'defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'" See *post*, at 625 (BREYER, J., dissenting) (quoting *North American Co. v. SEC*, 327 U.S. at 705). Such a formulation of federal power is no test at all: It is a blank check.

At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

DISSENTBY: STEVENS; SOUTER; BREYER

DISSENT: JUSTICE STEVENS, dissenting.

The welfare of our future "Commerce with foreign Nations, and among the several States, **[***94]** " U.S. Const., Art. I, § 8, cl. 3, is vitally dependent on the character of the

education of our children. I therefore agree entirely with JUSTICE BREYER's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools -- just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with JUSTICE SOUTER's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process. Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 405-411, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (STEVENS, J., dissenting). I believe, however, that the Court's extraordinary decision merits this additional comment.

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, [*603] either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The [***95] market for the possession of handguns by school-age children is, distressingly, substantial. * Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

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* Indeed, there is evidence that firearm manufacturers -- aided by a federal grant -- are specifically targeting schoolchildren as consumers by distributing, at schools, hunting-related videos styled "educational materials for grades four through 12," Herbert, Reading, Writing, Reloading, N. Y. Times, Dec. 14, 1994, p. A23, col. 1.

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JUSTICE SOUTER, dissenting.

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); *Preseault v. ICC*, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990); [***96] see *Maryland v. Wirtz*, 392 U.S. 183, 190, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968), quoting *Katzenbach v. McClung*, 379 U.S. 294, 303-304, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964). If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.'" *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 276, quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964); see also *Preseault v. ICC*, *supra*, at 17. n1

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n1 In this case, no question has been raised about means and ends; the only issue is about the effect of school zone guns on commerce.

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[*604] The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes [**1652] from Congress's political accountability in dealing with matters open to a wide range of possible choices.

[***97] See *id.*, at 313-316; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*,

supra, at 276; *United States v. Carolene Products Co.*, 304 U.S. 144, 147, 151-154, 82 L. Ed. 1234, 58 S. Ct. 778 (1938); cf. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 99 L. Ed. 563, 75 S. Ct. 461 (1955).

It was not ever thus, however, as even a brief overview of Commerce Clause history during the past century reminds us. The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power. A look at history's sequence will serve to show how today's *****98** decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

I

Notwithstanding the Court's recognition of a broad commerce power in *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 196-197, 6 L. Ed. 23 (1824) (Marshall, C. J.), Congress saw few occasions to exercise that power prior to Reconstruction, see generally 2 C. Warren, *The Supreme Court in United States History* 729-739 (rev. ed. 1935), and it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level, see *id.*, at ***605** 729-730. Although the Court upheld a fair amount of the ensuing legislation as being within the commerce power, see, e. g., *Stafford v. Wallace*, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922) (upholding an Act regulating trade practices in the meat packing industry); *Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914) (upholding Interstate Commerce Commission order to equalize interstate and intrastate rail rates); see generally *****99** Warren, *supra*, at 729-739, the period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of "commerce" to invalidate federal social and economic legislation, see, e. g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (striking Act prohibiting unfair labor practices in coal industry as regulation of "mining" and "production," not "commerce"); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 545-548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (striking congressional regulation of activities affecting interstate commerce only "indirectly"); *Hammer v. Dagenhart*, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918) (striking Act prohibiting shipment in interstate commerce of goods manufactured at factories using child labor because the Act regulated "manufacturing," not "commerce"); *Adair v. United States*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908) (striking protection of labor union membership as outside "commerce").

These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope *****100** of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process. See, e. g., *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928) (striking state law requiring pharmacy owners to be licensed as pharmacists); *Coppage v. Kansas*, 236 U.S. 1, 59 L. Ed. 441, 35 S. Ct. 240 (1915) (striking state law prohibiting employers from requiring their employees to agree not to join labor organizations); *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905) (striking state law establishing maximum working hours for bakers). See generally L. Tribe, *American Constitutional* ***606** Law 568-574 (2d ed. 1988). The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the ****1653** first third of the century showed itself in exacting judicial scrutiny *****101** of a legislature's choice of economic ends and of the legislative means selected to reach them.

