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INTRODUCTION

The federal government has passed three laws. One prohibits restaurant owners from discriminating on the basis of race, one prohibits the possession of a firearm within 1000 feet of a school zone, and one creates a civil remedy, enforceable in federal court, for victims of gender-motivated violence.

Question: The justifications offered by the federal government for these provisions have been rooted in what constitutional value?

Answers: Commerce; Commerce; Commerce.

A strikingly diverse array of federal statutes, serving a broad spectrum of goals, has been justified on the basis of the Constitution's grant of power to Congress "to regulate Commerce . . . among the several States."[1] The measures described above, which target race discrimination, gun violence, and violence against women, have all been defended, either by Congress[2] or by government lawyers arguing before the federal courts,[3] on the ground that they represent valid exercises of federal power under the Commerce Clause. In each case, the government relied on the familiar "substantial effects" doctrine, under which activities that substantially affect interstate commerce are deemed to be proper subjects of federal regulation. The substantial effects rule has also been invoked successfully to justify federal land-

1 U.S. CONST. art. I, § 8, cl. 3.

2 Violence Against Women Act, 42 U.S.C. § 13981(a) (2000) ("Pursuant to the affirmative power of Congress to enact this Part under . . . section 8 of Article 1 of the Constitution . . . ."); Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964) (discussing Congress's findings with respect to Title II of the Civil Rights Act of 1964).

3 *See* United States v. Lopez, 514 U.S. 549, 563 (1995).

use regulations,[4] criminal laws directed at loan-sharking,[5] and a law criminalizing parents' failure to pay past-due child support.[6]

Given the stunning breadth of federal power under the Commerce Clause, it is unsurprising that the Supreme Court's resurgent federalism jurisprudence has included a fundamental reworking of the effects test. In *United States v. Lopez*[7] and *United States v. Morrison*,[8] the Supreme Court held that Congress's power to regulate conduct that substantially affects interstate commerce is limited to activities that are themselves commercial in nature. Thus, in both *Lopez* and *Morrison*, the Court deemed irrelevant the fact that the conduct regulated by the statutes under review—possession of a gun within 1000 feet of a school zone (*Lopez*), and acts of gender-motivated violence (*Morrison*)—might have a dramatic effect on the national economy. Even if such an effect existed, the Court explained, because the regulated activities were not commercial in nature, federal regulatory authority was lacking.[9]

The doctrinal change embodied in these cases has been driven, in large part, by concern that the effects test makes nonsense of the Constitution's apparent commitment to a federal government of limited and enumerated powers. The doctrine, it has been argued, entails no meaningful limit on federal authority; and without such limits in place, the enumerated power to regulate commerce takes on the character of a general police power, thereby fundamentally, and impermissibly, altering the constitutional scheme.

It is difficult to quibble with *Lopez-Morrison*'s claim that the substantial effects theories proffered in support of the statutes at issue in those cases could be used to justify just about anything the federal government wants to do. If possession of a gun near a school, for example, has a substantial effect on interstate commerce, then everything does; and if this is so, then the effects test does, indeed, carry the potential to animate a general police power. Still, the particular method selected by the Court for curtailing federal regulatory authority—focusing on whether regulated activity is commercial or non-commercial in nature—is puzzling.

Congress appears regularly to rely on the fact that a given activity substantially affects interstate commerce as an excuse for employing

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

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

6 *E.g.*, United States v. Parker, 108 F.3d 28, 30 (3d Cir. 1997); United States v. Hampshire, 95 F.3d 999, 1004 (10th Cir. 1996).

7 514 U.S. 549, 561 (1995).

8 529 U.S. 598, 610 (2000).

9 *Morrison*, 529 U.S. at 611; *Lopez*, 514 U.S. at 561.

the commerce power in order to pursue ends that are largely unrelated to any such commercial effects. For example, nobody believes that the passage of the Gun-Free School Zones Act was triggered by concerns related to the effects on interstate commerce of gun possession in school zones. The Act, it would seem, was passed because of the direct threat to the safety of children posed by the presence of guns in school zones, not because gun violence in schools make for a less productive citizenry. Arguments made by the federal government as to the connection between gun possession in school zones and interstate commerce are purely pretextual. Yet, the modern Court has not explored the possibility of reviewing legislation to assure that Congress has not acted pretextually. Instead, by zeroing in on whether regulated activity is economic or non-economic in nature, it has revived a discredited approach to Commerce Clause jurisprudence that was discarded decades ago by a chastened Supreme Court.

This Article examines the Supreme Court's chosen method of reining in federal power under the Commerce Clause, and it considers in detail the path not taken, namely the introduction into Commerce Clause adjudication of judicial review for legislative pretext. I proceed, as does the current Supreme Court majority, from the premise that the judiciary has a role to play in preventing Congress from parlaying its enumerated power to regulate commerce into a general police power.[10] But I argue that the method of controlling congressional power that we see employed in *Lopez* and *Morrison* cannot yield satisfying or even stable doctrine. I attempt to demonstrate that if the Supreme Court hopes meaningfully to alter the division of power between federal and state government by modifying its Commerce Clause jurisprudence, it will have to face up directly to the difficulties presented by pretextual lawmaking. At the same time, however, I hope to show that a pretext-based Commerce Clause jurisprudence is not without difficulties of its own. While attention to the question of legislative pretext is essential to an understanding of how and why the commerce power has expanded so dramatically, the task of translating this understanding into a manageable Commerce Clause jurisprudence presents significant challenges.

