Taming Congress's Power under the Commerce Clause: What Does the Near Future Portend

Jesse H. Choper

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Recommended Citation
Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?

Jesse H. Choper*

I. INTRODUCTION

There is little doubt that the Supreme Court, at least as currently constituted, is really serious about the existence of true limits on Congress's power under the Commerce Clause, and the justices' capacity to enforce them. The modern revival of judicial protection of federalism, with the Court "making a mighty effort to put the states in what the Court conceives to be their rightful place," began shortly after Justice Thomas, who continues to provide the decisive fifth vote, joined the Court, and commenced with the first of several decisions aimed at shielding state institutions from being "commandeered" by the Federal

* Copyright © 2003 Jesse H. Choper. Earl Warren Professor of Public Law, University of California at Berkeley, School of Law (Boalt Hall). Thanks to Philip Frickey, Mark Killenbeck, Robert Post, and John Yoo for helpful comments, and Alexander Haas, Boalt 2002, for assistance in preparing this article.

1. The Commerce Clause has not been the sole subject of this resurgence. See also Seminole Tribe v. Florida, 517 U.S. 44 (1996) (discussing the Eleventh Amendment); infra notes 23-26 and accompanying text (discussing Section 5 of the Fourteenth Amendment). But there has been less than total consistency. For example, it has been pointed out that "some of the Court's most prominently pro-federalism justices are quick to find that federal regulatory statutes displace or preempt state regulations." Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429, 432 (2002). Indeed, over the decade since Clarence Thomas joined the Court and produced the current pro-federalism five-member majority, the Court has decided thirty-five preemption cases and found state statutes or causes of action to be preempted, either in whole or in part, in twenty-two. Indeed, during the Court's 1999 and 2000 Terms, the Court decided seven preemption cases and held that federal law preempted state law in all of them.

Id. at 462-63.

Government. It was not until 1995, however, that the Court signaled that boundaries would be judicially imposed on Congress’s ability to legislate nationally by using the broad power granted in the Court’s post-New Deal construction of the Commerce Clause. Prior to these rulings, “a leading constitutional theorist could argue that the courts should not enforce federalism . . . at all.”

In United States v. Lopez, however, the Court engaged in a surprising about face from this position by invalidating a federal statute—the Gun-Free School Zones Act (“GFSZA”)—that regulated private individuals throughout the country as being outside the commerce power. In Lopez, the Court identified three prongs of congressional authority under the Commerce Clause: (1) a jurisdictional nexus to the “channels of interstate commerce,” (2) “instrumentalities of interstate commerce” (and intrastate activities that may harm them), and (3) local actions that “substantially affect interstate commerce.” It then held that mere possession of a gun in a school zone, without more, did not fall within any of these three categories. This was the first piece of federal legislation struck down on Commerce Clause grounds since the New Deal era. While Lopez created a stir among those who follow constitutional law, numerous questions remained regarding the strength of the Court’s commitment to restricting Congress’s commerce power. Indeed, a number of legal scholars questioned whether Lopez was merely an aberration rather than an indication of a major shift in doctrine.


6. Id. at 558-59.


9. See DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 141 (1995) (“[T]he impact of the [Lopez] decision on broader questions of federal power will be limited.”); Michael C. Dorf, No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court,
Five years later, *United States v. Morrison*\(^{10}\) confirmed that *Lopez* was no "sport," and that the Court really meant to significantly redefine the scope of national power.\(^{11}\) The Court held that the civil remedy provision in the Violence Against Women Act ("VAWA"),\(^{12}\) providing injunctive relief or a private right of action for damages to persons injured by gender-motivated violence, could not be sustained under either the Commerce Clause or Section 5 of the Fourteenth Amendment. The statute at issue in *Morrison* was much less vulnerable to challenge than the gun possession law in *Lopez*. While neither enactment had any jurisdictional nexus,\(^{13}\) unlike the statute in *Lopez*, VAWA involved extensive congressional hearings and contained copious findings regarding the effects that gender-motivated violence has on the economy.\(^{14}\) Further, VAWA was vigorously supported as a solution to a widespread national problem of violence against women,\(^{15}\) and was thus intended to protect more

---


12. 42 U.S.C. § 13981 (1994) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender.").

13. For a discussion of the potential relevance of this jurisdictional element, see *infra* Section II.A.

14. *See, e.g.,* H.R. Conf. Rep. No. 103-711, at 385 (1994); *see also* *Morrison,* 529 U.S. at 628-35 (Souter, J., dissenting). For a discussion of the issue of congressional findings, see *infra* Section II.C.

15. Backers of the specific civil rights remedy rejected in *Morrison* included the Attorneys General of thirty-eight states. *See* *Morrison,* 529 U.S. at 653 (Souter, J., dissenting).
than half of the population of the country. This fact undoubtedly raised the practical consequences of an invalidation in *Morrison* to a significantly higher level than in *Lopez*.

Although *Lopez* and *Morrison* have been the Rehnquist Court’s only core Commerce Clause rulings in its resurrection of the judicial protection of states’ rights, the Justices have underlined their dedication to the task by several instances of aggressively using the technique of constitutional avoidance through statutory construction. In *Jones v. United States*, decided the week following *Morrison*, although the defendant complained that his prosecution under the federal arson statute, which covered property “used . . . in an activity affecting commerce,” was beyond the commerce power, the Court responded by a contracted interpretation of the law as not applying to fire-bombing an owner-occupied residence. Similarly, in *Solid Waste Agency v. United States Army Corps of Engineers*, decided a year later, the Court (5-4) rejected a statutory interpretation by the Army Corps of Engineers, which would have applied the Clean Water Act (“CWA”) to certain small ponds and mudflats that “are or would be used as habitat by . . . migratory birds which cross state lines,” in order “to avoid the significant constitutional and federalism questions raised.”

In addition to its efforts in respect to the Commerce Clause, the Court has also narrowly defined another of Congress’s sources of authority to legislate at the national level: Section 5

---

19. *Id.* at 859.
21. *Id.* at 164.
22. *Id.* at 174. Similarly, see *Alexander v. Sandoval*, 532 U.S. 275 (2001) (5-4), in which the Court held that, *even assuming* that Title VI of the Civil Rights Act of 1964 authorizes regulations that prescribe activities by state agency recipients of federal financial assistance that have only a disparate impact on racial groups, rather than intentionally discriminate against them, these regulations may not be enforced by a private right of action. The Court thereby avoided deciding whether Congress has authority under its spending power to create this kind of private cause of action against the states.
of the Fourteenth Amendment.\textsuperscript{23} The Court began this process in \textit{City of Boerne v. Flores}\textsuperscript{24} in 1997, and has regularly sought to constrain Congress's Section 5 powers since that time.\textsuperscript{25} While detailed consideration of this important piece of the federalism puzzle is beyond the scope of this article, the Section 5 developments are very helpful in informing our understanding both of the work already accomplished and to be done by the Court regarding the Commerce Clause. Indeed, the Court's decisions restraining regulatory power under Article I have prompted Congress to use Section 5 to provide methods to force states to comply with national legislation.\textsuperscript{26}

Although \textit{Morrison} confirmed \textit{Lopez} as more than a mere outlier, the overall thesis of this article is that many remaining issues must be addressed if these decisions are truly to be the harbinger of a revolution in Commerce Clause doctrine. Unless the Court provides more guidance, in regard to the Commerce Clause and other congressional powers as well, the real effect of \textit{Lopez} and \textit{Morrison} on national legislative reach will be relatively minor with few practical effects except at the margin. First, it is apparent that \textit{Lopez} and \textit{Morrison} (and the federal arson and migratory birds cases as well) raise abundant questions which must be clarified about the "substantial effects" prong of Congress's commerce power. Second, the Court must contain the enormously fertile potential of the other two prongs of the Commerce Clause: "channels"/"jurisdictional nexus" and "instrumentalities" of interstate commerce. Third, because Congress has other sources of authority to enact national regulations and influence individual states—mainly the Spending and the Taxing Clauses—the Court must also act in these areas if Congress's ability to govern is to be meaningfully limited.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{23} U.S. CONST. amend. XIV, § 5; see also Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1130-31 (2001).
\item \textsuperscript{24} 521 U.S. 507 (1997).
\item \textsuperscript{26} See cases cited in supra note 25.
\item \textsuperscript{27} A number of the sections that follow draw heavily on Jesse H. Choper & John C. Yoo, \textit{The Scope of the Commerce Clause after Morrison}, 25 OKLA. CITY U. L. REV. 843 (2000).
\end{itemize}
Section II discusses the Commerce Clause's "substantial effects" prong. Section III considers the remaining two Commerce Clause prongs. Section IV explores the potential of the spending and the taxing powers. Section V reviews suggestions advanced by several scholars that articulate factors meant to produce a workable standard for judicial review of issues of congressional power versus states' rights. Finally, ending where the Rehnquist Court's renewed protection of state sovereignty began, Section VI examines unresolved questions regarding use of the Tenth Amendment as an independent restriction on national lawmaking that affects the states as states.

II. SUBSTANTIAL EFFECTS

Both United States v. Lopez28 and United States v. Morrison29 deal primarily with the "substantial effects" prong of Commerce Clause doctrine.30 Providing an analytically sound and

30. There is certainly analytic force to Justice Thomas's Lopez concurrence that if the notion of substantial effects were in the minds of the Framers, all the other enumerated powers of Congress in Article I would be superfluous. See also Deborah Jones Merritt, The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems, 66 GEO. WASH. L. REV. 1206, 1208-09 (1998). Still, once the Court leaves original understanding as its sole ground, it is difficult to confine "commerce" to "selling, buying, and bartering," excluding "productive activities such as manufacturing and agriculture." Lopez, 514 U.S. at 585-86 (Thomas, J., concurring). Consequently, there is no realistic chance that the Court will revert to such an originalist interpretation of the Commerce Clause. For sharp disagreement on Justice Thomas's historical position, compare Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues, 85 IOWA L. REV. 1 (1999), with Randy E. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 ARK. L. REV. 847 (2003), Raoul Berger, Judicial Manipulation of the Commerce Clause, 74 TEX. L. REV. 695 (1996), and Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387 (1987). For the view that "Justice Thomas's list of sources illustrating contemporary usage hardly reflects the range of usages contemporaneous with the framing of the Constitution," see Herbert Hovenkamp, Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions, 96 COLUM. L. REV. 2213, 2229 (1996). For a different perspective, see BORIS I. BITTKER, REGULATION OF INTERSTATE AND FOREIGN COMMERCE 5-31 (1999). Specifically, Bittker notes:

[II]f changed circumstances have obliterated the presupposed existence in fact of 'activity that does not affect interstate commerce,' at least in the business or economic sphere, then an argument is not mistaken merely because it recognizes that there is no longer any economic activity that is beyond the power of Congress to regulate under the Commerce Clause.

Id.
workable standard will require the Court to tackle at least two areas mentioned in *Lopez* and *Morrison* as relevant to this prong, but where lines seem remarkably difficult to draw. First, the Court repeatedly refers to the distinction between economic (or commercial) and noneconomic (or noncommercial) activity as providing a benchmark between permissible and impermissible congressional action. This section discusses several problems in this connection: the lack of an adequate definition; the issue of aggregation and class size; and the relationship of the legislative record to these determinations. Second, a concurrence in *Lopez* and the majority in *Morrison* raise the question of whether the regulated activity is a matter of "traditional state concern" as providing an indicator for impermissible congressional power.

### A. Economic/Noneconomic Distinction

Both *Lopez* and *Morrison* rely heavily on the notion that activities with an essentially economic character are within Congress's power to legislate under the "substantial effects" prong, whereas noneconomic activity is not. In *Lopez*, Chief Justice Rehnquist emphasized that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Similarly, in *Morrison*, the Chief Justice again stressed that for all regulations the Court had upheld, "the [underlying] activity in question has been some sort of economic endeavor." A major difficulty, however, is whether any meaningful content can be supplied for this standard, i.e., what determines whether the underlying activity is economic (or commercial) as opposed to noneconomic (or noncommercial). Given the success of the law and economics movement in revealing the underlying economic motivations that might underlay various actions, many things may readily be characterized in

---

32. See *Morrison*, 529 U.S. at 611; accord *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).
33. 514 U.S. at 567.
34. 529 U.S. at 611.
economic terms, even though they may in the first instance seem noneconomic.35

Thus, while Congress may be prohibited from enacting criminal penalties for all violence, it may still be able to ban any violence that has an economic motive, purpose, or component (assuming that this conduct of a commercial sort has a substantial effect on interstate commerce). Not only would crimes that are fundamentally financial in nature, such as fraud or theft, fall under federal regulatory power, but large subsets of other offenses also could come within national jurisdiction. For example, after Lopez and Morrison, Congress probably cannot pass a law that forbids all physical assaults, but it could bar all muggings—which are, by definition, physical assaults undertaken to get the victim’s money. Congress probably could not ban all breaking and entering, but could enact a nationwide law prohibiting all robbery. Congress may not be able to prohibit possession or use of a certain product (e.g., drugs), but it could outlaw any transaction or exchange that involved that product. To push the economic/noneconomic criterion even further, neither Lopez nor Morrison prevent Congress from regulating any activity that involved the exchange of any money, or even barter. Consequently, Congress may well be able to make a federal offense of any crime that involved the use of federal currency.

In addition to raising a serious question as to whether the economic/noneconomic standard constitutes an effective constraint on the commerce power, it is also doubtful that it presents a sensible line of demarcation. In Lopez, Justice Breyer’s dissent contends that the majority’s focus solely on the nature of the act of gun possession is artificial and unrealistic, ignoring the reality of its impact: that guns in schools do affect the economy, albeit through several layers of inferences. Justice Breyer then highlights the problems of attempting to distinguish between economic and noneconomic activities in school settings:

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 ig-

nore 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?  