It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937, with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615. See Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 674-682 (1946). In *West Coast Hotel*, the Court's rejection of a due process challenge to a state law fixing minimum wages for women and children marked the abandonment of its expansive protection of contractual freedom. Two weeks later, *Jones & Laughlin* affirmed congressional commerce power to authorize NLRB injunctions against unfair labor practices. The Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.

In the years following these decisions, [***102] deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and Commerce Clauses, see *United States v. Carolene Products Co.*, 304 U.S. at 147-148, 152; *United States v. Darby*, 312 U.S. 100, 119-121, 85 L. Ed. 609, 61 S. Ct. 451 (1941); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-119, 86 L. Ed. 726, 62 S. Ct. 523 (1942), and in due course that deference became articulate in the standard of rationality review. In due process litigation, the Court's statement of a rational [*607] basis test came quickly. See *United States v. Carolene Products Co.*, *supra*, at 152; see also *Williamson v. Lee Optical Co.*, *supra*, at 489-490. The parallel formulation of the Commerce Clause test came later, only because complete elimination of the direct/indirect effects dichotomy and acceptance of the cumulative effects doctrine, *Wickard v. Filburn*, 317 U.S. 111, 125, 127-129, 87 L. Ed. 122, 63 S. Ct. 82 (1942); *United States v. Wrightwood Dairy Co.*, *supra*, at 124-126, so far [***103] settled the pressing issues of congressional power over commerce as to leave the Court for years without any need to phrase a test explicitly deferring to rational legislative judgments. The moment came, however, with the challenge to congressional Commerce Clause authority to prohibit racial discrimination in places of public accommodation, when the Court simply made explicit what the earlier cases had implied: "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach v. McClung*, 379 U.S. at 303-304, discussing *United States v. Darby*, *supra*; see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 258-259. Thus, under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half century the Court has no more turned back [***104] in the direction of formalistic Commerce Clause review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined toward reasserting the substantive authority of *Lochner* due process (as in the inflated protection of contractual autonomy). See, e. g., *Maryland v. Wirtz*, 392 U.S. at 190, 198; *Perez v. United States*, 402 U.S. 146, 151-157, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. at 276, 277.

[*608] II

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. [***1654] See *ante*, at 558-561. The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the [***105] process of deciding how much interference with contractual freedom was fatal. Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today's decision

reflects the century's end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began. Taking the Court's opinion on its own terms, JUSTICE BREYER has explained both the hopeless porosity of "commercial" character as a ground of Commerce Clause distinction in America's highly connected economy, and the inconsistency of this categorization with our rational basis precedents from the last 50 years.

Further glosses on rationality review, moreover, may be in the *****106** offing. Although this case turns on commercial character, the Court gestures toward two other considerations that it might sometime entertain in applying rational basis ***609** scrutiny (apart from a statutory obligation to supply independent proof of a jurisdictional element): does the congressional statute deal with subjects of traditional state regulation, and does the statute contain explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce? Once again, any appeal these considerations may have depends on ignoring the painful lesson learned in 1937, for neither of the Court's suggestions would square with rational basis scrutiny.

A

The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law. The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable. As for remoteness, it may or may not be wise for *****107** the National Government to deal with education, but JUSTICE BREYER has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed to show that hijacking interstate shipments of cigarettes can affect commerce substantially, even though the States have traditionally prosecuted robbery. And as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. The commerce power, we have often observed, is plenary. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 276; *United States v. Darby*, 312 U.S. at 114; see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549-550, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985); *Gibbons v. Ogden*, 9 Wheat., at 196-197. Justice Harlan put it this way in speaking for the Court in *Maryland v. Wirtz*:

610** "There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as **108** not to interfere with the free and full exercise of the powers of the other. . . . It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests As long ago as [1925], the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." ****1655** 392 U.S. at 195-196 (citations and internal quotation marks omitted).