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10 This premise is disputable. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 541 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of federal power."). But I do not undertake, in this Article, to defend the current Supreme Court majority's conception of federal power and the judiciary's role in restraining its exercise. Instead, I take this conception for granted and scrutinize the Court's selected method of channeling its vision of federalism into the stuff of doctrine.

I proceed in four steps. First, in Part I, I introduce the key themes in Commerce Clause jurisprudence by surveying some of the historic cases involving this constitutional provision. This historical account reveals some of the different strategies the Court has employed in trying to establish stronger federalism-based limits on the commerce power. Part II focuses on the strategy at play in *Lopez* and *Morrison*. In particular, it scrutinizes the newly crafted requirement that the substantial effects rule extend only to activities that are themselves commercial in nature. I will argue that the Court's focus on the character of activities regulated under the Commerce Clause, and its concomitant downplaying of the effects component of the doctrine, yields a framework that is prone to arbitrary results and, more importantly, is internally conflicted.

Part III explores an alternative strategy for limiting the commerce power. Specifically, it establishes a foundation for purpose-based review of congressional action. This Part demonstrates that there is textual, precedential, and theoretical support for the notion that exercises of the commerce power that rely on the substantial effects rationale ought to be reviewed by the courts to assure that Congress is pursuing a legitimate purpose, i.e., that it is not using its enumerated powers pretextually. From this perspective, where federal regulation of an activity is justified on the ground that it substantially affects interstate commerce, such regulation must be designed to "get at" that substantial effect. Put otherwise, where effects on interstate commerce serve as the predicate for federal action, such effects must be the primary targets of this action.[11]

Part IV examines the precise mechanics of purpose-based review in commerce cases. I introduce two schemes through which purpose-based review might be injected into commerce jurisprudence. The first entails an aggressive form of judicial review of legislative purpose. While this model is troubling because it invites courts to render judgments that strain the limits of judicial competence, it is also attractive insofar as it carries the promise of smoking out pretextual legislation. By drawing analogies to other areas of law in which purpose-based review is employed, this section challenges the contention that this form of judicial scrutiny is inherently unmanageable. The second model involves more deferential judicial scrutiny of legislative purpose. This approach would require Congress to provide findings de-

11 In Part III, I also address the oft-heard criticism that purpose-based review charges the judiciary with the impossible task of peering into the minds of legislators in order to determine whether they mean to pursue illegitimate purposes. I argue that this criticism rests upon a mistaken understanding of purpose-based review.

tailing the commercial object of a particular law. Rather than enlisting courts to make contestable judgments as to legislative purpose, this approach is designed to encourage Congress to take more seriously its role in safeguarding the federal/state balance.

I. SHIFTING VISIONS OF FEDERALISM IN COMMERCE CLAUSE ADJUDICATION

In this Part, I place the *Lopez* and *Morrison* decisions in context by offering a brief historical account of the Court's major Commerce Clause decisions. In Part I.A, I sketch the Supreme Court's pre-*Lopez* jurisprudence, focusing on its prior effort to enforce stricter federalism-based limits on the commerce power. In Part I.B, I carry the historical account to the present by examining *Lopez* and *Morrison* in detail, describing the significant doctrinal shift embodied in those cases.

A. Historical Background

1. Foundations—*Gibbons v. Ogden*

The contours of federal power under the Commerce Clause were first outlined in Chief Justice Marshall's seminal opinion in *Gibbons v. Ogden*.[12] In that case, the Court assessed whether a New York law granting a monopoly over steamboat navigation between New York and New Jersey conflicted with federal laws concerning ship licensing.[13] Ogden argued that no such conflict existed because the federal licensing laws were beyond the scope of Congress's authority under the Commerce Clause.[14] That Clause, Ogden contended, should be "limit[ed] . . . to traffic, to buying and selling, or the interchange of commodities" and should not be construed to encompass the "navigation" at issue in that case.[15] The Court, however, rejected this construction and offered, instead, a more expansive vision of the commerce power: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."[16] The Court declined to confine the term "commerce" to "prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."[17] This broad conception of "commerce"—reaching beyond the mere ex-

12 22 U.S. (9 Wheat.) 1 (1824).
13 *Id.* at 1–2.
14 *Id.* at 3–4.
15 *Id.* at 189.
16 *Id.*
17 *Id.* at 190.

change of commodities—has served as the cornerstone of Commerce Clause jurisprudence ever since *Gibbons*.[18]

The Court then turned to the question of what constitutes "interstate" commerce—i.e., what it means for commerce to be "among the several States."[19] The Court held that even *intrastate* conduct can fall under the ambit of federal power in certain circumstances. Chief Justice Marshall conceded that the Clause does not extend to "commerce[ ] which is completely internal . . . and which does not extend to or affect other States,"[20] but he insisted that it does encompass "those internal [activities] that affect the States generally."[21] The Court thus refused to draw a sharp line between interstate and intrastate activities for purposes of their amenability to federal regulation via the commerce power. Instead, the Court selected a functional approach rooted in the nature of an activity's effect on interstate commerce.

For the next half-century, the Supreme Court had little cause to reexamine the scope of congressional power under the Commerce Clause. Most of the significant Commerce Clause cases decided before the 1880s were of the "dormant" Commerce Clause variety—cases requiring the Court to assess whether *state* legislation impermissibly interfered with interstate commerce.[22]

As the national economy grew more integrated, American commercial intercourse increasingly operated on a national scale; markets

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18 Scholars continue to debate whether Marshall's broad construction of the term "commerce" accurately reflects the original understanding of the clause. *Compare, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104 (2001) (contending that the records of the Constitutional Convention and the ratification debates suggest a narrow definition of "commerce"—restricted to trade), *with* 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, 13–56 (1999) (arguing that the Clause was originally understood to cover all "gainful activity"). Justice Thomas's concurring opinion in *Lopez* makes the case that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes," and nothing more. United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

19 U.S. CONST. art. I, § 8.

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

21 *Id.* at 195.