In sum, there is a two-fold fundamental problem. First, the Court has not carefully delineated the boundary for when the underlying activity is economic or noneconomic in character, and its plasticity seems to show that it provides neither a workable nor meaningful standard for judicial review. Second, the Rehnquist majority has not persuasively explained why an activity that indisputably produces an economic effect does not logically or analytically come within the reach of the Commerce Clause, apart from its plaint this would permit Congress to "regulate any activity that it found was related to the economic productivity of individual citizens" and would make the Court "hard pressed to posit any activity by an individual that Congress is without power to regulate."  

In an admirably thoughtful effort, examining the original understanding of the Commerce Clause and seeking to develop an intellectually coherent test for drawing sound judicially enforceable restraints, Grant Nelson and Robert Pushaw attempt to breathe life into the economic/noneconomic distinction by confining the entire sphere of congressional regulation to "commerce," and then defining "commerce" as comprehending three areas:  

The first includes buying and selling goods; the production of such merchandise through activities such as manufacturing, farming, and mining; and incidents of that production, such as environmental and safety effects. The second encompasses the compensated provision of services (such as labor, insurance, and banking), which have long been regarded as "commercial," and which form a vital element of our modern economy. The third consists of the means by which commerce is transacted—for example, the documents used to facilitate commerce (contracts, negotiable instruments, securities, letters of credit, security interests in property, etc.).
Further, in an attempt to remove most "criminal law enforcement"—which the Rehnquist majority has identified, in addition to "family law (including marriage, divorce, and child custody) . . . [and] education, where States historically have been sovereign"—Nelson and Pushaw further limit "commerce" to "consensual transactions." Recognizing that a major concern for the Lopez and Morrison majorities was whether any limits on Congress's power to regulate crime would exist if GFSZA or VAWA had been upheld, Nelson and Pushaw concede that while most crime may be characterized as economic because it involves wealth transfer, it is not "commerce" because it does not involve a bargained relation between parties.

In my view, though, the major problem with their reasoning in respect to this point is that insurance comprises a "bargained for, consensual transaction." Indeed, Nelson and Pushaw agree that crimes against insured property, even though not themselves economic activities, fall within their definition of "commerce." As a result, Congress could make it unlawful to injure any individual or business that carries insurance to cover the economic effects of the criminal act. This would seemingly include many (probably most) acts of murder, arson, robbery, and burglary. Logically, even rape or other physical assaults would be covered if the victim called on her health insurance for medical treatment. If so, it seems intuitively problematic to make one class of crimes subject to federal power just because of the presence of insurance, while the exact offense would be outside the ambit of congressional authority in its absence.

Moreover, in determining what "commerce" means for these purposes, it is difficult to distinguish between committing arson against insured property (which Nelson and Pushaw count) and growing wheat for home consumption (which they do not). Neither act is "commerce" in itself, but both have a "direct" ("automatic" may be a less tainted word) economic

40. Id. For discussion of this criterion, see infra Section II.D.
42. See supra text accompanying note 37; infra notes 75-76.
44. Id. at 1218-19.
consequence: imposing liability on an insurance company, and reducing the demand for wheat. These seem to be distinguishable from the gun law in *Lopez*, which did appear to require “piling inference upon inference” before reaching an economic impact, but not so clearly different from the statute in *Morrison* because of the “immediate” result of gender-motivated violence on absence from the work force. Similarly, the “direct” economic effect of a crime covered by insurance (i.e., insurer must pay) seems different by only the slightest degree from the “direct” economic effect of offenses against uninsured persons or property (e.g., replacing stolen or destroyed items, or obtaining medical care for personal injury).

Nelson and Pushaw’s discussion of the Endangered Species Act (“ESA”) provides a revealing illustration. They believe that Congress could forbid construction of a hospital on land that is the habitat of an endangered species “because the restriction on construction affects commercial land development... ESA may even be applied where a landowner contracts with a builder to construct a single family home on a parcel that is the habitat of an endangered species.” But suppose that the landowner decides to build the house himself. Although it is true that there is no “commercial” contract, still, it seems to me that the economic impact of the construction appears to be sufficiently similar to justify Commerce Clause coverage.

Ultimately, Nelson acknowledges that

[c]ongressional power fails, in our view, in only a few relatively discreet situations. For example, Congress probably lacks the power to regulate directly air pollution caused by home fireplaces, backyard barbecues, and lawnmowers. Even here, however, Congress probably could deal with the problem indirectly by regulating the construction or manufacturing [or sale] of such appliances.

Indeed, Nelson and Pushaw further observe that “Congress arguably should be permitted to regulate noncommercial activities because many of them have a great impact on interstate commerce,” albeit one that requires a series of inferences.

45. 514 U.S. at 567.
47. Id. at 1230.
This all leaves very little beyond national governance and comes very close to reinstating the all-encompassing pre-Lopez regime. In the end, Nelson and Pushaw’s major effort to curtail the boundless commerce power that their analysis seems to imply is by urging the Court to “halt the increasing reliance by Congress on the Commerce Clause” to regulate a noncommercial activity for the purpose of imposing “a specific cultural or moral viewpoint,”\(^49\) pointing out that “the Framers believed that national uniformity is good in commerce but bad in political, social, cultural, and moral matters.”\(^50\)

This presents at least two significant difficulties. First, the areas of Congress’s present Commerce Clause authority that would be primarily affected by application of this approach would be in respect to the “channels” and “instrumentalities” prongs. For it has been congressional use of the “jurisdictional nexus” that has most successfully allowed it to approach the creation of a national police power.\(^51\) Indeed, Nelson and Pushaw specifically urge elimination of these two prongs as independent sources of regulatory capacity.\(^52\) As will be discussed shortly, this would have both beneficial and detrimental consequences.\(^53\)

The second difficulty, however, presents the major obstacle. The distinction between “economic” or “commercial” issues and “political, social, cultural, and moral matters” is exceedingly blurred. “All decisions about what the law should be are moral decisions in part. To which side of the ‘moral economic’ divide could we assign the question whether to have a minimum wage, or progressive taxation, or endangered species protection?”\(^54\) Is barring possession or use of marijuana an attempt by Congress to impose a political, moral, cultural, or social view? Or does it seek to regulate an international business? Into which category does use of faith-based organizations fall when Government enlists them to help solve such problems as

\(^{49}\) Id. at 12.

\(^{50}\) Id. at 113.

\(^{51}\) See infra Section III.A.

\(^{52}\) Nelson & Pushaw, supra note 30, at 112.

\(^{53}\) See infra Section III.A.

drug addiction, juvenile delinquency, and teenage pregnancy? Questions such as these, among a number of others, highlight the range of quandaries presented by the economic-noneconomic distinction advanced by the Court and related theories of prominent commentators.

B. The Class Aggregation Principle and Its Scope/Content

In *Wickard v. Filburn*, the Court upheld congressional regulation of a farmer’s personal consumption of his own privately grown small acreage of wheat because the effects of such use, when aggregated with that of other farmers, would have a substantial effect on prices in the national wheat market. *Lopez* and *Morrison* expressly reaffirm this aggregation principle, a core component of the “substantial effects” prong. The question that the Court continues to leave unelucidated, however, is its breadth and reach. On the one hand, Chief Justice Rehnquist ruled that “we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases.” On the other hand, he observed that the aggregation principle has only been held to operate in areas where the “regulated activity was of an apparent commercial character,” (a statement contradicted by the *Wickard* Court’s analysis). Still, the question remains whether the aggregation principle can be meaningfully limited. Otherwise, this presents another strong basis for concluding that the Court’s work to check the commerce power will flounder.

Donald Regan suggests that the aggregation principle should apply only to products and services that have a unified

55. 317 U.S. 111 (1942).
56. *Id.* at 127-28. Specifically, the Court stated: [E]ven 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.’ . . . That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

*Id.*
57. *Morrison*, 529 U.S. at 613.
58. *Id.* at 611 n.4.
59. See supra note 56.
national market and thus produce interstate competition. But Nelson and Pushaw correctly observe that "in our integrated national economy almost any commercial activity [even businesses with a purely local character] might reasonably be viewed as affecting interstate commerce." For example, while a Mom and Pop produce store may not participate in the national market, many such businesses compete with the interstate grocery chain located nearby. Because of our intertwined national economy, the local fruit and vegetable stands are equivalent to the farmers in *Wickard*.

Another unresolved aspect of the aggregation principle that threatens to upset the Court's program to reduce the Commerce Clause concerns the scope and content of the class. For example, the law in *Wickard* regulated corn, cotton, rice, peanuts, and tobacco, as well as wheat. Suppose that only the home consumption of wheat had any significant impact on interstate prices. Could the production for home consumption of the other crops be regulated under the aggregation principle, or must each commodity be considered separately? If Congress defined the national problem as "securing the survival of farmers by maintaining agricultural prices," the former alternative might seem eminently reasonable. But it would also produce a very expansive source of congressional governance.

A similar analysis may be applied to the Endangered Species Act. Once we assume that the ecology of the United States as a whole represents an economic (or commercial) matter which has a substantial effect on interstate commerce—seemingly a reliable proposition—can Congress preserve particular animals from extinction even though it does not appear that they themselves have any significant impact on interstate commerce? If *all* endangered species may be aggregated, it is fair to contend that this "would justify any federal legislation."

It has also been suggested that certain language in *Lopez* implies a "comprehensive-scheme" principle which "may allow Congress to regulate intrastate activities that are *not* themselves commercial or economic, so long as the regulation is integral to

---

60. See Regan, supra note 54, at 589-90.
62. Nagle, supra note 9, at 192 (discussing the Endangered Species Act after *Lopez*).
the success of a larger valid scheme” of interstate commercial regulation. If so, this would not only justify federal control over all agricultural products and all components of the nation’s ecology, but would also sustain the many lower courts that have upheld Congress’s bar on possession of a machine gun. Although the conduct at issue is neither economic nor commercial, prohibiting it may be fairly characterized as “integral to a larger federal scheme for the regulation of trafficking in firearms.”

Similarly, since Oregon’s permissive assisted suicide law has been used only seventy times since 1997, Lopez and Morrison might well make it difficult to find a substantial effect on interstate commerce when an Oregon physician prescribes lethal drugs for a terminally ill patient. But the “comprehensive-scheme” approach, relying on a national drug policy, might provide the solution.

Indeed, how the regulatory scheme is characterized, or whose characterization (Congress or Court) governs, can make all the difference. This point has been sharply illustrated in respect to whether the Federal Government has the power to criminalize the cultivation, possession, use, or sale of marijuana that state law permits to be used for medicinal purposes:

If the class of activity being regulated is the entire illegal-marijuana market, or even the entire illicit-drug market, then of course in the aggregate the transactions have a substantial effect on commerce or would be an essential part of the larger regulatory scheme. However, one could argue that the class is the purely in-state legal medical marijuana growers and users, and that there is no national market for this class of activity. Likewise, one could argue that the federal regulatory scheme concerns only the national market for illegal marijuana, not the local market for the distinguishable medicinal marijuana.

63. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects, 46 VILL. L. REV. 1325, 1332 (2001) (arguing that Commerce Clause review will encourage Congress to legislate more broadly and comprehensively than it would otherwise do).

64. See citations in id. at 1335 n.48.

65. United States v. Franklyn, 157 F.3d 90, 94 (2d Cir. 1998).


67. Id. at 1589.

68. Id. at 1590.
As described, both the aggregation and comprehensive-scheme principles have an extremely broad reach. If the results in Lopez and Morrison herald the future, the Court must be prepared to say more about these approaches.

C. Legislative Record

In Lopez, the Court flagged the importance of the absence in either the statute or its legislative history of express congressional findings about the relationship between possessing firearms in a school zone and a substantial effect on commerce, when the link between them was unclear. In Morrison, however, VAWA came with extensive congressional findings detailing the substantial effect that gender-motivated violence had on the economy, for instance, billions of dollars in diminished productivity every year through lost wages and health care costs. Although the Court did not dispute these findings, it rejected their relevance to the law's constitutionality. Invoking Marbury v. Madison, the Court ruled that "[s]imply 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 this Court." The Morrison majority found that VAWA suffered from the same doctrinal deficiencies as GFSZA. The link between violent crime and interstate commerce was too attenuated because, as in Lopez, if the Court allowed such a causal chain to justify federal regulation, it would be permitting "Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." Regardless of the strength of the leg-

69. 514 U.S. at 562-63.
70. 529 U.S. at 615.
71. Id. at 631-34 (Souter, J., dissenting).
72. 5 U.S. (1 Cranch) 137 (1803).
73. Morrison, 529 U.S. at 614 (quoting Lopez, 514 U.S. at 557 n.2).
74. Id. (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring)).
75. Id. at 615-17.
islative record, if the Court allowed Congress to regulate gender-motivated violence because of its economic effects, it feared that it would concede to Congress the power to regulate all crime.\(^7\)

There are both similarities and differences in respect to congressional factfinding efforts between the Commerce Clause decisions and those in which the Court has held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment. The two sets of rulings are equivalent in that both address the scope of Congress’s substantive interpretive authority, in \textit{Lopez} and \textit{Morrison} concerning what amounts to a substantial effect on interstate commerce, and in the Section 5 cases about what constitutes a violation of due process and equal protection. They are dissimilar in regard to their conclusions about the shortcomings of the record that Congress assembled. As noted above, there were no findings whatsoever in \textit{Lopez}, and thus no occasion for the Court to identify how certain additions or modifications might have made a difference, whereas in \textit{Morrison}, no amount of adjustments to the record would have changed the Court’s conclusion.