See also *United States v. Darby*, *supra*, at 114; *Gregory v. Ashcroft*, 501 U.S. 452, 460, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); *United States v. Carolene Products Co.*, 304 U.S. at 147.

Nor is there any contrary authority in the reasoning of our cases imposing clear statement

rules in some instances of legislation that would significantly alter the state-national balance. In the absence of a clear statement of congressional design, for example, we have refused to interpret ambiguous federal statutes to limit fundamental state legislative prerogatives, *Gregory v. Ashcroft*, *supra*, at 460-464, [***109] our understanding being that such prerogatives, through which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere," 501 U.S. at 460, 461. Likewise, when faced with two plausible interpretations of a federal criminal statute, we generally will take the alternative that does not force us to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States. See *United States v. Enmons*, 410 U.S. 396, 411-412, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973); *United States v. Bass*, 404 U.S. 336, 349-350, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971); *Rewis v. United States*, 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971).

These clear statement rules, however, are merely rules of statutory interpretation, to be relied upon only when the [***611] terms of a statute allow, *United States v. Culbert*, 435 U.S. 371, 379-380, 55 L. Ed. 2d 349, 98 S. Ct. 1112 (1978); see *Gregory v. Ashcroft*, *supra*, at 470; *United States v. Bass*, *supra*, at 346-347, and in cases implicating Congress's historical [***110] reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States, *Gregory v. Ashcroft*, *supra*, at 461; *United States v. Bass*, *supra*, at 349; see *Rewis v. United States*, *supra*, at 811-812. They are rules for determining intent when legislation leaves intent subject to question. But our hesitance to presume that Congress has acted to alter the state-federal status quo (when presented with a plausible alternative) has no relevance whatever to the enquiry whether it has the commerce power to do so or to the standard of judicial review when Congress has definitely meant to exercise that power. Indeed, to allow our hesitance to affect the standard of review would inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago. The Court does not assert (and could not plausibly maintain) that the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern; but if congressional action is not forbidden absolutely when it touches such a [***111] subject, it will stand or fall depending on the Court's view of the strength of the legislation's commercial justification. And here once again history raises its objections that the Court's previous essays in overriding congressional policy choices under the Commerce Clause were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of Congress (as distinct from state legislation subject to review under the theory of dormant commerce power) nothing in the Clause compelled the judicial activism, and nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with. There is no reason to expect the lesson would be different another time.

[***612] B

There remain questions about legislative findings. The Court of Appeals expressed the view, 2 F.3d 1342, 1363-1368 (CA5 1993), that the result in this case might well have been different if Congress had made explicit findings that guns in schools have a substantial effect on interstate commerce, and the Court today does not repudiate that position, see *ante*, at 562-563. Might a court aided by such findings have subjected this legislation to less exacting scrutiny [***112] (or, put another [***1656] way, should a court have deferred to such findings if Congress had made them)? n2 The answer to either question must be no, although as a general matter findings are important and to be hoped for in the difficult cases.

-----Footnotes-----

n2 Unlike the Court, (perhaps), I would see no reason not to consider Congress's findings, insofar as they might be helpful in reviewing the challenge to this statute, even though adopted in later legislation. See the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 320904, 108 Stat. 2125 ("The occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; . . . this decline . . . has an adverse impact on interstate commerce and the foreign commerce of the United States; . .

. Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection"). The findings, however, go no further than expressing what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record. The Solicitor General certainly exercised sound judgment in placing no significant reliance on these particular afterthoughts. Tr. of Oral Arg. 24-25.

-----End Footnotes-----

*****113** It is only natural to look for help with a hard job, and reviewing a claim that Congress has exceeded the commerce power is much harder in some cases than in others. A challenge to congressional regulation of interstate garbage hauling would be easy to resolve; review of congressional regulation of gun possession in school yards is more difficult, both because the link to interstate commerce is less obvious and because of our initial ignorance of the relevant facts. In a ***613** case comparable to this one, we may have to dig hard to make a responsible judgment about what Congress could reasonably find, because the case may be close, and because judges tend not to be familiar with the facts that may or may not make it close. But while the ease of review may vary from case to case, it does not follow that the standard of review should vary, much less that explicit findings of fact would even directly address the standard.