22 *See* Wickard v. Filburn, 317 U.S. 111, 121 (1942):

> For nearly a century . . . decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce.

that had previously been "local" were connected to a rapidly growing national web.[23] As a consequence, congressional efforts to use the commerce power in order to regulate the national economy began to intrude into what traditionally had been perceived as matters of strictly local concern. These intrusions gave rise to the first significant judicial efforts to curtail the scope of congressional power under the Commerce Clause.

2. Reining in the Commerce Power: Take 1

The Court became concerned that an expansive reading of the Commerce Clause, coupled with the fact of increasing economic integration, would upset the Constitution's scheme of enumerated powers. If the definition of "Commerce . . . among the several States" were not revised, the Court feared, the commerce power might extend to virtually all aspects of citizens' lives and would thereby take on the character of a federal police power.[24] Accordingly, in as series of cases spanning the years 1895–1936, the Supreme Court modified its interpretation of the Commerce Clause.

To do so, the Court crafted a series of formal categories, based on the character of the regulated activity, that distinguished proper from improper exercises of the commerce power.[25] Those activities that fit into the "wrong" category were deemed to be beyond the scope of Congress's regulatory authority. Thus, the Court held that "manufacturing" and other production-related activities did not constitute "commerce" and, hence, were outside the reach of federal power.

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23 *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 137–38.

24 The decisions discussed in this section were not only motivated by a desire to preserve a sphere of legislative autonomy for the states. The establishment of stricter limits on federal regulatory authority was also prompted by the Supreme Court majority's belief that the Constitution implicitly embraces a laissez-faire economic theory. United States v. Morrison, 529 U.S. 598, 644 (2000) (Souter, J., dissenting).

25 To be more precise, these distinctions were not so much "crafted" as they were borrowed from the Court's dormant Commerce Clause jurisprudence. Lessig, *supra* note 23, at 146:

> In the [ ] negative Commerce Clause cases, in an effort to preserve the power of states to regulate . . . the Court had built a set of formal categories to separate interstate from intrastate. Those state regulations deemed intrastate regulations would be permitted; those interstate, denied. It is these same categories then that were used for making the division the other way round. The Court stole these categories from the negative commerce jurisprudence to fashion a limit on the positive Commerce Clause.

See also United States v. Lopez, 514 U.S. 549, 554 (1995) (acknowledging that these distinctions were "imported from our negative Commerce Clause cases").

In *United States v. E.C. Knight Co.*,[26] for example, the Supreme Court considered whether the Sherman Antitrust Act could be applied to the American Sugar Refining Company's effort to purchase additional refineries and thereby gain a monopoly over sugar manufacturing. The Court asserted that "[c]ommerce succeeds to manufacture, and is not a part of it."[27] Because, in the Court's view, the sugar monopoly was not one over "commerce," the federal government was powerless to intervene.[28] This sharp formal distinction—between commerce, on the one hand, and manufacture or production, on the other—emerged as a crucial feature of the Court's Commerce Clause analysis during the period; it enabled the Court to contain the reach of federal power by categorically placing those activities labeled "manufacture" or "production" outside of Congress's reach.[29]

The narrowing of the Court's definition of "commerce" was likewise evident in *Hammer v. Dagenhart*.[30] In that case, the Court invalidated a federal law prohibiting the shipment in interstate commerce of the products of child labor.[31] It did so notwithstanding the fact that, in the past, it had upheld laws excluding various goods from interstate commerce.[32] The Court explained that the provision under review was intended to regulate the conditions under which goods were produced.[33] Because the law was aimed at "production," it fell on the wrong side of the "commerce/non-commerce" line and was deemed to be beyond Congress's reach. The Court explained,

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26 156 U.S. 1 (1895).

27 *Id.* at 12.

28 *Id.* at 13–14.

29 The Court conceded that a monopoly over manufacturing might affect interstate commerce, but insisted that such an effect would be merely "indirect" and thus inadequate to give rise to federal regulatory authority. *Id.* at 16. This "direct/indirect" distinction was the other significant categorical distinction on which the Court relied during this period in order to limit the expansion of federal power. *See infra* Part II.B.

30 247 U.S. 251 (1918).

31 *Id.* at 268 n.1.

32 *Id.* at 270 (citing Hoke v. United States, 227 U.S. 308 (1913); Hippolite Egg Co. v. United States, 220 U.S. 45 (1911); Champion v. Ames, 188 U.S. 321 (1903)).

33 *Id.* at 271–72:

> The thing intended to be accomplished by the statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.

> Commerce consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities. The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof.
>
> Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but *the production of articles*, intended for interstate commerce, is a matter of local regulation.[34]

Here too, the Court's focus on the formal "production/commerce" distinction (on the character of the regulated activity), in lieu of the actual effects of the regulated activity on interstate commerce, prevented the fact of increasing economic integration from underwriting the further expansion of federal authority.[35]

3. The "Switch in Time": Letting Go of the Reins

For a number of reasons, the Court's effort to use these formal categories in order to cabin congressional power proved unsustainable. For starters, Commerce Clause jurisprudence was increasingly perceived as out of touch with the realities of American commercial life. By clinging to the notion that certain intrastate activities (e.g., manufacturing, production) were not a part of "interstate commerce," the Court seemed to deny what everyone in a country suffering from nationwide economic depression already knew—namely, that the country's commercial life was deeply interconnected and that the line separating "local" and "interstate" in economic affairs was blurry, if it existed at all. Second, and related, important pieces of New Deal legislation were among the casualties of the Court's narrow vision of the commerce power. Specifically, regulations promulgated under the National Industrial Recovery Act were struck down in *A.L.A. Schechter Poultry Corp. v. United States*,[36] and fragments of the Bituminous Coal Conservation Act were invalidated in *Carter v. Carter Coal Co.*[37] By striking down these significant pieces of President Roosevelt's legislative agenda, the Court invited an enormous amount of political pressure, which was epitomized in FDR's Court-packing plan.