In each of the Fourteenth Amendment opinions, however, the Court spoke to why the congressional record was inadequate, and suggested the kinds of efforts that could work to sustain the invalidated laws.\(^77\) In \textit{City of Boerne v. Flores},\(^78\) which involved the Religious Freedom Restoration Act’s (“RFRA”) award of a religious exemption from most laws of general applicability that substantially burden free exercise, the Court emphasized that “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry,” instead of those which only “place incidental burdens on religion.”\(^79\) In \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank},\(^80\) invalidating the Patent Remedy Act, which made states subject to federal court actions for patent infringement, “Congress identified no

\(^{76}\) Id.

\(^{77}\) For the view that “despite its claims [in Section 5 opinions] of purported deference to Congress’s factfinding, a phantom assessment suggests that no amount of factfinding by Congress could pass muster,” see Ruth Colker & James J. Brudney, \textit{Dissing Congress}, 100 MICH. L. REV. 80, 123-28 (2001).

\(^{78}\) 521 U.S. 507 (1997).

\(^{79}\) Id. at 530.

\(^{80}\) 527 U.S. 627 (1999).
pattern of patent infringement by the States,” nor found “that state remedies were constitutionally inadequate.” In *Morrison*, the Court also rejected the Government’s reliance on Section 5 to sustain VAWA’s civil remedy against perpetrators of gender-motivated violence. In addition to ruling that the law failed the state action requirement of the Fourteenth Amendment because it was not “directed . . . at any State or state actor,” the Court observed that “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,” and that the remedy had not been “directed only to those States in which Congress found that there had been discrimination.” In *Kimel v. Florida Board of Regents*, which held that Congress could not abrogate the states’ immunity from suits in federal court for actions in violation of the Age Discrimination in Employment Act (“ADEA”), the Court reasoned that “the ADEA’s legislative record confirms . . . that Congress never identified any pattern of age discrimination by the States . . . that rose to the level of constitutional violation . . . under the applicable equal protection, rational basis standard.” Finally, the Court’s most recent decision in *Board of Trustees of the University of Alabama v. Garrett*, applying *Kimel’s* rationale to the employment provision (Title I) of the Americans with Disabilities Act (“ADA”), was similarly based on the inadequacy of findings to meet a minimum threshold, and “represents the full emergence of this new intensive and skeptical review of legislative materials.”

81. *Id.* at 643.
82. *Morrison*, 529 U.S. at 626. The Court could have, but did not, advert to the lack of any evidence before Congress that perpetrators may have been “jointly engaged with state officials in the prohibited action,” which facts could support a finding of state action. United States v. Price, 383 U.S. 787, 794 (1966).
83. *Morrison*, 529 U.S. at 626.
84. *Id.* at 627.
86. *Id.* at 86. The record did contain “a key legislative proponent’s floor statements describing employment discrimination against the elderly, and a California legislative study documenting age discrimination by public agencies.” Colker & Brudney, *supra* note 77, at 109.
The Court noted a number of instances in which the legislative hearings and record were wanting. Although Congress made a "general finding" that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem," and the "record assembled by Congress includes many instances to support such a finding," the "great majority of these incidents do not deal with the activities of States," but rather with private employers and units of local government (who cannot be treated as the states themselves for purposes of immunity from suit). Further, while the law's defenders "cite half a dozen examples from the record that did involve States... these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."^

The Court continued:

[The] host of incidents... [in the appendix to Justice Breyer's dissent] consists not of legislative findings, but of unexamined, anecdotal accounts of "adverse, disparate treatment by state officials."... Of course... "adverse, disparate treatment" often does not amount to a constitutional violation where rational-basis scrutiny applies. These accounts, moreover, were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities, which made no findings on the subject of state discrimination in employment. And, had Congress truly understood this infor-

89. Garrett, 531 U.S. at 369.
90. Id. at 369-70.
91. Compare Phillip P. Frickey & Steven S. Smith, Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique, 111 Yale L.J. 1707 (2002), in which Frickey and Smith state:
   A case could be made that the report of a task force authorized for such a specific purpose is more likely to be noticed by members and staff than a routine committee report prepared days before floor action on an important measure. Moreover, in this instance the work of the task force was substantial: It held hearings in each state, attended by more than 30,000 people, and collected numerous examples of apparent disparate treatment of persons with disabilities. Id. at 1735.
92. Compare the reasoning of Chief Justice Burger's plurality opinion in Fullilove v. Klutznick, 448 U.S. 448 (1980), sustaining Congress's power under § 5 to require that a percentage of the appropriation of construction funds be used for "minority business enterprises." Id. at 487, 492. The provision originated as a floor amendment, never previously considered by any congressional committee. There was some floor discussion that "cited the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises," id. at 459 (emphasis added), but
mation as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act’s legislative findings.93

Although the main corpus of the Court’s consideration of the need for, and boundaries of, the legislative record is contained in Section 5 opinions, there would appear to be no special reason to believe that the Court will not employ its newly developed approach and apply the same (or at least a similar) standard of scrutiny under the Commerce Clause in regard to the topics already presented in this section as well as other approaches to be advanced in Section V.94 The similarities of the issues presented has already been discussed above. Moreover, just as the pre-Boerne Section 5 decisions upholding congressional power involved both statutes preceded by extensive hearings and con-

the MBE provision dealt with funds to be used for state and local government public works projects. In support of his conclusion that Congress had “abundant evidence” regarding state and local contracting, Chief Justice Burger relied mainly on a House Committee on Small Business report that had been presented in connection with other proposed legislation eight weeks before the MBE provision was introduced on the floor of the House, and never mentioned during the brief discussion on the floor. Id. at 550 n.25 (Stevens, J., dissenting). This 1977 report of the Small Business Committee, Chief Justice Burger emphasized, summarized a 1975 report of another House subcommittee that dealt with the low participation of minority businesses in federal construction. Id. at 465. The Chief Justice observed that the 1975 subcommittee report had, in turn, taken “full notice” of reports submitted to Congress by the General Accounting Office and the Civil Rights Commission, the latter of which detailed the barriers that existed for minority businesses respecting federal, state, and local government contracts. Fullilove, 448 U.S. at 466.

93. Garrett, 531 U.S. at 370-71. In a footnote, the Court added:

Only a small fraction of the anecdotes JUSTICE BREYER identifies in his Appendix C relate to state discrimination against the disabled in employment. At most, somewhere around 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States, and most of them are so general and brief that no firm conclusion can be drawn. The overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA.

Id. at 371 n.7. But “there would seem to be no reason in principle why Congress could not reasonably assume that state-sanctioned discrimination in non-employment settings . . . might also pervade state employment decisions. Certainly such evidence would be probative on the question whether there is a state problem in need of a federal remedy.” Vikram D. Amar & Samuel Estreicher, Conduct Unbecoming a Coordinate, 4 GREENBAG 2d 351, 354 (2001) (discussing the reasoning of Garrett).

94. But see Robert Post & Reva Siegel, Protecting the Constitution From the People: Garrett-ing Section Five Power, 78 IND. L.J. (forthcoming 2003) [hereinafter Post & Siegel, Protecting the Constitution] (noting that the “Court would not require Congress in the exercise of its Commerce Power to adopt such juricentric rules of evidence”).
clusions, as well as laws, with no findings or records whatever, so, too, was this true of pre-Lopez Commerce Clause enactments.

In addition to the thorny matter of the quantum of evidence on an appropriate issue that the Court will require, a wide range of other questions demands responses. A thorough examination of the problem lies beyond the scope of this article, but some of the difficulties may be briefly sketched: Will satisfactorily documented congressional findings suffice, or must an actual hearing be held? Will extensive hearings be adequate, even though no findings are made? "Must the evidence be found in the record so that the Court can evaluate it, whatever the reasons members offered for the record? Or, must the Court be persuaded that (1) the evidence was available, and (2) members of

95. Compare South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) ("Voluminous legislative history" showed, inter alia, "unremitting and ingenious defiance of the Constitution" in the enactment of literacy tests in various states.), with Katzenbach v. Morgan, 384 U.S. 641, 669 n.9 (1966) (Harlan, J., dissenting) ("There were no committee hearings or reports referring to this section, which was introduced from the floor during debate on the full Voting Rights Act.").

96. Compare Perez v. United States, 402 U.S. 146, 156 (1971) (noting that "reports and hearings ... supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue"); Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (observing that the legislative "record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants"); Heart of Atlanta, 379 U.S. at 252-53 (stating the record is "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce" and "voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel"), with United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) (finding that challenges to the legislative judgment "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it"); see also Archibald Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91, 105 (1966) ("No case has ever held that a record is constitutionally required. ... [There are] cases upholding congressional legislation under the Commerce Clause prior to the 1930s, much of which apparently rested upon factual conclusions for which no legislative record could be cited.").; contra A. Christopher Bryant & Timothy J. Simeone, Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes, 86 CORNELL L. REV. 328, 356-59 (2001) (discussing 1920s decisions giving "rigorous review of the legislative record").

97. After the Court granted certiorari in Lopez, Congress amended the Gun-Free School Zones Act to include findings regarding the effects of the problem on interstate commerce. But no hearings were ever held as a predicate to these findings.

98. Bryant & Simeone, supra note 96, at 361 (noting that the Civil Rights Act of 1964 decisions so hold).
Congress deliberated on it?" Will the Court discount hearings where "committee chairs ... pack their committees with like-minded thinkers ... determine when and what the committee investigates, and ... arrange hearings in ways that frustrate the search for the truth"? Will the Court mandate "legislative record review that is akin to agency hard look review"?

It is generally acknowledged that "Congress educates itself not just through structured record evidence but through a range of informal contacts—including local meetings with constituents, ex parte contacts between members (or staff) and lobbyists, and exchanges with executive branch representatives." Thus, the legislative history is much richer than the legislative record. Beyond committee hearing testimony and committee reports, members have at their disposal written documents drafted in party leadership offices, congressional support agencies, and members' caucuses, and by committee and personal staff. The analyses of many of these sources, including those of the Congressional Research Service, are provided to members on a confidential basis. And, crucially, the information cumulates over

---

99. Frickey & Smith, supra note 91, at 1741; see also id. at 1745 ("Perhaps the Court itself will undertake the responsibility of weighing the evidence and is merely requiring Congress to assemble the factual basis for judicial review.").

100. Neil Devins, Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis, 50 DUKE L.J. 1169, 1183 (2001). "[T]here is reason to think that special-interest politics, not factfinding in the public interest, dominate[s] congressional decisionmaking." Id. at 1200.

101. See Buzbee & Schapiro, supra note 88, at 130. For criticism of this approach, see Bryant & Simeone, supra note 96, at 370-73. For the view that Congress cannot conduct mini-trials, with full adversary hearings, as would "a court of competent jurisdiction." Congress does not possess the procedures or the time to delve into the circumstances of particular cases so as to characterize them in their full factual complexity. Instead Congress surveys the state of the nation by conducting hearings in order to make broad judgments about social trends and problems. Legislative hearings educate the nation and summon it to action; they have political functions that are without judicial analogy. These functions would be undermined were Congress required to transform legislative hearings into disinterested judicial inquiries.... see Post & Siegel, Protecting the Constitution, supra note 94.

102. Colker & Brudney, supra note 77, at 117.
many years, often, if not typically, long before a particular measure is debated and enacted.\textsuperscript{103} Accordingly, "[c]an legislators base their actions on their assessment of constituent views? Do representative samples of concerned citizen or official views ever suffice to create a record? Can information adduced by task forces or other delegated fact-gathering vehicles ever suffice to create an adequate record?"\textsuperscript{104} Finally, must the legislative record be current with contemporary conditions and if so, how close in time? For example, suppose that certain facts—such as the refusal of many states to employ disabled workers,\textsuperscript{105} or the practice of many public employers to engage in arbitrary age discrimination (especially among professionals, managers, and bureaucrats)\textsuperscript{106}—that supported a law at the time when passed, no longer exist?

D. Areas of Traditional State Concern

A final matter that the Court has addressed under the "substantial effects" prong is a subject first raised in Justice Kennedy's concurrence in \textit{Lopez} and then incorporated into the majority opinion in \textit{Morrison}: activities that are of "traditional state concern." The underlying offense in both \textit{Lopez} and \textit{Morrison} was essentially criminal in nature and would ordinarily fall under the state's police power. It was this incursion that prompted Justice Kennedy to worry that "[w]ere 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."\textsuperscript{107}

\begin{flushright}
\textsuperscript{103} Frickey & Smith, \textit{supra} note 91, at 1734-35; see also Bryant & Simeone, \textit{supra} note 96, at 384-87.
\textsuperscript{104} Buzbee & Schapiro, \textit{supra} note 88, at 133.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} See Colker & Brudney, \textit{supra} note 77, at 110-11; see also Carolene Products, 304 U.S. at 153 ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.").
\textsuperscript{107} \textit{Lopez}, 514 U.S. at 577 (Kennedy, J., concurring). Justice Kennedy contended that if the line of demarcation between the Federal Government and the states were blurred, "political responsibility would become illusory," and that "[t]he resultant inability to hold either branch of the government answerable to the citizens . . . [would be] more dangerous
Indeed, it is this venerable "dual federalism" dynamic that appears to me to be the driving force at the core of the Rehnquist Court's overall revival of judicially secured federalism, a process that had its contemporary roots in the notions of "traditional aspects of state sovereignty" and "integral operations in areas of traditional governmental functions" expressed by then-Justice Rehnquist's opinion for the Court in *National League of Cities v. Usery*. Thus, in *Lopez* and again in *Morrison*, the majority identified specific areas—"family law (including marriage, divorce, and child custody)," "criminal law enforcement," and "education"—"where States historically have been sovereign." In both opinions, Chief Justice Rehnquist then expressed the fear that "if we were to accept the Government's arguments [to sustain congressional power], we are hard pressed to posit any activity by an individual that Congress is without power to regulate."