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a finding, and there is no reason to entertain claims that Congress *****114** acted ultra vires intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. at 276-277; *Katzenbach v. McClung*, 379 U.S. at 303-304; *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 391-392, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (Hughes, C. J., dissenting); cf. *FCC v. Beach Communications, Inc.*, 508 U.S. at 315 (in the equal protection context, "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it[;] . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature") (citations and internal quotation marks omitted); *Ferguson v. Skrupa*, 372 U.S. 726, 731-733, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. at 487. Congressional findings do not, however, directly address *****115** the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply ***614** either a judicial authority to review the justification (and, hence, the wisdom) of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed ****1657** and more or less arbitrarily applied. Under such a regime, in any case, the rationality standard of review would be a thing of the past.

On the other hand, to say that courts applying *****116** the rationality standard may not defer to findings is not, of course, to say that findings are pointless. They may, in fact, have great value in telling courts what to look for, in establishing at least one frame of reference for review, and in citing to factual authority. The research underlying JUSTICE BREYER's dissent was necessarily a major undertaking; help is welcome, and it not incidentally shrinks the risk that judicial research will miss material scattered across the public domain or buried under pounds of legislative record. Congressional findings on a more particular plane than

this record illustrates would accordingly have earned judicial thanks. But thanks do not carry the day as long as rational possibility is the touchstone, and I would not allow for the possibility, as the Court's opinion may, *ante*, at 563, that the addition of congressional findings could in principle have affected the fate of the statute here.

III

Because JUSTICE BREYER's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions [*615] not quite in [***117] gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. 301 U.S. at 41-43. But we know what happened.

I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

I

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, encompasses the power to regulate local activities insofar as they significantly [***118] affect interstate commerce. See, e. g., *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 194-195, 6 L. Ed. 23 (1824) (Marshall, C. J.); *Wickard v. Filburn*, 317 U.S. 111, 125, 87 L. Ed. 122, 63 S. Ct. 82 (1942). As the majority points out, *ante*, at 559, the Court, in describing how much of an effect the Clause requires, sometimes has used the word "substantial" and sometimes has not. Compare, e. g., *Wickard*, *supra*, at 125 ("substantial economic effect"), with *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) ("affects interstate commerce"); see also *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968) (cumulative effect must not be "trivial"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937) [*616] (speaking of "close and substantial relation" between activity and commerce, not of "substantial effect") (emphasis added); *Gibbons*, *supra*, at 194 (words of Commerce Clause do not "comprehend . . . commerce, which is completely internal . . . and which does not . . . affect other States"). And, as the majority [***119] also recognizes in quoting Justice Cardozo, the question of degree (how much effect) requires an estimate of the "size" of the effect that no verbal formulation can capture with precision. See *ante*, at 567. I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. See, e. g., *Perez v. United States*, 402 [*1658] U.S. 146, 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971); *Daniel v. Paul*, 395 U.S. 298, 308, 23 L. Ed. 2d 318, 89 S. Ct. 1697 (1969). But to speak of "substantial effect" rather than "significant effect" would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i. e.*, the effect of all guns possessed in or near schools). See, e. g., *Wickard*, *supra*, at 127-128. As

this Court put the matter almost 50 years ago:

"It is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that *****120** requires preventative regulation." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 (1948) (citations omitted).

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the **[*617]** determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. See *Hodel, supra*, at 276-277. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "a rational basis" for so concluding. *Ante*, at 557 (emphasis added).