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34 *Id.* at 272 (internal quotation marks omitted) (ellipsis in original) (emphasis added).

35 This formalistic approach would be used again in the years that followed to strike down federal laws that were perceived as incursions on state regulatory authority. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating parts of the Coal Conservation Act on the ground that it regulated "production, not trade").

36 295 U.S. 495, 521, 550 (1935).

37 298 U.S. at 278, 311.

These factors conspired to produce the watershed 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*[38] In that case, the Court upheld the National Labor Relations Act (NLRA) against a constitutional challenge. The Court deemed federal regulation of labor relations within the steel industry permissible notwithstanding the fact that the covered laborers were engaged in intrastate "manufacturing."[39] The *Jones & Laughlin* Court abandoned the formalism that had become synonymous with Commerce Clause jurisprudence in previous years, insisting that "in view of respondent's far-flung activities, it is idle to say that the effect [of these activities on interstate commerce] would be indirect or remote. It is obvious that [the effect] would be immediate and might be catastrophic."[40] The possibility of so dramatic an effect on interstate commerce was sufficient to render federal regulation constitutional, whatever the character of the regulated activity might be. *Jones & Laughlin* thus ushered in a new era in Commerce Clause jurisprudence in which functional concerns predominated.

United States v. Darby[41] represents the second major step in the Commerce Clause revolution engineered during this period. In *Darby*, the Court affirmed the constitutionality of the Fair Labor Standards Act (FLSA), holding that Congress could (1) establish minimum wage and maximum hour requirements for individuals employed in the production of goods "for interstate commerce,"[42] and (2) prohibit the shipment in interstate commerce of goods manufactured under conditions that did not comport with the maximum hour and minimum wage requirements of the FLSA.[43]

In upholding the maximum hour and minimum wage provisions, the Court emphasized that "Congress may . . . by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce."[44] Though this "substantial effects" test has roots in earlier cases, *Darby*'s application of this standard to intrastate

38 301 U.S. 1 (1937).

39 *Id.* at 49.

40 *Id.* at 44; *see also id.* ("We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum.").

41 312 U.S. 100 (1941).

42 *Id.* at 122.

43 *Id.* at 116–17.

44 *Id.* at 119.

manufacturing activity was seen as a crucial recasting of federal power.[45]

In affirming the constitutionality of the shipment prohibition, the Court overturned its decision in *Hammer v. Dagenhart*. In doing so, the Court established that the motive behind a decision by Congress to prohibit the transportation of certain goods in interstate commerce is irrelevant to the question of constitutionality.[46] Therefore, the fact that the shipment prohibition sought to use the commerce power as a lever to regulate the conditions of production did not render it constitutionally defective.

The Supreme Court's decision in *Wickard v. Filburn*[47] represents the final phase of the New Deal revolution in Commerce Clause jurisprudence. In that case, the Court held that Congress could regulate an individual farmer's production of wheat for home consumption, notwithstanding the fact that this consumption occurred on an entirely intrastate basis and, on its own, undeniably did not have a substantial effect on interstate commerce. The Court held that the possible aggregate effects on wheat prices and, hence, on interstate commerce of many farmers' home consumption of wheat was sufficient to give rise to federal regulatory authority.[48]

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45 The permissibility of regulating intrastate activity under the Commerce Clause was acknowledged as far back as *Gibbons*, *see supra* text accompanying notes 19–21, and had been reaffirmed repeatedly in more recent cases. *See, e.g.*, Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 466 (1938) (noting, in dicta, that "a close and substantial relation to interstate commerce" is adequate to justify "federal control . . . over activities which separately considered are intrastate"); The Shreveport Rate Cases, 234 U.S. 342, 351 (1914) (holding that regulation of intrastate activity is permissible where such activity bears "a close and substantial relation to interstate traffic").

46 The Court stated,

> The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . 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.

Darby, 312 U.S. at 115.

47 317 U.S. 111 (1942).

48 *Id.* at 127–28 ("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.").

4. The Uncontrollable Commerce Clause

Buttressed by the substantial effects test and the aggregation principle, federal authority under the Commerce Clause grew remarkably broad in the years after *Wickard*. From the 1936 decision in *Carter Coal* until the *Lopez* decision in 1995, the Court did not deem a single act of Congress invalid on Commerce Clause grounds.[49] The expansion of the commerce power during this period was accomplished, in part, by combining the two key holdings of *Darby*. While *Darby* established the irrelevance of legislative motive with respect to the shipment prohibition at issue in that case (which was upheld without reliance on the substantial effects doctrine), it did not squarely hold that congressional purpose was likewise immaterial with respect to the minimum wage and maximum hour provisions (which were upheld on the basis of the substantial effects rationale).[50] In the decades that followed, however, the Court extended *Darby*'s rule against purpose-based review beyond the context in which it was initially employed.