Defining "areas of traditional state concern," "where States historically have been sovereign," however, is no easy task. The Court has undertaken to develop reasonably objective criteria to cabin this intuitively attractive value but has failed, on a number of past occasions, perhaps most famously in a seven-decade effort to grant states constitutional immunity from federal taxation, and most recently, in *Usery's* attempt to articulate a standard for affording states a constitutional immunity from federal regulation, abandoned in just nine years.

On the one hand, every area might be said to be an area of traditional state concern until the federal government takes an interest in it; on the other hand, with regard to *Lopez*

---

109. Id. at 852.
110. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 613.
111. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 613.
114. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539, 548 (1985) (noting that "this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*," and commenting on "the elusiveness of objective criteria for 'fundamental' elements of state sovereignty").
specifically, the federal government has long taken an interest in aspects of primary and secondary education and in regulating firearms.\footnote{115. Regan, supra note 54, at 566.}

Resurrecting this enterprise requires the Court to do what it thus far has been unable to accomplish: define and describe how the broad scope of "traditional state concerns" should be used in future Commerce Clause cases.

III. ADDITIONAL COMMERCE CLAUSE PRONGS

Even if the Court succeeds in addressing the issues discussed in Section II, Congress has a group of other imposing tools in its arsenal to achieve federal control over local matters. This section examines the two other prongs of the commerce power—"channels"/"jurisdictional nexus" and "instrumentalities" of interstate commerce—prominently mentioned but not applied in \textit{United States v. Lopez}\footnote{116. 514 U.S. 549 (1995).} and \textit{United States v. Morrison}.\footnote{117. 529 U.S. 598 (2000).} Section IV considers two different sources of federal authority—the Spending Clause and the Taxing Clause—as avenues of as yet virtually unrestrained national governance. The Court must also do more work in respect to all of these if it intends to produce a true shift away from encompassing federal legislative power.

A. Channels of Interstate Commerce: Jurisdictional Element/Nexus

Although the Court's discussion of the "substantial effects" prong of the Commerce Clause in \textit{Lopez} and \textit{Morrison} runs deep, both rulings explicitly reaffirmed and left wholly unqualified the other two "broad categories of activity that Congress may regulate under its commerce power."\footnote{118. \textit{Lopez}, 514 U.S. at 558.} Since neither \textit{Lopez} nor \textit{Morrison} involved a statute that included a jurisdictional element (or jurisdictional nexus), i.e., in which the subject of federal control itself is or has been in interstate commerce, the Court gave no indication of how elastic these might be to inoculate similar legislation from constitutional invalidation. Indeed,
under the current state of the law, although less than fully developed, the "jurisdictional nexus" prong of Commerce Clause analysis seems to permit virtually unlimited congressional regulation. This dominion, clearly established in opinions of the Court well before the "substantial effects" approach, may be seen as even more threatening to the primary goals and ideas envisioned by the Framers.

The fact is that matters of finance, commerce, and business motivated the call of the Constitutional Convention in Philadelphia in 1787. Under the Articles of Confederation, the infant nation was beset with severe economic problems. Protectionist-minded states established discriminatory and burdensome artificial trade barriers against their sister states as well as against foreign nations. Other countries preyed on the newly established industries in the states by refusing to deal with them on reasonable terms. The individual states were incompetent to cope with these problems of commerce, and, under the Articles of Confederation, Congress was equally powerless.

Thus, in brief, the great purpose of the Commerce Clause, although assuredly limited in its ultimate reach, was to enable Congress to facilitate interstate trade, to promote development of national industries and markets and, generally, to encourage economic growth. Yet, in Champion v. Ames, the famous Lottery Case, the Court ruled that the commerce power authorized Congress to prohibit the transportation of lottery tickets across state lines, even though these articles were intrinsically harmless and the law's unambiguous purpose was the social regulation of public morals rather than some commercial or economic goal—a decision whose rationale led "to the conclusion that Congress may arbitrarily exclude from commerce among

120. BEVERIDGE, supra note 119, at 310-12.
121. SWISHER, supra note 119, at 25.
122. Stern, supra note 119, at 1337-41.
124. 188 U.S. 321 (1903).
the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive.\textsuperscript{125}

In my view, if the judicial branch took a wrong turn regarding the original understanding of the restricted scope of the Commerce Clause, this is where it occurred,\textsuperscript{126} when it sustained congressional power to hinder interstate trade and, effectively, to destroy those national industries and markets that it wished.\textsuperscript{127} Soon after the Lottery Case, and well before the New Deal revolution, the Court upheld federal provisions of the Mann Act that prohibited the transportation across state lines of women not just for prostitution, but also for noncommercial immoral purposes.\textsuperscript{128} The Court did dramatically alter this course in \textit{Hammer v. Dagenhart},\textsuperscript{129} invalidating a federal bar on the interstate transportation of goods produced by child labor on the ground that "[t]he grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."\textsuperscript{130} But after

\begin{footnotesize}
\begin{itemize}
  \item[125.] \textit{Id.} at 362.
  \item[127.] This, of course, is not to say that Congress may never prohibit interstate transportation of persons or goods. "Diseased cattle, inadequately secured toxic chemicals or high explosives, rowdy passengers, firearms or weapons on airplanes—all these Congress may exclude in its own pursuit of the safety and convenience of the systems themselves." Regan, \textit{supra} note 54, at 578. As early as \textit{The Daniel Ball}, 77 (10 Wall.) U.S. 557 (1870), the Court recognized that the commerce power "authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce... whether that legislation consists in requiring the removal of obstructions to their use." \textit{Id.} at 564 (emphasis added). The \textit{Shreveport Rate Cases}, 234 U.S. 342 (1914), extended that authority beyond physical obstructions to economic ones as well, even when the object of the regulation was itself intrastate commerce. See Richard D. Friedman, \textit{The Sometimes-Bumpy Stream of Commerce Clause Doctrine}, 55 ARK. L. REV. 981 (2003). "But lottery tickets, or for that matter goods manufactured under substandard labor conditions, do not pose the same sort of threat to the trucks, trains, ships, or planes carrying them." Regan, \textit{supra} note 54, at 578.
  \item[128.] See, \textit{e.g.}, \textit{Caminetti v. United States}, 242 U.S. 470 (1917); \textit{Hoke v. United States}, 227 U.S. 308 (1913).
  \item[129.] 247 U.S. 251 (1918).
  \item[130.] \textit{Id.} at 273-74.
\end{itemize}
\end{footnotesize}
the New Deal switch in time, the Court emphatically reaffirmed the *Lottery Case* (and Justice Holmes’s dissent in *Dagenhart*):

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare even though the state has not sought to regulate their use. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.\(^\text{131}\)

This “jurisdictional nexus” approach was subsequently relied on in cases such as *Scarborough v. United States*,\(^\text{132}\) which upheld federal criminalization of firearm possession by felons, and *Cleveland v. United States*,\(^\text{133}\) which upheld federal prohibition of polygamy.

If the Court allows this line of doctrine to continue unqualifiedly, Congress may well find that its ability to engage in social regulation will be little slowed. *Lopez* and *Morrison* notwithstanding, Congress still may use its control over the channels of interstate commerce to establish a “plenary police power that would authorize enactment of every type of legislation”\(^\text{134}\) in regard to noneconomic as well as economic conduct. To this day, for instance, under what has been termed “a fetishism of state-line crossings,”\(^\text{135}\) it is a federal crime for a felon, living within a single state and never having crossed state lines, to possess a firearm.\(^\text{136}\) Even after *Lopez* and *Morrison*, this statute has been

\(^{131}\) United States v. Darby, 312 U.S. 100, 114-15 (1941).
\(^{133}\) 329 U.S. 14 (1946).
\(^{134}\) *Lopez*, 514 U.S. at 566.
\(^{135}\) Regan, *supra* note 54, at 562.
\(^{136}\) See 18 U.S.C. § 922(g) (1994). The relevant portion of the statute states:

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g).
upheld by every federal court of appeals because of the presence of a jurisdictional element. The firearms have been shipped or transported in interstate or foreign commerce. At trial, the prosecution need only show that the gun was manufactured in another state, even if many years earlier.

Moreover, federal statutes today penalize persons who cross a state line with the intent to commit designated acts. Thus, to take VAWA, if Congress were to prohibit anyone from crossing state borders with the intention of committing gender-motivated violence, this would provide the "jurisdictional element" missing in both Lopez and Morrison. Even further, is it possible that Congress could (a) prohibit travel in (or use of) interstate commerce in the future by persons who have committed such violence in the past, and (b) prohibit such violence in the future by persons who have traveled in (or used) interstate commerce in the past? To take Lopez, could Congress pass a law prohibiting the possession within a school zone of any firearm that has ever traveled in interstate commerce—which would almost certainly include almost every firearm in the country?

There is precedent that may support such comprehensive national regulatory impact. In United States v. Sullivan, the Court addressed the application of the Federal Food, Drug, and Cosmetic Act to a local pharmacist engaged in purely intrastate commercial transactions. The pharmacist had purchased pills contained in large bottles, upon which federal warning labels


138. See United States v. Singletary, 268 F.3d 196, 200 (3d Cir. 2001) ("[T]he transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession a sufficient nexus to interstate commerce to fall within the ambit of the statute.").


140. 332 U.S. 689 (1948).
had been placed, from a wholesaler who had received the labeled bottles from outside the state. The defendant then had split them into smaller bottles for resale to instate customers. He had violated the Act by failing to place the federal warning label on the smaller bottles. Upholding the conviction, the Court found that Congress could regulate this purely local activity because the pills at one point had traversed the channels of interstate commerce. The Court built upon earlier cases that had approved federal health and safety laws prohibiting the movement of diseased livestock or impure or misbranded foods and drugs across state lines.\textsuperscript{141}

Moreover, as indicated above, the Court’s decisions have not required that any nexus exist between the time that persons cross state borders and the time they engage in the prohibited activity. Due to the nationalization of the economy and our society, since almost every person and every product in the nation crosses a state boundary at some point, the Court’s willingness so far to respect Congress’s plenary control over the channels of interstate commerce threatens the very results that \textit{Lopez} and \textit{Morrison} fear. Take two further examples that test the Court’s suggestion that family law remains a preserve of state regulation: First, suppose that Congress passed a law requiring that anyone traveling in interstate commerce, either in the past or in the future, who wishes to obtain a divorce, must obtain a divorce that meets federal standards. Second, in the Defense of Marriage Act, Congress allowed states to refuse to recognize same-sex marriages granted by other states. Suppose Congress went further and (a) refused to allow anyone to cross state boundaries who was married under a same-sex marriage law, or (b) refused to allow someone to enter a same-sex marriage who had previously traveled from one state to another. Such laws would succeed in imposing a virtually nationwide rule of conduct without relying upon the “substantial effects” prong of the Commerce Clause. If Congress could accomplish this by using the “channels” of interstate commerce prong of the Commerce Clause, there would appear to be no subjects it could not reach. Conse-

\textsuperscript{141} See, e.g., McDermott v. Wisconsin, 228 U.S. 115 (1913) (upholding federal food and drug law requiring that prescribed labels for goods shipped in interstate commerce must remain on the goods until sold to the ultimate consumer); see also Reid v. Colorado, 187 U.S. 137 (1902).
quently, if the Court is to continue down the path it has sketched so far, it will need to tighten the jurisdictional element by making clear how close the nexus must be between the crossing of state boundaries and the commission of an act subject to federal regulation.142

B. Instrumentalities of Interstate Commerce

As was true with respect to the “channels” prong, the laws in neither *Lopez* nor *Morrison* involved regulation of the “instrumentalities” of interstate commerce. Like the “jurisdictional nexus,” this aspect of the commerce power potentially provides Congress with an extremely broad source of control.

Under the “instrumentalities” prong, although less clearly delineated than the “channels”/“jurisdictional nexus” prong, “Congress may properly make whatever regulations it sees fit for the existence, safety, efficiency, and accessibility”143 of the nationwide transportation and communications networks by and through which commerce flows.144 Indeed, Congress has gone further and criminalized activity that *uses* the “instrumentalities” of interstate commerce. Thus, federal mail and wire fraud statutes make it a crime to engage in fraud while using the telephone or the mails, and could analogously do so for activities that use other networks, such as the railroads, interstate highways, and the Internet.

While as yet not fully exploited by Congress, it is easy to imagine how the “instrumentalities” prong could sweep a nearly limitless amount of intrastate activity, both economic and noneconomic, within the ambit of national authority. For example, even if we assume that robbery of an intrastate bank is beyond the “substantial effects” prong, if the bank were a member of the Federal Reserve System, which facilitates nationwide activity by financial institutions, it might be brought under the “instrumentalities” prong. Note that mail and wire fraud require only one use of the mails or the phones to trigger federal jurisdiction.

Could Congress add other crimes apart from fraud to the mail and wire statutes: conspiracy to commit murder, robbery, assault, and so on? Seemingly, all it would take is one phone call in the course of planning to rob or attack a victim to make something a federal crime.\textsuperscript{145} Further, could Congress make it a federal offense to use the interstate highways, or any road connected to a federal road, in the commission of any unlawful act? Could Congress make it a federal crime to use the Internet, or a computer network attached to the Internet, to engage in designated misconduct? As with Congress's power to regulate the channels of interstate commerce, the nationalization of the economy and society gives the legislature's power over the instrumentalities of interstate commerce a potentially all-encompassing reach which must be checked by the Court if its rejuvenation of states' rights is to succeed.