I recognize that we must judge this matter independently. "Simply because Congress may conclude *****121** that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel, supra*, at 311 (REHNQUIST, J., concurring in judgment). And, I also recognize that Congress did not write specific "interstate commerce" findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i. e.*, whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference. See, *e. g.*, *Katzenbach v. McClung*, 379 U.S. 294, 299, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964) (noting that "no formal findings were made, which of course are not necessary"); *Perez, supra*, at 156-157; cf. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994) (opinion of KENNEDY, J.) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate *****122** judicial review"); *Fullilove v. Klutznick*, 448 U.S. 448, 503, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate . . ."). It would seem particularly unfortunate to make the validity of **[*618]** the statute at hand turn on the presence or absence of findings. Because Congress did make findings (though not until after Lopez was prosecuted), doing so would appear to elevate form over substance. See Pub. L. 103-322, §§ 320904 (2) (F), (G), 108 Stat. 2125, 18 U.S.C. §§ 922(q)(1)(F), (G).

In addition, despite the Court of Appeals' suggestion to the contrary, see 2 F.3d 1342, 1365 (CA5 1993), there is no special need here for a clear indication of Congress' rationale. The statute does not interfere with the exercise of state or local authority. Cf., *e. g.*, *Dellmuth v. Muth*, 491 U.S. 223, 227-228, 105 L. Ed. 2d 181, 109 S. Ct. 2397 (1989) (requiring clear statement for abrogation of Eleventh Amendment immunity). Moreover, any clear *****123** statement rule would *****1659** apply only to determine Congress' intended result, *not* to clarify the source of its authority or measure the level of consideration that went into its decision, and here there is no doubt as to which activities Congress intended to regulate. See *ibid.*; *id.*, at 233 (SCALIA, J., concurring) (to subject States to suits for money damages, Congress need only make that intent clear, and need not refer explicitly to the Eleventh Amendment); *EEOC v. Wyoming*, 460 U.S. 226, 243, n. 18, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983) (Congress need not recite the constitutional provision that authorizes its action).

II

Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign *****124** commerce"? 18 U.S.C. §§ 922(q)(1)(F), (G). As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co. v. United States*, 196 U.S. 375, 398, 49 L. Ed. 518, 25 S. Ct. 276 **[*619]** (1905) (Holmes, J.), the answer to this question must be yes. Numerous reports and studies -- generated both inside and outside government -- make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. (See Appendix, *infra*, at 631, for a sample of the documentation, as well as for complete citations to the sources referenced below.)

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, Centers for Disease Control 2342; Sheley, McGee, & Wright 679; that 12 percent of urban high school students have had guns fired at them, *ibid.*; that *****125** 20 percent of those students have been threatened with guns, *ibid.*; and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools, U.S. Dept. of Justice 1 (1989); House Select Committee Hearing 15 (1989). And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. See, e. g., House Judiciary Committee Hearing 44 (1990) (linking school violence to dropout rate); U.S. Dept. of Health 118-119 (1978) (school-violence victims suffer academically); compare U.S. Dept. of Justice 1 (1991) (gun violence worst in inner-city schools), with National Center 47 (dropout rates highest in inner cities). Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Senate Labor and Human Resources Committee Hearing 39 (1993); U.S. Dept. of Health 118, 123-124 (1978). Congress could therefore have found a substantial educational problem -- teachers unable to teach, students unable to learn -- and concluded that guns near schools contribute substantially to the size and scope of that *****126** problem.

[*620] Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. See generally Seybolt; Rorabaugh; U.S. Dept. of Labor (1950). As late as the 1920's, many workers still received general education directly from their employers -- from large corporations, such as General Electric, Ford, and Goodyear, which created schools *****1660** within their firms to help both the worker and the firm. See Bolino 15-25. (Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school. See *id.*, at 11.) As public school enrollment grew in the early 20th century, see Becker 218 (1993), the need for industry to teach basic educational skills diminished. *****127** But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic growth in the early years of this century is traceable directly to increased schooling, see Denison 243; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one, see Schultz 26 (1961); and that the economic returns to this

investment in education exceeded the returns to conventional capital investment, see, *e. g.*, Davis & Morrall 48-49.