In *Katzenbach v. McClung*[51] and *Heart of Atlanta Motel v. United States*,[52] for example, the Supreme Court upheld the enforcement of Title II of the Civil Rights Act of 1964—which forbade race discrimination in places of public accommodation—against a small family-owned restaurant (*McClung*) and a motel (*Heart of Atlanta*). The Court deemed rational Congress's conclusion that, in the aggregate, such discrimination has a substantial effect on the interstate sale of goods and on interstate travel.[53] Accordingly, the existence of federal power under the Commerce Clause was affirmed.

Critically, in both cases, the Court relied heavily on the substantial effects test,[54] and yet it refused to inquire into the question of legislative motive. In *Heart of Atlanta*, the Court expressly acknowl-

49 The Court did, in *National League of Cities v. Usery*, 426 U.S. 833, 842–43 (1976), deem an exercise of the commerce power to be invalid. However, the Court's holding was predicated on the Tenth Amendment and not strictly on an interpretation of the Commerce Clause itself. *Id.* at 842. Likewise, the Court's decision in *New York v. United States*, 505 U.S. 144, 159 (1992), which held an exercise of the commerce power unconstitutional, is rooted in a reading of the Tenth Amendment.

50 *Darby*, 312 U.S. at 123.

51 379 U.S. 294 (1964).

52 379 U.S. 241 (1964).

53 *McClung*, 379 U.S. at 304; *Heart of Atlanta*, 379 U.S. at 258–59.

54 *McClung*, 379 U.S. at 304 (taking note of race discrimination's "direct and adverse effect on the free flow of interstate commerce" and relying on *Wickard* for the proposition that appellee's activity may be reached by Congress if it exerts a substantial effect on interstate commerce); *Heart of Atlanta*, 379 U.S. at 257, 258 (taking note of "the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse" and stating that "the power of Congress to promote

edged that "the fundamental object of Title II was to vindicate 'the deprivation of dignity that surely accompanies denials of equal access to public establishments,'"[55] yet it insisted that "Congress was not restricted" by the fact that it was "dealing with what it considered a moral problem."[56] Thus, *McClung* and *Heart of Atlanta* extended *Darby*'s admonition against judicial assessment of legislative purpose to regulations resting on the substantial effects theory.[57]

Equally important to the expansion of the commerce power during this period was the emergence of the "jurisdictional nexus requirement" as potentially sufficient to support federal regulation under the Commerce Clause.[58] In cases such as *United States v. Sullivan*[59] and *Scarborough v. United States*[60] the Court affirmed the existence of broad federal regulatory authority over things that had previously passed through interstate commerce. So long as a nexus between a particu-

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interstate commerce also includes the power to regulate . . . local activities . . . which might have a substantial and harmful effect upon that commerce").

55 *Heart of Atlanta*, 379 U.S. at 250 (quoting S. Res. 872, 88th Cong. (1964)).

56 *Id.* at 257.

57 *See* Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 744 (1996) (noting that *McClung* was unusual in that "a federal 'police power' measure was upheld on the basis of the affects . . . doctrine. In the past, the affects doctrine was generally used to permit Congress to use its interstate commerce power to regulate activities that appear not to be interstate," not to permit regulation of activities that did not appear to be "commerce").

In both cases, the Court also took note of the connection between the particular places of public accommodation at issue and items or individuals that had passed through interstate commerce. *McClung*, 379 U.S. at 299–300; *Heart of Atlanta*, 379 U.S. at 252–53. Thus, the decisions seem to rely not only on the substantial effects test, but also on the nexus between regulated activity and persons and things in interstate commerce. *But see* Graglia, *supra*, at 744 ("[T]he Court [in *McClung*] seemed deliberately to avoid reliance on [the jurisdictional nexus theory]."). Even if the existence of this "jurisdictional nexus" played a role in the *McClung* and *Heart of Atlanta* decisions, the Court was still required to go beyond *Darby*'s holding as to legislative motive. *Darby*'s pronouncements with respect to congressional purpose pertained only to the exclusion of goods from the channels of interstate commerce, while the regulations at issue in *McClung* and *Heart of Atlanta* covered intrastate activity. Thus, whether we read these cases as relying on a substantial effects or a jurisdictional nexus theory, it was necessary for the Court to expand the *Darby* holding as to legislative motive to a different sort of Commerce Clause regulation.

58 I say "potentially" because, as I will discuss in Part II, the *Lopez* Court treated the question of whether a jurisdictional nexus requirement is always sufficient to underwrite federal regulatory authority as an open one. United States v. Lopez, 514 U.S. 549, 561–62 (1995).

59 332 U.S. 689 (1948).

60 431 U.S. 563 (1977).

lar good and interstate commerce could be established, the federal government was empowered to regulate activity involving that good.

Thus, in *Sullivan*, the Court sustained the conviction of a pharmacist for selling pills in a box that did not meet the Food, Drug, and Cosmetic Act's labeling requirements.[61] The sale in question had occurred on an intrastate basis; and, in fact, the defendant pharmacist had purchased the pills from an in-state retailer.[62] That retailer, however, had purchased the pills interstate, and the Court held that the Act applied "without regard to . . . how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment."[63] *Sullivan*'s holding—that Congress may regulate *intrastate* transactions involving goods that have previously traveled in interstate commerce—represents a significant extension of *Darby*.[64] While *Darby* established broad federal authority over things *passing through* interstate commerce, *Sullivan* established federal power over things that had, *at some time in the past*, traveled in interstate commerce.