IV. OTHER MAJOR SOURCES OF REGULATORY AUTHORITY

A. Spending Power

One of Congress's most effective means to persuade state action on any regulatory matter is its ability to use its spending power conditionally. The Spending Clause provides that Congress has the "Power . . . to pay the Debts and provide for the . . . general Welfare of the United States."\textsuperscript{146} While some, like James Madison, argued that federal spending was limited to the subjects enumerated elsewhere in Article I, Section 8, in United States v. Butler,\textsuperscript{147} the Court adopted the opposite position, that the spending power was a grant of independent authority, espoused most famously by Alexander Hamilton.\textsuperscript{148} Since then, the Court has interpreted the spending power to grant Congress broad discretion to determine which expenditures advance the "general Welfare of the United States." By attaching conditions to its disbursement of federal funds to states (and to indi-
individuals, too), Congress has extensive authority to accomplish results that it could not require directly. *South Dakota v. Dole*, the Court's most recent extended explanation of the spending power, provides an informative example. In *Dole*, Congress required that five percent of allocable federal highway funds be withheld from any state that did not have a twenty-one-year-old drinking age. With then-Justice Rehnquist (the author of both *Lopez* and *Morrison*) writing, the Court upheld the condition on the grant, even though it assumed that Congress could not regulate drinking ages directly.\(^{150}\)

Despite the recent re-emergence of judicial protection of states' rights in its various forms, the Court has not qualified the breadth of Congress's broad conditional spending power.\(^{151}\) The articulated limitations may be found in *Dole*. First, the Court found that the drinking age condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."\(^{152}\) Since this "directly related" criterion has not yet been found to be unsatisfied in any Supreme Court decision, its limiting force is unclear and problematic. Moreover, given the breadth and quantity of federal expenditures, it is likely that Congress would be able to use some existing spending program to encourage virtually any imaginable conduct. If not, Congress could, of course, make a new authorization of funds and impose its desired condition.

Take the provision struck down in *United States v. Morrison*.\(^{153}\) Congress could produce a civil damages remedy for gender-motivated crimes of violence by conditioning federal grants-in-aid to the states on the requirement that the states enact an effective remedy, albeit in state rather than federal court, of

---

150. The source of this assumption was the explicit reservation of control over alcoholic beverages to the states under the Twenty-First Amendment. U.S. CONST. amend. XXI.
151. In fact, even in its cornerstone Tenth Amendment case, *New York v. United States*, 505 U.S. 144 (1992), the Court explicitly endorsed this method of encouraging state action and found implicitly that conditional spending did not constitute federal commandeering of state institutions. *Id.* at 166-69; see also *Alden v. Maine*, 527 U.S. 706, 712-13 (1999) (discussing state immunity from being sued in state courts); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (noting that a state may waive its sovereign immunity, the Eleventh Amendment notwithstanding).
this kind against alleged perpetrators. If Congress attached the proviso to some existing expenditures for law enforcement programs, the condition would clearly have a "direct relation" to preventing crime. Indeed, Congress could reasonably conclude that a private cause of action might create an additional deterrent to the commission of such criminal acts, which might reduce a state’s criminal justice costs and correspondingly lower the Federal Government’s outlays to assist the states in this endeavor. Or Congress might simply create an independent spending program for the express purpose of reducing gender-motivated violence, and appropriate funds to state law enforcement to help deal with the problem. Similarly, if Congress wished to ban handguns near schools, it could place conditions on federal education or law enforcement monies that required states to enact and enforce a similar law, as it currently does concerning other education funding. Congress might reasonably (indeed, persuasively) claim that creating a violence-free learning environment would make the use of national education grants more effective.

Beyond the "directly related" check, the only operative restraints on spending conditions the Court noted in Dole were ones that sought to induce the states to engage in unconstitutional acts, or that were coercive rather than offering states a choice. The first of these criteria (inducing the state to engage in unconstitutional acts) is addressed almost exclusively to the protection of individual rights—e.g., invalidating federal education funds offered on condition that state recipients discriminate on the basis of race—and not states’ rights.

The second restriction (coercing the states to act in ways that Congress could not directly require) carries greater potential for securing principles of federalism. Just as the Court has very loosely defined its "directly related" test, however, it has also failed to provide any bite to its "coercion" restriction, even

---

155. See, e.g., 20 U.S.C. § 8921(1) (1994) (requiring that state beneficiaries of federal educational funds have procedures to expel students with guns at school).
156. 483 U.S. at 210-11.
when a coercive condition has "stared the Court in the face."\textsuperscript{158} The most notable example of this "refusal to see" is the landmark case of \textit{Steward Machine Co. v. Davis},\textsuperscript{159} which involved Congress’s efforts to establish a nationwide unemployment compensation system. The federal statute imposed a payroll tax on employers within the states. The proceeds went into the Federal Government’s general funds, ninety percent of which were credited if the employer contributed to a state-created unemployment plan that met federally-approved standards. If the employer’s state legislature did not take the required action, however, no benefits flowed to anyone in the state.\textsuperscript{160} There is no clearer example of compulsion: The Federal Government took the citizens’ money who received nothing in return if their state did not comply with the Federal Government’s demands, but they did regain almost all of the funds if the state established a proper unemployment compensation system.

It seems plain that truly imposing substantive limits on Congress’s regulatory reach, which the rhetoric of \textit{Lopez} and \textit{Morrison} describe, and thereby carving out areas of state sovereignty, rather than simply directing Congress to work its will in one way or another, will require the Court to address the Spending Clause. The most direct approach would simply be for the Court to employ the doctrine of unconstitutional conditions and rule that Congress cannot use a carrot to accomplish what it is forbidden to do with a stick. The Court could reaffirm that Congress has an independent spending power, but still does not have authority to condition its spending on conduct it could not directly require by means of one of its regulatory powers. For example, if we assume that Congress has no power to require tiny lakes throughout the nation to be free of pollution, then it could not demand that states or individuals take care of this in exchange for federal money. Nonetheless, if Congress wished to spend federal funds to accomplish this goal, it could do so through the independent use of the spending power. Note, however, a variant of the law of unintended consequences that periodically emerges in the federalism area:\textsuperscript{161} This judicially

\begin{itemize}
\item \textsuperscript{158} \textit{Id.} at 464.
\item \textsuperscript{159} 301 U.S. 548 (1937).
\item \textsuperscript{160} \textit{Id.} at 574-76.
\item \textsuperscript{161} \textit{See also supra} note 63; \textit{infra text} following note 164.
\end{itemize}
crafted effort to support states' rights ends up with the Federal Government assuming a larger role than it would if it made a conditional grant.

Apart from this straightforward approach, no clear limiting principle has emerged to restrict Congress's spending authority. Providing teeth for the compulsion element appears problematic. As Laurence Tribe suggests,

It is not clear what... could constitute compulsion... [or] whether—assuming that choice and free will can sometimes be meaningful—there is any form or level of inducement that can truly render someone unable to choose, as well as the question of what choice and compulsion mean when we are talking about states rather than persons.162

A frequently cited proposal has been advanced by Justice O'Connor in her dissenting opinion in Dole: The Court ought to distinguish between conditions that only generally relate to the purposes of Congress's grant (and thus realistically amount to regulations), and conditions that expressly specify how the money should be spent.163 While this may provide an ascertainable criterion for distinguishing permissible conditions from impermissible ones, and may more often require enacting a new federal expenditure instead of simply hooking a condition to an existing grant program, Justice O'Connor's view seems just as malleable as other potential limiting principles. Thus, suppose that the Court would strike down the hypothetical VAWA statutes presented above because a private cause of action for gender-related violence that is attached to a general federal spending program for law enforcement does not meet Justice O'Connor's standard. It seems that Congress could still achieve its objectives by enacting a separate appropriation whose purpose was expressly stated to be combating gender-motivated violence. To illustrate, suppose Congress granted funds for hiring additional state prosecutors and police, whose main job was to deal with gender-motivated violence. Even if a condition that required states to create a private cause of action would not be

held to fall sufficiently directly within the subject matter and objective of that spending program, Congress could simply allocate funds to pay for additional state judges needed to adjudicate an effective new civil damages action by victims against perpetrators. Similarly, in respect to Lopez, Congress might allocate "Safe School Funds" on condition that recipient states make it a crime to possess guns in a school zone. Thus, all Congress needs to do is enact spending plans with more specific goals.\textsuperscript{164} Ironically, this is a result that the states, which seemingly benefit from the broad discretion allowed to them by block grant approaches, themselves might not favor.

Given the changes in the Court's composition since Dole,\textsuperscript{165} the conservative majority may lighten its deference to Congress if a similar spending provision reached the Court today. Indeed, some commentators see recent intimations to this effect\textsuperscript{166} in the brief exchange between Justice Scalia's opinion for the Court (including Chief Justice Rehnquist) in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,\textsuperscript{167} and Justice Breyer's opinion for the four dissenters. The case involved a federal law providing that states which engage in activities regulated by the Lanham Act are subject to suit in federal court for false or misleading advertising in


Does a federal requirement that grants to a state university for biological research not be used to subsidize action infringing valid patents specify how funds shall be spent or purchase a regulatory objective? Can the grants also be conditioned on the university's not infringing the copyright laws in its preparation of course materials for students—on the theory (well known to university fundraisers) that money raised for one activity (biological research), by freeing up funds in the general budget, may indirectly support other activities (operation of the copy center)?

\textit{Id.} at 54 n.250.

\textsuperscript{165} As Justice Thomas joined the Court four years after the decision and would likely vote to overturn or restrict Dole, it appears that Chief Justice Rehnquist, Dole's author, "remains the key... on this issue." Lynn A. Baker, Conditional Federal Spending and States' Rights, 547 ANNALS AM. ACADEM. POL. & SOC. SCI. 104, 116 (2001).


\textsuperscript{167} 527 U.S. 666 (1999).
connection with those activities. The majority rejected Justice Breyer’s contention that, since a waiver of a state’s Eleventh Amendment immunity “may be found in a State’s acceptance of a federal grant,”\(^1\) so, too, may such waiver be found when states engage in federally regulated commercial activities. Justice Scalia’s initial response was to distinguish “the denial of a gift or gratuity” (federal funds) from “a sanction” (“exclusion of the State from otherwise permissible activity”).\(^2\) Justice Breyer replied, persuasively, that “[g]iven the amount of money at stake, it may be harder, not easier, for a State to refuse highway funds [or “funds needed to educate its children”] than to refrain from entering [business regulated by the Lanham Act].”\(^3\) Justice Scalia’s rejoinder was to acknowledge that a “financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”\(^4\) But this does no more than restate long established doctrine that, as we have seen, is singularly toothless. More promising for proponents of new judicial strictures on the spending power—but less subject to generating optimism because of its narrowly stated and conclusory quality—was Justice Scalia’s final sentence: “In any event, we think where the constitutionally guaranteed protection of the States’ sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.”\(^5\)

The difficulty for those who support reduced spending authority is that even though there may be no persuasive distinction between Eleventh Amendment sovereign immunity (as in *College Savings Bank*) and Tenth Amendment states’ rights (as in having to create a GFSZA- or VAWA-like regulation), Justice Scalia *does continue to differentiate* between the Government’s conditioning a state’s receipt of “a gift or gratuity” (which he sees as implicating consent), from federal “exclusion of the State from otherwise lawful activity” on its consent to waive immunity.

---

168. *Id.* at 696 (Breyer, J., dissenting).
169. *Id.* at 687.
170. *Id.* at 697 (Breyer, J., dissenting).
171. *Id.* at 687. This language is actually a quotation from *Dole*, 483 U.S. at 211, which in turn quoted from *Steward Mach.*, 301 U.S. at 590.
TAMING CONGRESS’S POWER

(which he apparently does not feel involves a similar voluntariness, on the state’s part). Only time will tell whether this unexplained distinction will continue to prevail.

B. Taxing Power

Article I, Section 8, which empowers Congress to “lay and collect taxes, duties, imposts and excises,”\(^\text{173}\) affords another source of congressional authority to influence broad areas of behavior at the state and local level. Eighty years ago, the Court held that Congress could not use the Taxing Clause to achieve results forbidden to it under the Commerce Clause.\(^\text{174}\) While the Court has never explicitly repudiated this reasoning, it has applied it only once more to invalidate a federal tax,\(^\text{175}\) and that before the New Deal Court’s “switch-in-time.” Since then, the Court has consistently refused to reject a federal tax as an effort to impose regulatory standards alleged to be outside the scope of other enumerated federal powers.\(^\text{176}\) Due to the post-1937 expansion of national legislative power, however, under which these challenged taxes might readily have been upheld as a necessary and proper exercise of the Commerce Clause, neither the Court nor Congress has had occasion to seriously reconsider the principle of symmetry between the commerce and taxing powers in effecting regulations.

Even if the Court moved to place restrictions on the taxing power, it is unclear whether it could impose limitations corresponding to those it has affixed to the Commerce Clause, such as the commercial/noncommercial distinction for the “substantial effects” prong. Although much of the income tax code certainly can find justification as the regulation of commercial activity, other provisions that do not might be brought into

\(^{173}\) U.S. CONST. art I, § 8, cl.1.


\(^{175}\) See United States v. Constantine, 296 U.S. 287 (1935).