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. See, *e. g.*, MIT 32 [***621**] (only about one-third of handtool company's 1,000 workers were qualified to work with a new process that requires high-school-level reading and mathematical skills); Cyert & Mowery 68 (gap between wages of high school dropouts and better trained workers increasing); U.S. [*****128**] Dept. of Labor 41 (1981) (job openings for dropouts declining over time). There is evidence that "service, manufacturing or construction jobs are being displaced by technology that requires a better-educated worker or, more likely, are being exported overseas," Gordon, Ponticell, & Morgan 26; that "workers with truly few skills by the year 2000 will find that only one job out of ten will remain," *ibid.*; and that

"over the long haul the best way to encourage the growth of high-wage jobs is to upgrade the skills of the work force. . . . Better-trained workers become more productive workers, enabling a company to become more competitive and expand." Henkoff 60.

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. Marshall 205; Marshall & Tucker 33. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. See National Center 57; Handbook [*****129**] of Labor Statistics 561, 576 (1989); Neef & Kask 28, 31. At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts, see, *e. g.*, MIT 28, and, presumably, to high school dropout rates of 20 to 25 percent (up to 50 percent in inner cities), see, *e. g.*, National Center 47; Chubb & Hanushek 215. Indeed, Congress has said, when writing other statutes, that [***622**] "functionally or technologically illiterate" Americans in the work force "erode" our economic "standing in the international marketplace," Pub. L. 100-418, § 6002(a)(3), 102 Stat. 1469, and that "our Nation is . . . paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling," H. R. Rep. No. 98-6, pt. 1, p. 19 (1983).

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education. See MacCormack, Newman, & Rosenfield 73; Coffee 296. Scholars on the subject report, [*****130**] for example, that today, "high speed communication and transportation make it possible to produce most products and services anywhere in the world," National Center 38; that "modern machinery and production methods can therefore be combined with low wage workers to drive costs down," *ibid.*; that managers can perform "'back office functions anywhere in the world now,'" and say that if they "'can't get enough skilled [****1661**] workers here'" they will "'move the skilled jobs out of the country,'" *id.*, at 41; with the consequence that "rich countries need better education and retraining, to reduce the supply of unskilled workers and to equip them with the skills they require for tomorrow's jobs," Survey of Global Economy 37. In light of this increased importance of education to individual firms, it is no surprise that half of the Nation's manufacturers have become involved with setting standards and shaping curricula for local schools, Maturi 65-68, that 88 percent think this kind of involvement is important, *id.*, at 68, that more than 20 States have recently passed educational reforms to attract new business, Overman 61-62, and that business

magazines have begun to rank cities according [***131] to the quality of their schools, see Boyle 24.

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical [*623] threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." The evidence of (1) the *extent* of the gun-related violence problem, see *supra*, at 619, (2) the *extent* of the resulting negative effect on classroom learning, see *ibid.*, and (3) the *extent* of the consequent negative commercial effects, see *supra*, at 620-622, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."

Specifically, Congress could have found that gun-related violence [***132] near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, see, e. g., National Center 29, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, see, e. g., Becker 10 (1992), of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," *Perez v. United States*, 402 U.S. at 157, and that unfair labor practices pose to instrumentalities of commerce, see *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221-222, 83 L. Ed. 126, 59 S. Ct. 206 (1938). As I have pointed out, *supra*, at 618, Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce and the foreign commerce of the United States." 18 U.S.C. §§ 922 [***133] (q)(1)(F), (G). The violence-related facts, the educational [*624] facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, see *supra*, at 615-617; *infra*, at 627-628, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local," *ante*, at 567 (citation omitted; internal quotation marks omitted); nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. *Ante*, at 564. First, this statute is aimed at curbing a particularly acute threat to the educational process -- the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way [***134] in which guns and education are incompatible. See *supra*, at 619. This Court has previously recognized the singularly disruptive potential [**1662] on interstate commerce that acts of violence may have. See *Perez, supra*, at 156-157. Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances. See *Heart of Atlanta [*625] Motel, Inc. v. United States*, 379 U.S. 241, 251, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964). It would recognize that,

in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as *****135** well as our social, well-being. In accordance with well-accepted precedent, such a holding would permit Congress "to act in terms of economic . . . realities," would interpret the commerce power as "an affirmative power commensurate with the national needs," and would acknowledge that the "commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy." *North American Co. v. SEC*, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946) (citing *Swift & Co. v. United States*, 196 U.S. at 398 (Holmes, J.)).