In *Scarborough v. United States*, federal power to regulate activity involving goods with some nexus to interstate commerce was extended further. *Scarborough* involved a provision of the Omnibus Crime Control and Safe Streets Act of 1968 which made it a crime for a convicted felon to possess a firearm that had traveled in or affected interstate commerce.[65] Though the decision in *Scarborough* ultimately rested on a question of statutory interpretation, the Court's reasoning made clear that, as a constitutional matter, Congress was permitted to regulate intrastate activity involving goods that had traveled in interstate commerce *even if that activity did not involve a commercial transaction*.[66] Accordingly, the statute could be applied to mere possession of a firearm so long as that firearm had, at some time, passed through interstate commerce.[67]

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61 *Sullivan*, 332 U.S. at 698.

62 *Id.* at 691.

63 *Id.* at 696.

64 *See* Graglia, *supra* note 57, at 742 (noting that the decision in *Sullivan* "does not follow . . . from the logic of [*Darby*]," for while "[t]he transportation of goods across a state line is interstate commerce by definition according to the *Lottery Case* and *Darby*, . . . a sale of goods by a local merchant to a local customer is an intrastate transaction, its seems, even if the goods once crossed a state line").

65 *Scarborough*, 431 U.S. at 563–64.

66 *Id.* at 575 ("[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce.").

67 Notably, the *Scarborough* Court explicitly acknowledged that any commerce-related justification for the regulation at issue was purely pretextual. *Id.* at 575 n.11

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As these examples demonstrate, *Jones & Laughlin* marked the beginning of a steady process of erosion of judicially enforceable limits on the commerce power. The six decades of Commerce Clause jurisprudence that followed *Jones & Laughlin* created the impression that "Congress could regulate any act . . . under the Commerce Clause."[68] In fact, in the 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[69] the Supreme Court explicitly declared that it would no longer seek to enforce federalism-based limits on the commerce power, leaving to the political process (that is, to Congress's discretion) the question of how broad federal regulatory authority under this Clause would be.[70] It is against this backdrop that the Supreme Court issued its surprising opinion in *United States v. Lopez*.

B. Reining in the Commerce Power: Take 2

After these many years of acquiescence in the expansion of federal power under the Commerce Clause, the Supreme Court abruptly changed course with its 1995 decision in *United States v. Lopez*. In that case, a bare majority of the Court invalidated the Gun-Free School Zones Act, deeming it beyond the scope of the commerce power.[71] It was unclear, immediately after *Lopez* came down, whether that decision marked the beginning of a new era in which federalism concerns would motivate the imposition of judicially enforceable limits on Congress's authority to regulate commerce. Some scholars characterized *Lopez* as a mere warning shot designed to signal to Congress that the Court had gone too far in seeking to distance itself from the wooden formalism of the pre-1937 era and that Congress ought to take more seriously the constitutional boundaries on its legislative authority.[72]

("Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of [the law].").

68 Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674 (1995); *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1259 (1995) ("Since the New Deal 'switch,' the Commerce Clause power . . . has been understood to be remarkably inclusive. . . . It . . . seems almost brazen to suggest that there is anything Congress may not do.").

69 469 U.S. 528 (1985).

70 *Id.* at 551 ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structural of federal power.").

71 United States v. Lopez, 514 U.S. 549, 551 (1995).

72 *See, e.g.*, Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 63 ("[A]t present, I am inclined to view *Lopez* less as a fundamental recasting of relations between nation and state than as a warning shot across

But five years later, in *United States v. Morrison*, the Court dropped the other shoe by deeming the Violence Against Women Act to be beyond the scope of Congress's power under the Commerce Clause.[73] Taken together, these decisions represent an unmistakable shift in the Court's approach toward judicial enforcement of strict federalism-based limits on the commerce power.

1. *United States v. Lopez*

On March 10, 1992, Alfonso Lopez, Jr., a senior at Edison High School in San Antonio, was arrested by local law enforcement authorities after they received a report that Lopez had brought a firearm to school.[74] Lopez was charged with violating the Gun-Free School Zones Act ("the Act"), which made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[75]

Lopez argued that the Act exceeded Congress's authority under the Commerce Clause and, hence, that the charges against him should be dismissed.[76] The Supreme Court agreed.[77] The Court began from the premise that a theory of the Commerce Clause that establishes no judicially enforceable limit on Congress's regulatory authority cannot be sustained, for such a theory entails the transformation of an enumerated power into a general police power and thus threatens to upset the federal balance.[78] The majority contended that

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the bow."); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1484 (1995) ("In short, *Lopez* does not and should not augur a new period of aggressive judicial enforcement of jurisdictional limitations on congressional power. It is best read as a remand for Congress to attend federalism values more explicitly.").

73 United States v. Morrison, 529 U.S. 598, 610 (2000).

74 *Lopez*, 514 U.S. at 551.

75 *Id.* (quoting 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988)). A school zone was defined as anywhere within 1000 feet of a public, private, or parochial school. 18 U.S.C. § 921(a)(25) (Supp. V 1988).

76 *Lopez*, 514 U.S. at 552.

77 *Id.* The district court had denied Lopez's motion, and the defendant was convicted and sentenced to six months in prison. *Id.* at 551–52. On appeal before the Fifth Circuit, Lopez's conviction was reversed. Relying heavily on the fact that Congress had failed to issue findings demonstrating the link between interstate commerce and the activity regulated under the Act, *United States v. Lopez*, 2 F.3d 1342, 1365–66 (5th Cir. 1993), the Court of Appeals held that "section 922(q) . . . is invalid as beyond the power of Congress under the Commerce Clause." *Id.* at 1367–68.