\(^{176}\) See United States v. Kahriger, 345 U.S. 22 (1953) (discussing a ten-percent tax on all wagers coupled with registration of all wager takers, whose names must be given to state prosecutors, if requested); United States v. Sanchez, 340 U.S. 42, 43 (1950) (stating that Congress expressed two objectives: raising revenue and making “extremely difficult the acquisition of marihuana”); Sonzinsky v. United States, 300 U.S. 506, 513-14 (1937), (discussing a $200 tax on each transfer of concealable firearms, and stating “inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts”).
question on the ground that their purpose and effect is not to raise revenue, but rather to achieve regulatory ends such as encouraging charitable contributions or conserving gasoline. Moreover, while gift and estate taxes involve the transfer of wealth, large portions do not seem to involve commercial or economic activity of the sort contemplated by Lopez and Morrison. Holding that the congressional taxes in these areas are unconstitutional would involve serious disruption of long-settled federal practices.

Pursuant to its long-established practice of imposing a tax on conduct as well as on products, if the Court were to adopt a more relaxed approach to the taxing power, Congress would gain access to a broad reservoir of authority to replace its losses in the Commerce Clause arena. While Congress might not be able to ban handguns near school zones, it might raise taxes on such guns to a level that would effectively discourage the activity. Congress might not be able to create a private cause of action to stop gender-motivated violence, but it might be able to impose taxes on individuals who commit such actions. Or, building on the existing tax code, Congress could deny anyone who possessed a handgun near a school zone or who committed gender-motivated violence any deductions or exemptions, or could impose a very high tax on any gifts or inheritances they receive.

V. ADDITIONAL APPROACHES FOR LIMITING CONGRESSIONAL REGULATORY POWER AND SECURING STATES' RIGHTS

As we have seen, the Court’s exclusive efforts in United States v. Lopez177 and United States v. Morrison178 to cabin the potentially gargantuan reach of the Commerce Clause involve the “substantial effects” prong. The primary tools the Court disclosed, but did not establish as hard doctrine, were the economic/noneconomic distinction, and the notion of areas of traditional state concern. But scholars have suggested other ways to accomplish the Court’s goal, some of which have relevance not only to the various Commerce Clause prongs, but to the Taxing

and Spending Clauses as well. This section discusses three such approaches: congressional power being triggered only when the states are separately incompetent to act on their own; defeating federal authority because of improper congressional motive; and judicial use of a variant of the famous tort law doctrine of proximate cause.

A. States Separately Incompetent

Earlier discussion has made plain that there is an unfortunate but real contradiction between the fundamental proposition that our federal system of government has limited regulatory power, and the undeniable fact that the integrated national economy that has evolved in our country has made the Commerce Clause’s "substantial effects" prong all-encompassing. A similar conflict exists between the historically embedded principle of a Federal Government of restricted authority and the judicially granted plenary congressional power over the "channels" and "instrumentalities" of interstate commerce. One of the major reasons that I have argued elsewhere at length against the justiciability of this matter is the absence of judicially manageable standards.\(^\text{179}\) Despite this conclusion against judicial review, an approach that I have found most attractive is to most readily sustain Congress’s commerce power in those situations where the states are separately incompetent to act on their own. This approach has been urged by scholars on various occasions, and carries significant potential for confining the reach of all three prongs of commerce authority listed in \textit{Lopez}. Nonetheless, it has not come to the fore in the Court’s opinions, including \textit{Lopez} and \textit{Morrison}, as the Justices have grappled with the problem of charting perimeters for the Commerce Clause.

There is a clearly documented connection between federalism, as originally understood, and the "separately incompetent" standard, emanating from the famous Virginia Resolution.\(^\text{180}\) Although this proposal was rejected by the Constitutional Convention, Robert Stern, a leading government advocate during the

\(^{179}\) See Choper, supra note 4, ch. 4, at 29-45.

\(^{180}\) The Virginia Resolution originally suggested that the national legislature should have power "to legislate in all cases for the general interest of the Union, and also in those to which the States are separately incompetent." See 2 Max Farrand, Records of the Federal Convention 26-27 (1911).
New Deal period, forcefully urged that the powers specifically enumerated in Article I were meant to be interpreted as "comprehend[ing] those matters as to which the states were separately incompetent and in which national legislation was essential."\textsuperscript{181}

Acceptance of this historically creditable and intellectually appealing view, however, does not settle the question of when the states are separately incompetent, thereby authorizing congressional power. Under the strong (or substantially restrictive) view, the standard is met when the underlying regulated activity raises the possibility of a prisoner's dilemma or race to the bottom among the several states,\textsuperscript{182} that is, when the spillover effects or externalities of conduct that one or more states wish to regulate flow beyond states' jurisdictional lines, such that no state could realistically accomplish its goal in the absence of a national rule. As Donald Regan has recently framed the question:

[W]hen we are trying to decide whether some federal law or program can be justified under the commerce power, we should ask . . .: 'Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?' Federal power exists where and only where there is special justification for it . . .\textsuperscript{183}

Thus, congressional action is unwarranted when the states could effectively regulate the matters themselves.

\textsuperscript{181} Stern, supra note 119, at 1341 (arguing that the Convention’s accepting the replacement in the “absence of objection or comment upon change” argues for this interpretation); see also Regan, supra note 54, at 556, in which Regan states: [T]here is no reason to think the Committee of Detail was rejecting the spirit of the Resolution when they replaced it with an enumeration. They may have thought they were doing nothing more than unfolding the implications of the general language. They may have meant to guard against overexpansive interpretation of the Resolution’s vague, or at least abstract, language. They may have been motivated by stylistic considerations. Id.


\textsuperscript{183} Regan, supra note 54, at 555 (emphasis added). Thus, “[t]here is nothing in the background of the [Gun-Free Schools Zone Act] to suggest that states are less capable of dealing with the problem of guns in schools than the federal government; nor is there anything to suggest the states are inadequately motivated to do so.” Id. at 569 (footnote omitted).
Minimum wage laws—at least as applied to enterprises that offer goods or services in the national market—provide a classic example of the need for collective action. As a realistic matter of politics and economics, individual states could not themselves set higher wages. Any effort by a single state (or several) to do so would provide an obvious incentive for other states to maintain their lower labor costs, thus not only making their goods more competitive in the general interstate market, but even within the borders of those states that themselves passed minimum wage laws.184

*Wickard v. Filburn*185 also fits within this classification. The legislative goal was to raise agricultural prices by setting production quotas. Analogous to the minimum wage situation, no state would benefit its farmers by reducing their acreage unless enough other states did likewise. If they did not do so, prices would remain low and the states that did restrict growing would only worsen their farmers’ plight. Indeed, the optimal benefit would redound to those few states who maintained production if most others diminished it. Only a uniform rule would accomplish the desired result and treat all market participants fairly.

Unlike the laws for minimum wages or higher prices, which are ordinarily analyzed under the Commerce Clause’s “substantial effects” prong, federal statutes that prohibit interstate flight to avoid prosecution or testifying in a criminal case186 are “separately incompetent” examples that fall under the “channels” prong. Since the criminals or witnesses have done nothing improper in the state into which they have fled, these “receiving” states have no incentive—apart from reciprocity, which was one of the unsatisfactory conditions that existed under the Articles of Confederation—to expend resources to return

---

184. It has been suggested that “Congress could protect the interests of high-wage states by prohibiting the introduction into those states of goods manufactured under substandard conditions . . . [so that] goods from high-wage states will not have to compete with goods from low-wage states in their own home markets or in the market of any other high-wage state.” *Id.* at 588. While it is true that this regime might mitigate a state’s reluctance to enact a minimum wage, given the realities of the market, the high cost of doing so makes it doubtful that this would be enough to permit such states to effectively achieve their policy choices.


186. See, e.g., *Hemans v. United States*, 163 F.2d 228 (6th Cir. 1947).
them to those states from which they have come. Similarly, this is the situation when a parent travels to another state to escape child support obligations.\footnote{187} Once again, only federal intervention will realistically work.\footnote{188}

A milder (or less restrictive) definition of the "separately incompetent" criterion has also been put forward, thus loosening the tight strictures that would be placed on the Commerce Clause by the strong view just discussed. The test has been said to be met when the individual states could not accomplish a particular task "with perfect efficiency,"\footnote{189} or when there is something "the states generally want done that Congress can... do more efficiently,"\footnote{190} or when congressional action would be "at least a very useful aid to the states in the enforcement of their own choices."\footnote{191} Regan illustrates this usage with the \textit{Lottery Case}:\footnote{192} "Lottery tickets are small, portable, concealable, and in some views dangerous—like guns. Stamping out lotteries may have been something the states were individually incompetent to do, practically speaking."\footnote{193} Further examples of Regan's milder version end up affording Congress fairly generous power, justifying federal control in such areas as labor relations, consumer protection, and environmental regulation.\footnote{194} As suggested above, I believe that assessing whether the states are

\footnote{187} This would be covered by the Child Support Recovery Act of 1992, 18 U.S.C. § 228(a) (1994). The most recent federal court of appeals decision on this law noted that "Congress made express findings that collection of past-due debts had grown beyond the enforcement capacities of the states," \textit{United States v. Faase}, 265 F.3d 475, 488 (6th Cir. 2001), and that "all ten of our sister circuits that have considered the constitutionality of the CSRA in Commerce Clause challenges after \textit{Lopez}... have upheld the statute." \textit{Id.} at 479.

\footnote{188} Nelson and Pushaw would find the regulations just discussed in this paragraph as beyond Congress's power under the Commerce Clause because they reject the "channels" and "instrumentalities" prongs and because these statutes do not involve "commerce" as they define it. \textit{See} Nelson, \textit{supra} note 43, at 1232. Similarly, Nelson and Pushaw's approach would probably exclude the Corp of Engineers migratory bird rule, see text accompanying \textit{supra} notes 20-22, because it does not concern "commerce," even though the ponds and mudflats "may well create spillovers of the kind that should be centrally regulated: if a state fails to protect them, it is harming wildlife both inside and outside its borders." McGinnis, \textit{supra} note 4, at 518.

\footnote{189} Regan, \textit{supra} note 54, at 569.

\footnote{190} \textit{Id.} at 607.

\footnote{191} \textit{Id.} at 576.

\footnote{192} 188 U.S. 321 (1903).

\footnote{193} \textit{Id.}

\footnote{194} \textit{Id.} at 602-10.
separately capable of dealing with complex socioeconomic national problems presents pragmatic issues of comparative skill and utility (in contrast to issues of principle associated with individual rights), and therefore should not be subject to judicial review. Nonetheless, I think the Court’s adoption of the “separately incompetent” test (as described above) might go some distance toward resolving the conflict that has developed between the original idea of a Federal Government with limited power and the present complexities generated by our integrated national economy.

It should be underlined, however, that the “separately incompetent” standard is grounded in the notion of Congress’s facilitating state choices (i.e., helping states achieve their goals which they would otherwise find to be impossible or difficult). This is to be distinguished from use of the federal commerce power to maximize national economic development or to implement national solutions to broadly perceived national problems. While it may well be that a proper interpretation of the Commerce Clause authorizes such exertions of power, it stretches the “separately incompetent” idea to the breaking point to have it support GFSZA with the argument that guns near schools are a national problem and that the failure of some states to address this harmful conduct dilutes the most effective comprehensive solution. The educational difficulties generated by guns near schools are analogous to the moral and commercial problems raised by racial discrimination in places of public accommodations and to the scourge of violence against women. Realistically, there would appear to be no reason why these are not all subjects that individual states can adequately address themselves. Their failure to do so reflects unwillingness rather than incapacity.

Finally, it should be noted that there is another weak version of the “separately incompetent” approach that the
Rehnquist majority would find wholly unsatisfactory in its efforts to bound the Commerce Clause. A model contention may be taken from *Lopez*: Especially because of the mobility of Americans, there is a real likelihood that persons schooled in one state will end up in another which has a real social and economic interest in a well educated state citizenry. The argument concludes that since the "receiving" states cannot regulate the quality of education offered outside their borders, a Federal Education Act is within congressional power because the individual states are incompetent to deal with the issue. If "separately incompetent" could be defined in this way, it would amount to nothing less than an endorsement of the "substantial effects" prong in full bloom.

B. Congressional Motive

The Court's emphases in *Lopez* and *Morrison* on the distinction between economic and noneconomic matters and on areas of traditional state concern both reflect an effort to prevent federal legislation that is intended to exercise a national police power unrelated to commercial subjects. Nelson and Pushaw echo this need to reserve control over "political, social, cultural, and moral matters" to the states. Harking back to Chief Justice Marshall's famous caution that "should [C]ongress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal ... to say, that such an act was not the law of the land," some commentators such as Thomas Merrill have specifically suggested that the Court undertake a motive-based inquiry:

[W]e must ask whether the intent of Congress is to regulate commerce insofar as it affects the movement of matter and energy across state lines (a permissible objective) or whether it is to regulate commercial activity without regard to whether there is any effect on interstate movements (an impermissible usurpation of the states' police powers).
While Merrill's precept is addressed to the "channels" prong of the Commerce Clause, its rationale plainly applies to the "substantial effects" and "instrumentalities" prongs as well. Indeed, there is no reason that the motive analysis could not be applied to divide subjects where states are separately incompetent to act on their own from others that states can adequately address themselves.

There are three formidable problems, however, that must be confronted in respect to this approach. The first barrier is existing law. In United States v. Darby,\(^2\) which unanimously upheld congressional power to prohibit the shipment in interstate commerce of goods produced in violation of the wage and hour provisions of the Fair Labor Standards Act, the Court explicitly stated that "[w]hatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."\(^2\) Overruling Hammer v. Dagenhart, which had found that Congress was without authority to exclude the product of child labor from interstate commerce,\(^2\) the Darby Court emphasized that "[t]he thesis of the [Dagenhart] opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force."\(^2\) A similar rule governs the "substantial effects" prong. In Heart of Atlanta Motel, Inc. v. United States,\(^2\) which unanimously upheld Congress's authority to prohibit racial discrimination by virtually every inn, hotel and motel in the country, the Court acknowledged that Congress was "dealing with what it considered a moral problem," but reasoned that the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse . . . empowered Congress to enact appropriate legislation, and . . . Congress was not restricted by the fact that the particular obstruction

\(^{200}\) 312 U.S. 100 (1941).
\(^{201}\) Id. at 115.
\(^{202}\) 247 U.S. 251, 276-77 (1918).
\(^{203}\) 312 U.S. at 116.
\(^{204}\) 379 U.S. 241 (1964).
to interstate commerce with which it was dealing was also deemed a moral and social wrong.”