III

The majority's holding -- that § 922 falls outside the scope of the Commerce Clause -- creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. In *Perez v. United States*, *supra*, the Court held that the Commerce Clause authorized a federal statute that makes it a crime to engage in loan *****136** sharking ("extortionate credit transactions") at a local level. The Court said that Congress may judge that such transactions, "though purely *intrastate*, . . . affect *interstate* commerce." 402 U.S. at 154 (emphasis added). Presumably, Congress reasoned that threatening or using force, say with a gun on a street corner, to collect a debt occurs sufficiently often so that the activity (by helping organized crime) affects commerce among the States. But, why then cannot Congress also reason that the threat or use of force -- the frequent consequence of possessing a gun -- in or near a school occurs sufficiently often so that such activity (by inhibiting basic education) affects **[*626]** commerce among the States? The negative impact upon the national economy of an inability to teach basic skills seems no smaller (nor less significant) than that of organized crime.

In *Katzenbach v. McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964), this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination *****137** affected purchases of food and restaurant supplies from other States. See *id.*, at 300; *Heart of Atlanta Motel*, *supra*, at 274 (Black, J., concurring in *McClung* and in *Heart of Atlanta*). In *Daniel v. Paul*, 395 U.S. 298, 23 L. Ed. 2d 318, 89 S. Ct. 1697 (1969), this Court found an effect on commerce caused by an amusement park located several miles down a country road in the middle of Alabama -- because some customers (the Court assumed), some food, 15 paddleboats, and a juke box had come from out of state. See *id.*, at 304-305, 308. In both of these cases, the Court understood that the specific instance of discrimination (at a local place of accommodation) was part of a general practice that, considered as a whole, caused not only the most serious human and social harm, but had nationally significant economic dimensions as well. See *McClung*, *supra*, at 301; *****1663** *Daniel*, *supra*, at 307, n. 10. It is difficult to distinguish the case before us, for the same critical elements are present. Businesses are less likely to locate in communities where violence plagues the classroom. *****138** Families will hesitate to move to neighborhoods where students carry guns instead of books. (Congress expressly found in 1994 that "parents may decline to send their children to school" in certain areas "due to concern about violent crime and gun violence." 18 U.S.C. § 922(q)(1)(E).) And (to look at the matter in the most narrowly commercial manner), interstate publishers therefore will sell fewer books and other firms will sell fewer school supplies where the threat of violence disrupts learning. Most importantly, like the local racial discrimination at issue in *McClung* and *Daniel*, the local instances here, taken **[*627]** together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions.

In *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), this Court sustained the application of the Agricultural Adjustment Act of 1938 to wheat that Filburn grew and

consumed on his own local farm because, considered in its totality, (1) homegrown wheat may be "induced by rising prices" to "flow into the market and check price increases, *****139** " and (2) even if it never actually enters the market, homegrown wheat nonetheless "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market" and, in that sense, "competes with wheat in commerce." *Id.*, at 128. To find both of these effects on commerce significant in amount, the Court had to give Congress the benefit of the doubt. Why would the Court, to find a significant (or "substantial") effect here, have to give Congress any greater leeway? See also *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze"); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. at 236 ("It is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventive regulation").