78 *Lopez*, 514 U.S. at 557:

> [T]he scope of the interstate commerce power "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace

upholding the Gun-Free School Zones Act would entail the elimination of the distinction between the "local" and the "national," for if Congress could regulate gun possession in school zones under the Commerce Clause, then there was no activity that it could not reach.

In detailing the shortcomings of the Gun-Free School Zones Act, the Court focused its attention on three particular defects. First, the Court noted that in contrast to the many regulations upheld under the substantial effects test during the decades after *Jones & Laughlin*, the Gun-Free School Zones Act "by its terms has nothing to do with 'commerce' or any sort of economic enterprise . . . ."[79] Only, the Court explained, "[w]here *economic activity* substantially affects interstate commerce, [will] legislation regulating that activity . . . be sustained."[80] In this way, the Court revived the categorical formalism of the pre-1937 era, once again focusing Commerce Clause doctrine on the character of the regulated activity. Second, the Court pointed out that the Act did not contain a jurisdictional nexus requirement limiting its application to guns that had "an explicit connection with or effect on interstate commerce."[81] Finally, the Court chastised Congress for failing to include in the statute any findings evincing a link between the regulated activity and interstate commerce.[82] For these reasons, the Court determined that the Gun-Free School Zones Act could not be upheld on the basis of precedent case law.[83]

The Court concluded by addressing arguments that had been presented by the U.S. Government in an effort to demonstrate that the Act met the requirements articulated in the applicable precedents. Specifically, the Government insisted that because, in the ag-

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> them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

(quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

79 *Id.* at 561.

80 *Id.* at 560 (emphasis added). The Court's application of an economic activity requirement points to an interesting distinction between *Lopez* and an earlier round of commerce cases. Specifically, the extension of the commerce power implicit in the leap from *Sullivan* to *Scarborough* parallels the jump required to go from *Wickard* to *Lopez*. *Scarborough* and *Lopez* both involved statutes that sought to extend theories of the commerce power from regulation of commercial activity to regulation of noncommercial activity. This move was deemed permissible in *Scarborough* but not in *Lopez*. *See* Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2174 (2001) ("[T]he *Lopez/Morrison* requirement that the regulated activity be economic only applies if there is no jurisdictional nexus to interstate activity of any kind.").

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

82 *Id.*

83 *Id.* at 567.

gregate, possession of guns in school zones substantially affects interstate commerce, such activity is subject to federal regulation.[84] The Government contended that this was so notwithstanding the absence of legislative findings or a jurisdictional nexus requirement in the statute and notwithstanding the fact that the regulated activity was non-economic in nature.[85]

The Government sought to establish the link between gun possession in school zones and interstate commerce in the following ways: first, it asserted that gun possession in a school zone can lead to violent crime, which creates substantial costs, which "through the mechanism of insurance . . . are spread throughout the population," and which "reduce[ ] the willingness of individuals to travel to areas within the country that are perceived to be unsafe."[86] Second, the Government contended that the presence of guns in schools threatened the educational process which, in turn, would yield a "less productive citizenry" which, in turn, would pose a threat to the economic well-being of the country.[87]

The Court forcefully rejected both of these arguments and, in the process, developed the opinion's major theme, namely that a theory of commerce that imposes no meaningful limit on congressional power cannot pass constitutional muster. "[I]f we were to accept the Government's arguments," the Court explained, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[88] From this perspective, even if the Government's arguments were taken as true, because the method of reasoning underlying them was faulty, they could not serve as the basis for valid Commerce Clause regulation. The Court stated that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police

84 *Id.*

85 *Id.* at 563–68.

86 *Id.* at 564.

87 *Id.*

88 *Id.* The Court explained further:

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime . . . . Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens . . . .

Id. The Court also emphasized that the dissenters, in embracing the Government's "national productivity" theory, were "unable to identify any activity that the States may regulate but Congress may not." *Id.*; *see also id.* at 565 ("Justice Breyer's rationale lacks any real limits.").

power of the sort retained by the States."[89] The constraints of federalism, in the Court's view, preclude reliance upon so attenuated a link between regulated activity and interstate commerce.

2. *United States v. Morrison*

In *United States v. Morrison*, petitioner Christy Brzonkala brought suit against two defendants, Antonio Morrison and James Crawford, alleging that they had assaulted and raped her repeatedly soon after they met on the campus of Virginia Polytechnic Institute.[90] Brzonkala sued under § 13891 of the Violence Against Women Act of 1994 (VAWA), which provided a civil remedy, enforceable in federal court, to victims of gender-motivated violence.[91]

Morrison and Crawford moved to dismiss, arguing that § 13891 was unconstitutional. The Supreme Court held that § 13891 was not a valid exercise of federal power under either the Commerce Clause or Section Five of the Fourteenth Amendment.[92] The Court framed its reasoning (with respect to the Commerce Clause question) around the *Lopez* opinion. In so doing, the majority strongly reaffirmed the significance of the economic/non-economic distinction, noting that acts of "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," and insisting that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[93] The Court pointed out, moreover, that "[l]ike the Gun-Free School Zones Act . . . § 13891 contains no jurisdictional element establishing

89 *Id.* at 567.

90 Unites States v. Morrison, 529 U.S. 598, 602 (2000).

91 *See* 42 U.S.C. § 13891(c) (2000) ("A person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."). Brzonkala also brought suit against the university, claiming that their handling of her complaints against the defendants violated Title IX of the Education Amendments of 1972. *Morrison*, 529 U.S. at 604.