The same rule applies in respect to the taxing power. Although the Court has occasionally in the past invalidated federal taxes—on goods produced by child labor and on liquor businesses operated in violation of state law—because their “primary motive” was regulation rather than taxation, with a “purpose . . . to usurp the police powers of the State,” it directly changed course after 1935. Although the broad expansion of the national commerce power has provided Congress no real reason to use taxation for regulatory purposes, the Court has several times rejected the argument that a federal tax should be held invalid because of a regulatory purpose, stating that a judicial “[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.”

The second hurdle that stands in the way of determining whether an act of Congress was really meant to impose “political, social, cultural, and moral” values, rather than “to regulate Commerce . . . among the several States,” is the generally agreed upon fact, reaching back to the landmark ruling in Fletcher v. Peck, that divining the real motive of lawmakers is a perilous undertaking and an exceedingly tricky endeavor. The Court has faced this difficulty, and has largely overcome it, by engaging in a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available,” in respect to issues of racial and religious neutrality under the Equal Protec-

205. Id. at 257. After satisfying itself that the “substantial effects” prong was met, the Court ruled “[t]hat Congress was legislating against moral wrongs . . . rendered its enactments no less valid.” Id.
208. Bailey, 259 U.S. at 38.
209. Constantine, 296 U.S. at 296.
211. 10 U.S. (6 Cranch) 87, 130 (1810).
212. See United States v. O'Brien, 391 U.S. 367, 383 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . Inquiries into congressional motives or purposes are a hazardous matter.”).
tion Clause\textsuperscript{214} and the Religion Clauses of the First Amendment.\textsuperscript{215}

It is one thing, however, to question whether a lawmaking body has really acted with racial or religious animus while attempting to wrap it "in the verbal cellophane"\textsuperscript{216} of a legitimate public goal. That seems to be a much more straightforward, less complex, and less multifaceted enterprise than seeking to determine whether the purpose of a law, that either addresses obvious economic activities or has plainly observable commercial ramifications, is to solve a problem that in one way or another demands a national solution (or at least Congress might reasonably so believe) rather than to impose a socially or morally based uniform rule throughout the country. Illustrations of the complicated nature of this task abound, as indicated by the earlier observation in this respect about minimum wages, progressive taxation, endangered species, and drug use.\textsuperscript{217} Indeed, some of the Court's leading Commerce Clause decisions sharply demonstrate its intractability, especially when recognizing the real possibility that the legislators may have multiple purposes with no single goal being dominant: \textit{Heart of Atlanta Motel}, barring racial discrimination in places of public accommodation;\textsuperscript{218} \textit{Dagenhart}, regarding child labor;\textsuperscript{219} and \textit{Perez v. United States}, outlawing loansharking.\textsuperscript{220}

The analysis under the taxing power—whether Congress's purpose in imposing a tax is to raise revenue or discourage the activity—seems simpler, at least as an initial matter. The easiest situation occurs when the tax is so onerous that all persons alter their conduct so as to avoid its bite, and it therefore produces no revenue at all. Only slightly less straightforward is the case where the collection costs exceed any money raised. Beyond these instances, however, the ambiguities in respect to determining intent in regard to the taxing power are little different than in connection with the Commerce Clause. This is because virtually

\begin{itemize}
\item \textsuperscript{214} Washington v. Davis, 426 U.S. 229 (1976).
\item \textsuperscript{216} United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting).
\item \textsuperscript{217} See text accompanying \textit{supra} note 127.
\item \textsuperscript{218} See text at \textit{supra} notes 204-05.
\item \textsuperscript{219} 247 U.S. 251.
\item \textsuperscript{220} 402 U.S. 146, 154-57 (1971).
\end{itemize}
all taxes reflect the dual purpose of not only adding to the fisc but also accounting for preferred social and economic policy values. For example, the stated goal of most cigarette taxes is both to discourage smoking and to provide revenue for its health-related effects. Calculating which purpose is "dominant" or "primary" appears to be an especially formidable exercise under these circumstances. 221

This second impediment is exacerbated by the third: the fact that the legislative motive at issue in all of these cases under discussion is that of the 535 members of Congress. Wholly apart from separation of powers considerations and the respect owed coordinate and equal branches of government, the difference in terms of perplexity between identifying the motive of a single administrator, or a city council, or perhaps even a state legislature, and that of Congress is of such great degree as to effectively amount to a distinction in kind.

C. Proximate Cause

In an effort to solve the problem of finding some coherent, principled judicial limit on congressional regulation under the Commerce Clause, several scholars have raised the possibility of using the concept of proximate cause as a tool for judging legislation under various prongs. Indeed, it may be that some notion of causation explains Chief Justice Rehnquist's famous criticism in Lopez of piling "inference upon inference" in order to find a substantial effect on commerce. 222 Moreover, Chief Justice Rehnquist explicitly refers to causation in Morrison when appraising the Government's theory of substantial effects:

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' 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 effects on employment, production, transit, or consumption.\footnote{223}{529 U.S. at 615.}

As noted, both of Chief Justice Rehnquist's points deal with the "substantial effects" prong, which led Deborah Merritt to observe a kinship to the notion of proximate cause in tort law. The \textit{Lopez} majority meant that the relationship between the regulated activity and interstate commerce must be strong enough or close enough to justify federal intervention, just as the concept of proximate cause means that a defendant's negligence must be closely enough related to the plaintiff's injury to justify forcing the defendant to bear the costs of the injury. Both of these judgments are qualitative ones, resting on a host of contextual factors, rather than simple quantitative calculations.\footnote{224}{Merritt, \textit{Commerce!}, supra note 9, at 679 (footnotes omitted).}

There is plainly a similarity between the proximate cause rule's goal of erecting a cut-off point for the liability that would accrue under a "but for" regime and the Rehnquist majority's quest of imposing some realistic strictures on the legislative reach of the Commerce Clause. Indeed, Justice Sutherland's opinion for the Court in the (in)famous \textit{Carter v. Carter Coal Co.},\footnote{225}{298 U.S. 238 (1936).} decision also invoked a proximate cause-like approach in articulating its failed effort to employ a "direct/indirect" distinction so as to cabin the commerce power.\footnote{226}{Id. at 307-09.} But there are a series of reasons that cast doubt on the helpfulness of the analogy. First are the ambiguities and complications that surround the proximate cause doctrine. As Prosser noted a half century ago, "[p]roximate cause remains a tangle and a jungle, a palace of mirrors and a maze ... that covers a multitude of sins [and] is a complex term of highly uncertain meaning under which other rules, doctrines and reasons lie buried."\footnote{227}{William L. Prosser, \textit{Proximate Cause in California}, 38 CAL. L. REV. 369, 375 (1950).} This judgment persists to the present time, as confirmed by Kenneth Abraham:
"[N]o single formulation of the concept of proximate cause can fully describe how it is applied, because it is often used as a 'fudge-factor' that permits judges and juries to decide that there ought not to be liability even when the other prerequisites to liability have already been satisfied." And though it may well be that it is "the exceptional cases that tend to pose difficulties" in respect to proximate cause, it is also the exceptional (rather than run-of-the-mill) cases that call out for an intelligible standard to guide judicial review of congressional acts under the Commerce Clause.

The problem of complexity and opaqueness of proximate cause is exacerbated by the fact that resolution is a question for the jury, where a group of laypersons is instructed "to use its judgment in deciding whether the defendant was sufficiently blameworthy under all the circumstances to deserve to bear liability," and consequently weighs "the very factors that are so difficult to articulate in a formal judicial opinion." This is hardly a helpful prescription for determining when the Court should tell the national political branches that they have exceeded a constitutional boundary.

Finally, it seems that the policies that underlie the proximate cause principle are very different than the reasons for restricting national legislative power, thus making the former an unlikely candidate as a model for the latter. At a general level, proximate cause's overarching function is to determine the scope of a person's risk in undertaking certain activity. Its major ingredient is "foreseeability," i.e., "the defendant's negligence is a proximate cause of the plaintiff's harm if causing that harm was a foreseeable result of acting as the defendant did." This has led to the observation that "the determination that is made under the rubric of proximate cause has more to do with

---

228. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 118 (2002); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 273 (5th ed. 1984) (stating that proximate cause refers "to those more or less undefined considerations which limit liability even where the fact of causation is clearly established").
229. ABRAHAM, supra note 228, at 118.
230. Id. at 136.
231. Id. at 135.
232. Id. at 119.
negligence than with causation,” 233—that is to say, defendant’s conduct should not produce liability to a particular plaintiff, even though it should make defendant responsible to other injured persons, because “the defendant’s negligence did not foreseeably increase the risk of harm that the plaintiff actually suffered.” 234 At root, it appears that all this is guided by what society (reflected through judges and juries) considers fair—to plaintiffs but particularly to defendants—under the circumstances. 235 But neither risk, foreseeability, nor fairness seem to have any bearing on the fundamental values of federalism or a Federal Government with a finite authority.

A more developed application of the proximate cause approach has been made by Harry Litman and Mark Greenberg in respect to the “channels” prong. 236 They urge that congressional power should not extend to any transaction simply because it involves items that once moved in interstate commerce “no matter how attenuated or incidental the connection” may be. 237 Rather, the federal regulation must address “a harm of which the movement of items across state lines is a cause” 238 under “the ordinary notion of causation,” 239 i.e., one that is “more discriminating than but for causation.” 240 They then contend that the revised Lopez statute, which contains a jurisdictional element, 241 is valid: “[F]ew would deny that the interstate traffic in guns is a cause in the ordinary sense of the problem of guns in schools.” 242

I find several problems with this rationale. First, Litman and Greenberg acknowledge that “[s]ince the ordinary notion of causation is purpose- and context- dependent, application of the

233. Id.
234. ABRAHAM, supra note 228, at 120.
237. Id. at 949.
238. Id. at 950.
239. Id. at 951.
240. Id.
241. See text accompanying supra note 139.
242. Litman & Greenberg, supra note 236, at 953 (emphasis added).
notion will inevitably turn on judgment and experience ... [and] it is inevitable that there will be borderline cases in which the determination of causation will be open to debate.”243 Still, they accurately point out that “the law ... regularly employs notions—for example, voluntariness, or prejudice, or negligence—that are plainly meaningful and readily applied in most cases even though they are difficult to apply in borderline cases.”244

As noted earlier, however, it is the exceptional cases—i.e., those that are “borderline” and most “open to debate”—that present the commerce power question to the Court, and are the only meaningful ones when the Court holds an act of Congress unconstitutional.

Second, their conclusion—that the interstate traffic in guns is a cause of the problem that falls short of “but-for”—is not obvious to me. In my view, the cause of the problem of guns in schools is that students bring them there, and it is wholly irrelevant whether the guns ever cross state lines. One might similarly contend that, in United States v. Sullivan,245 the unlabeled pills coming from outside the jurisdiction are “a cause in the ordinary sense of the problem of consuming unwanted and harmful drugs.” But again, for me, the core problem is the distribution of unlabeled pills, whether or not they ever were shipped in interstate commerce.

It is probably true that principles of causation could lead to the decision that a federal statute, requiring that anyone traveling in interstate commerce in the past or in the future who wishes to dissolve his marriage must obtain a divorce that meets federal standards,246 was not sustainable simply because of the presence of the jurisdictional element. But, in my view, the stronger argument against upholding the divorce law, the revised gun statute, and the unlabeled pills regulation under the “channels” prong is one that concerns the history and purposes of the Commerce Clause, as outlined above,247 and has nothing to do with proximate cause.

243. Id. at 951.
244. Id.
245. 332 U.S. 689 (1948).
246. See text following supra note 141.
247. See supra notes 119-27 and accompanying text.
VI. TENTH AMENDMENT STATE SOVEREIGNTY

The Rehnquist Court’s systematic effort to reinstate vigorous judicial protection of state prerogatives began in *New York v. United States*,\(^{248}\) ruling that Congress’s effectively requiring state legislatures to pass laws dealing with radioactive waste generated within their borders abridged principles of state sovereignty, which the Court majority found reinforced textually by the Tenth Amendment. These precepts prevented Congress from “‘commandeer[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,’”\(^{249}\) despite the fact that Congress had the power to promulgate the regulation itself. This decision was extended in *Printz v. United States*,\(^{250}\) which involved a federal statute instructing state law enforcement officers to conduct background checks on handgun purchasers, the Court forbidding the commandeering of “the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”\(^{251}\) Although the doctrinal import of these decisions is significant, both their reach over only state legislative and executive officers, and the practical consequences within this ambit, are exceedingly limited, particularly in view of the Court’s specific recognition that the national spending power (whose broad potential has been considered at length in Section IV.A.) might be used to accomplish these results.\(^{252}\)

Whatever the historical,\(^{253}\) analytic, and public policy merits or deficiencies of the *New York* and *Printz* opinions, their


\(^{249}\) *Id.* at 161 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, Inc., 452 U.S. 264, 288 (1981)).


\(^{251}\) *Id.* at 935.