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making *****140** a critical distinction between "commercial" and noncommercial "transaction[s]." *Ante*, at 561. That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formula[s]" that would give

***628** "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Wickard, supra*, at 120.

See also *United States v. Darby*, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941) (overturning the Court's distinction between "production" and "commerce" in the child labor case, *Hammer v. Dagenhart*, 247 U.S. 251, 271-272, 62 L. Ed. 1101, 38 S. Ct. 529 (1918)); *Swift & Co. v. United States*, 196 U.S. at 398 (Holmes, J.) ("Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). Moreover, *****141** the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate "economic activity," *ante*, at 559, the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Filburn's consumption of homegrown wheat, "though it may not be regarded ****1664** as commerce," could nevertheless be regulated -- "whatever its nature" -- so long as "it exerts a substantial economic effect on interstate commerce." *Wickard, supra*, at 125 (emphasis added).

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases (*McClung* and *Daniel*) or *Perez* -- in *****142** each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself "commercial." And, if the majority instead means to distinguish generally among broad categories of activities, differentiating what is educational from what is commercial, then, as a ***629** practical matter, the line becomes almost impossible to draw. Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. American industry itself has been, and is again, involved in teaching. See *supra*, at 620, 622. When, and to what extent, does its involvement make education commercial? Does the

number of vocational classes that train students directly for jobs make a difference? Does it matter if the school is public or private, nonprofit or profit seeking? Does it matter if a city or State adopts a voucher plan that pays private firms to run a school? Even if one were to ignore these practical questions, why should there be a theoretical distinction between education, when it significantly benefits commerce, and environmental pollution, when it causes economic harm? See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

*****143** Regardless, if there is a principled distinction that could work both here and in future cases, Congress (even in the absence of vocational classes, industry involvement, and private management) could rationally conclude that schools fall on the commercial side of the line. In 1990, the year Congress enacted the statute before us, primary and secondary schools spent \$ 230 billion -- that is, nearly a quarter of a trillion dollars -- which accounts for a significant portion of our \$ 5.5 trillion gross domestic product for that year. See Statistical Abstract 147, 442 (1993). The business of schooling requires expenditure of these funds on student transportation, food and custodial services, books, and teachers' salaries. See U.S. Dept. of Education 4, 7 (1993). These expenditures enable schools to provide a valuable service -- namely, to equip students with the skills they need to survive in life and, more specifically, in the workplace. Certainly, Congress has often analyzed school expenditure as if it were a commercial investment, closely analyzing whether schools are efficient, whether they justify the significant resources ***630** they spend, and whether they can be restructured to achieve *****144** greater returns. See, e. g., S. Rep. No. 100-222, p. 2 (1987) (federal school assistance is "a prudent investment"); Senate Appropriations Committee Hearing (1994) (private sector management of public schools); cf. Chubb & Moe 185-229 (school choice); Hanushek 85-122 (performance based incentives for educators); Gibbs (decision in Hartford, Conn., to contract out public school system). Why could Congress, for Commerce Clause purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope, see, e. g., 18 U.S.C. § 844(i) (destruction of buildings used in activity affecting interstate commerce), and other statutes that contain no jurisdictional language at all, see, e. g., 18 U.S.C. § 922 *****145** (o)(1) (possession of machineguns). Do these, or similar, statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element? Cf. *United States v. Staszczuk*, 517 F.2d 53, 57-58 (CA7 1975) (en ****1665** banc) (Stevens, J.) (evaluation of Congress' intent "requires more than a consideration of the consequences of the particular transaction"). More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take *Wickard*, 317 U.S. at 127-128, (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather ***631** than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

IV

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . *****146** to act in terms of economic . . . realities." *North American Co. v. SEC*, 327 U.S. at 705 (citing *Swift & Co. v. United States*, 196 U.S. at 398 (Holmes, J.)). It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. See *Gibbons v. Ogden*, 9 Wheat., at 195 (holding that the commerce power extends "to all the external concerns of the nation, and to those

internal concerns which affect the States generally "); *United States v. Darby*, 312 U.S. at 116-117 ("The conclusion is inescapable that *Hammer v. Dagenhart* [the child labor case] was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision It should be and now is overruled"). Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce *****147** they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

APPENDIX TO OPINION OF BREYER, J.

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