In addition to the use of conditional spending as a means of achieving its regulatory aims, “Congress may force states to choose between administering federal programs or having their laws preempted and replaced with either a federally enforced policy or even a regulatory void.” Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 242.

\(^{253}\) For the view that the original understanding supports this “anti-commandeering” conclusion, see Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993). For criticism, see Evan H. Caminker, *State Sovereignty and Subordinacy:*
rules and rationales seemed to be fairly clear: Unlike federal laws that subject state and local governments to generally applicable regulations, when the Federal Government mandates that state or local legislative or executive officials take action in their official capacity, "the accountability of both state and federal officials is diminished" thereby, because "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." However, the Court's recent holding in this area, Reno v. Condon, in accepting the legitimacy of congressional authority for "regulating a state activity" by requiring "administrative and sometimes legislative action to comply with federal standards," and thus clouding the definitions of "commandeering" and "generally applicable," indicates that Congress's authority over state legislative and executive officials is not as restricted as the earlier decisions may have suggested. In a quite cryptic opinion—perhaps attributable to the need for Chief Justice Rehnquist to hold a unanimous Court that is usually divided sharply on this federalism issue—Reno sustained congressional authority under the Commerce Clause to pass the Driver's Privacy Protection Act ("DPPA"), which bars state motor vehicle departments (with various exceptions) from selling or disclosing personal information (such as name, address, telephone number, vehicle description, Social Security number, medical data, and photograph) required for a driver's license or car registration. The Court emphasized several points, all of which present ana-

---

255. New York, 505 U.S. at 168.
256. Id. at 169.
258. Id. at 150 (quoting South Carolina v. Baker, 485 U.S. 505, 514 (1988)).
259. Id. at 151 (quoting Baker, 485 U.S. at 515).
260. Id. at 148.
lytical difficulties and require future elucidation to determine the scope of this aspect of federalism doctrine.

First, *Reno* distinguished *New York* and *Printz* by noting that "the DPPA does not require the States in their sovereign capacity to regulate their own citizens":\(^ {261}\) "It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."\(^ {262}\) But the Court did not even attempt to explain why there is a constitutional difference in respect to "commandeering" between compelling state officials to pass or enforce laws and forbidding them from doing so. For example, if *New York* prohibits Congress from requiring states to pass laws against corruption by government officials (or mandating that state officials investigate such practices), why does *New York* not similarly bar Congress from making it a federal crime for state and local officials to engage in graft? The answer may be that despite the similarity in respect to "commandeering," the federal action in *New York*, *Printz*, and the first of the two hypothetical acts of Congress—but not the federal corruption prohibition—blurs and diminishes "the accountability of both state and federal officials."\(^ {263}\) But even were this true (and there is strong objection both to its empirical soundness\(^ {264}\) and to its underlying rationale\(^ {265}\)), the "accountability" factor would seem to be equally implicated by the DPPA's prohibiting state officials from selling or disclosing motor vehicle data to private individuals. Indeed, as we shall see, the "accountability" rationale also appears to be out of sync with the Court's second ground in *Reno*: its one-paragraph discussion of the "generally applicable" criterion.

\(^ {261}\) *Id.* at 151.

\(^ {262}\) *Reno*, 528 U.S. at 151. For discussion of certain affirmative obligations that the DPPA in fact imposed on state officials, see *infra* note 280.

\(^ {263}\) *New York*, 505 U.S. at 160.


\(^ {265}\) *See* Martin H. Redish *Doing It with Mirrors*: *New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L. Q. 593, 602 (1994) ("[T]hat Congress unquestionably has constitutional power to preempt all state regulation (or non-regulation) of nuclear waste, regardless of the contrary will of particular state legislatures, . . . [shows that] the primary regulatory policy choice is made by Congress and the Presidency, which are both representative and accountable.").
The Court rejected the state's argument that the DPPA was unconstitutional because it regulated the states exclusively. It reasoned that since the law applied not only to "the States as initial suppliers of the information," but also to "private resellers or redisclosers of that information in commerce," it "regulates the universe of entities that participate as suppliers to the market for motor vehicle information," and thus satisfied any requirement of "general applicability."\(^{266}\)

This brief consideration of "general applicability" raises a host of issues. The "generally applicable" factor first appeared in New York. It was used to distinguish the radioactive waste law (which the Court invalidated in New York) from the application of the Fair Labor Standards Act to the states (which the Court upheld in Garcia v. San Antonio Metropolitan Transit Authority\(^{267}\)) since the latter regulation applied to private as well as government employers, whereas New York was "not a case in which Congress ha[d] subjected a State to the same legislation applicable to private parties."\(^{268}\) In fact, it appears that neither wing of the Court is inclined to accord this issue any real significance, at least in the ordinary run of cases in this area. The conservative Justices paid it no heed in either their majority opinion in National League of Cities v. Usery\(^{269}\) or their dissent in Garcia, voting in both cases to hold it beyond congressional power to require minimum wages and maximum hours for state and local employees even though it was agreed that private employers were properly subject to the regulation.\(^{270}\) The liberal Justices, on the other hand, had no difficulty in upholding the statutes in New York and Printz despite the argument that they singled out the states for special regulation. Thus, Reno's avoidance of "the question whether general applicability is a constitutional requirement for federal regulation of the States"\(^{271}\) seems to be of little importance.

\(^{266}\) Reno, 528 U.S. at 151.
\(^{267}\) 469 U.S. 528; see also supra note 254.
\(^{268}\) 505 U.S. at 160.
\(^{269}\) 426 U.S. 833 (1976).
\(^{270}\) On the likelihood that the present conservative majority will adhere to this position of their predecessors, see text following infra note 282.
\(^{271}\) 528 U.S. at 151.
To the extent that "general applicability" continues to be a meaningful issue, Reno strongly illustrates the difficult and malleable nature of its definition. At the theoretical level, the question of how such concepts as "neutrality," "discrimination," and "preference" should be defined traverses constitutional adjudication. With direct reference to the topic at hand, although it has been argued that Congress "could not impose a minimum wage on the state governor, state legislators, or state judges, because these state workers have no private counterparts," it might be asked whether corporate presidents and boards of directors, or arbitrators and mediators, should be thought of as "private counterparts" if the federal minimum wage applied to them as well.

The primary enlightenment provided by Reno on the idea of "general applicability," however, concerns its analytic plasticity. While it is technically true that the DPPA by its terms regulated both private and public actors, in reality, the statute was designed primarily to control states rather than private parties because it is the states that were able to obtain the automobile and driver information from their citizens. In terms of market share, it is obvious that it was the states that dominated the sale of this data. Further, to characterize the DPPA as "generally applicable" robs the concept of its reason for existence: its "effect of linking states' interest in avoiding burdensome federal legislation with that of private entities, a device that enhances the likelihood that undue burdens on states in federal legislation will be ironed out in the legislative process."

Indeed, Reno's reasoning on this issue is quite similar to the Printz dissent's argument that if "Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective pur-

272. As one example arising under the Free Exercise Clause, if a state bars imbibing of all alcoholic beverages but permits sacramental use, may it bar ingestion of all hallucinogenic substances without exempting sacramental use? See Michael J. Perry, Freedom of Religion in the United States: Fin de Siécle Sketches, 75 IND. L.J. 295, 305 (2000).


274. Vicki C. Jackson, Narratives of Federalism: Of Continuities and Comparative Constitutional Experience, 51 DUKE L.J. 223, 282 (2001). For the persuasive suggestion that "further protection of state interests arises where the law in question is extended to the federal, as well as state governments," see id.
chaser's fitness to own a weapon,"\(^\text{275}\) then the "general applicability" standard would have been met. The majority's refutation was that the \textit{Printz} statute required the state law enforcement officers "to provide information that belongs to the State and is available them only in their official capacity,"\(^\text{276}\) a point that sounds much like the facts under the DPPA.

A final observation on the "general applicability" test concerns its incompatibility with the "accountability" analysis. Assuming that the DPPA was "generally applicable," the state citizenry clearly would have no better idea of who was responsible for the law's effects than if the state were unquestionably the sole object of federal regulation. Analogously it would seem that if Congress, in its effort to deal with radioactive waste in \textit{New York}, had not only required state lawmaking bodies to pass rules on the subject, but also instructed private corporations to provide for disposal of their waste, the federal statute would have been "generally applicable." This would be similarly true if the federal gun control law in \textit{Printz} had simply mandated that all employers (including government) conduct background checks on all employees (including police officers) who carry firearms. Yet, as Justice White pointed out in his dissent in \textit{New York}, "[i]n no case has the Court rested its holding on such a distinction" and "an incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that 'commands' specific action also applies to private parties."\(^\text{277}\) In sum, I know of no effective rebuttal to Roderick Hills's contention that \textit{New York} "provides no explanation for why such generally applicable laws burden political accountability less than laws that apply only to governmental entities."\(^\text{278}\)

Although the concepts of "commandeering," "accountability," and "general applicability" played a prominent role in the opinions of Reno's predecessors (\textit{New York} and \textit{Printz}), Chief Justice Rehnquist's lengthiest discussion was addressed to an idea not at play in those wellspring rulings: national power to

\begin{footnotes}
\item[275.] \textit{Printz}, 521 U.S. at 961 (Stevens, J., dissenting).
\item[276.] \textit{Id.} at 932 n.17.
\item[277.] 505 U.S. at 201-02 (White, J., dissenting).
\end{footnotes}
require that state and local activities conform to federal standards. The state’s major objection was that the DPPA "thrusts upon the States all of the day-to-day responsibility for administering its complex provisions," "requires the State’s employees to learn and apply the Act’s substantive restrictions," and "that these activities will consume the employees’ time and thus the State’s resources."  

The Reno Court replied by relying on the result and rationale in South Carolina v. Baker, upholding a federal statute that denied federal income tax exemption for interest earned on unregistered (or bearer) state bonds, thus effectively compelling states to issue only registered bonds. But Reno’s quotation of a long passage from Baker—including the language “regulating a state activity” by requiring “administrative and sometimes legislative action to comply with federal standards”—though accurate is ironic, if not disingenuous, in light of Baker’s general reliance on Garcia. Five Justices joined that part of the Baker opinion, the same five that constituted the Garcia majority. Only two of the four Garcia dissenters remained on the Court in Baker: Justice O’Connor dissented and Chief Justice Rehnquist concurred on a narrow ground. Justice Scalia also concurred in limited fashion, specifically disassociating himself with Garcia’s analysis. Justice Kennedy did not participate. I would add that it is eminently fair to speculate that Justice Thomas, the fifth member of the present conservative majority of the Rehnquist Court, would connect himself with these four colleagues.

It was clear in Baker that by requiring states to issue only registered bonds, Congress “commandeered” state officials (somewhat, but by no means persuasively, more clearly than in Reno), although it did not “control or influence the manner in which States regulate private parties.” The Baker majority...
pointed out that this was also the situation in Federal Energy Regulatory Commission v. Mississippi\textsuperscript{284} (as it was in Reno as well). But the forebears of the present conservative majority dissented in FERC. As a consequence of this history, it is somewhat challenging to determine just what it is about the DPPA that prompted the Rehnquist conservative majority to sustain it.

In my view, as indicated earlier,\textsuperscript{285} the solution to this puzzle rests in the fact that the Rehnquist majority did not view the prohibition of a state's sale of driver and motor vehicle information—as their precursors appraised the FLSA in Usery—as directly displacing the State's freedom to structure integral operations in areas of traditional governmental functions,\textsuperscript{286} which the Court considered as being activities that were essential to the separate and independent existence of the states.\textsuperscript{287} Thus, Chief Justice Rehnquist's Reno opinion observed that the state "asks that the DPPA be invalidated on its entirety, even as it is applied to the States acting purely as commercial sellers,"\textsuperscript{288} whereas his concurrence in Baker rested on the finding of the Special Master appointed by the Court in that case that the tax scheme "had no substantive effect on the abilities of States to raise debt capital, on the political processes by which States decide to issue debt, or on the power of the States to choose the purpose to which they will dedicate the proceeds of their tax-exempt borrowing."\textsuperscript{289} Although cabining this concept has defied prior judicial attempts, and was specifically rejected in Garcia as the key principle for the subject at hand,\textsuperscript{290} its most recent incarnation has been traced earlier in this article. I would conclude here as I did there: There is no reason to believe that an effective judicially manageable standard can be developed.

\textsuperscript{284} 456 U.S. 742 (1982) [hereinafter FERC] (noting that Congress may require state regulatory agency to adjudicate disputes in accordance with designated federal policies).

\textsuperscript{285} See text accompanying supra notes 108-09.

\textsuperscript{286} Usery, 426 U.S. at 851-55.

\textsuperscript{287} Id. at 851-52.

\textsuperscript{288} 528 U.S. at 150 n.3 (emphasis added).

\textsuperscript{289} 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment).

\textsuperscript{290} See text accompanying supra notes 112-15.
VII. CONCLUSION

The large group of federalism decisions of the Rehnquist Court in the past decade restricting congressional power under the Commerce Clause (and Section 5 of the Fourteenth Amendment) have become its defining issue, marking a distinct change of course from the preceding half century. Nevertheless, because of the yet untapped potential of the "channels" and "instrumentalities" prongs under the Commerce Clause, and the still unrestricted reach of the Taxing and Spending Clauses, the justices' task of meaningfully reestablishing states' rights is far from accomplished. This article addresses these remaining issues and explores several significant problems left open under the Commerce Clause's "substantial effects" prong. It also analyzes a number of proposals advanced by others that bear on the critical question of whether there are judicially administrable principles to deal with all these matters. In the end, assuming no change in the philosophic position of the Court's membership, only an effective resolution of these topics may satisfactorily fulfill the Rehnquist majority's quest to impose substantive limits on Congress's regulatory authority.