92 *Morrison*, 529 U.S. at 619. The district court had granted defendants' motion, holding that the challenged provision was unconstitutional. Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996). A panel of the U.S. Court of Appeals for the Fourth Circuit reversed, but, on rehearing en banc, the full court affirmed the decision of the district court. Brzonkala v. Va. Polytechnic & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc). The fragment of the Supreme Court's opinion analyzing the constitutionality of VAWA under Section Five of the Fourteenth Amendment is beyond the scope of this Article.

93 *Morrison*, 529 U.S. at 613.

that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[94]

As for congressional findings, however, *Morrison* presented a very different case from *Lopez*. As the dissenters noted, Congress had collected a veritable "mountain of data" demonstrating the effects of violence against women on interstate commerce.[95] Under these conditions, the Court could hardly criticize Congress (as it had in *Lopez*) for not doing its homework. Instead, the majority simply rejected the legislature's findings, insisting that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[96]

The Court justified its rejection of the findings compiled by Congress by returning to the theme of enumerated powers:

> In these cases, Congress's findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. . . .
>
> The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce. If accepted, *petitioners' reasoning would allow Congress to regulate any crime* as long as the nationwide, aggregate impact of that crime has substantial effects on employment, production, transit, or consumption.[97]

From this perspective, even if the links identified by Congress between violence against women and interstate commerce were conceded to exist, they could not give rise to federal regulatory authority under the Commerce Clause. For the method employed by Congress to establish these links—i.e., piling inferences on top of each other in order to find an attenuated connection to interstate commerce—was deemed by the Court to be constitutionally inadequate.[98]

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94 *Id.*

95 *Id.* at 628–29 (Souter, J., dissenting). For example, one Senate Report indicated that "[p]artial estimates show that violent crime against women costs this country at least 3 billion . . . dollars a year." *Id.* at 632 (quoting S. REP. No. 101-545, at 33 (1990) (citing E. SCHNEIDER, LEGAL REFORM EFFORTS FOR BATTERED WOMEN: PAST, PRESENT, AND FUTURE (1990))).

96 *Id.* at 614 ("'Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995) (quoting Hodel v. Va. Surface Mining & Reclamation, 452 U.S. 264, 311 (1981))).

97 *Id.* at 615 (emphasis added).

98 *Id.* at 612 ("'[The] decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.'" (quoting *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel*, 452 U.S. at 311))).

Morrison's reshuffling of rationales—downplaying the significance of legislative findings, while highlighting (1) the requirement that regulated activity be economic in character, and (2) the methodological limits on the application of the substantial effects test—is critical. Even the copious amount of evidence marshaled by Congress in support of its conclusion that violence against women has a substantial effect on interstate commerce was deemed inadequate to save § 13981 from invalidation.[99] The methodological problem of "attenuation" or "piling of inferences," coupled with the fact that VAWA regulated non-commercial activity, trumped Congress's factual findings regarding the effect of the regulated activity on interstate commerce.

* * *

Morrison has exploded the notion that *Lopez* was merely a "warning shot" intended to stimulate increased congressional attention to federalism values. Instead, the *Lopez-Morrison* doctrine signals the recasting of federalism-based limits on the commerce power. Whether this effort to rein in federal power under the Commerce Clause is likely to fare better than the Court's prior attempt to do so is the focus of the next Part.

II. ASSESSING THE EMERGING DOCTRINE

This Part offers a critical assessment of the *Lopez-Morrison* doctrine. I will focus my attention on the economic/non-economic distinction[100] and on what I will call "the attenuation principle"—the rule under which statutes that rely on too attenuated a link between regulated activity and interstate commerce violate background principles of federalism and are therefore invalid. I will begin, in Part II.A, by examining the way these particular doctrinal tools operate. First, I will argue that the attenuation principle has been applied clumsily by the Court, and I will question whether and how it may help to distinguish valid exercises of the commerce power from invalid ones. I will then scrutinize the economic/non-economic distinction, raising doubts as to whether this distinction is sufficiently determinate to serve as the foundation for a workable Commerce Clause jurisprudence.

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99 Even in *Lopez*, the Court's reliance on the absence of findings was qualified. The majority in that case explicitly confirmed that "Congress normally is not required to make formal findings," *Lopez*, 514 U.S. at 562, and insisted that, ultimately, courts must decide whether an adequate link between the regulated activity and interstate commerce exists. *Id.* at 557 n.2.

100 I will use the terms "economic/non-economic distinction" and "commercial/non-commercial distinction" interchangeably.

In Part II.B, I connect *Lopez-Morrison*'s vision of federalism-based limits on the commerce power to the Court's prior effort to ratchet up the constraints on federal power under this Clause. Though there are significant differences between the modern and the pre-1937 cases, I will argue that in fundamental respects, the doctrines constructed during these eras are similar. I will then make the case that the conception of "interstate commerce" implicit in the *Lopez-Morrison* doctrine is unlikely to endure because the cases fail to offer a coherent account of the proper division of power between state and federal government.

A. Doctrinal Tools

1. Attenuation and "Piling of Inferences"

One of the pillars of the *Lopez-Morrison* doctrine is a prohibition against use of a particular methodology for linking regulated activity to interstate commerce. Specifically, the cases hold that if it is necessary to "pile inference upon inference" in order to establish this link—if the causal chain connecting regulated activity to interstate commerce is too "attenuated"—then the statute cannot be upheld as a valid exercise of federal power under the Commerce Clause.[101]

But it is not at all clear that the series of inferences establishing the interstate commerce connection in the context of, say, the Violence Against Women Act differs in any meaningful way from the chain of reasoning linking interstate commerce to regulated activity in the context of statutes that the Court has upheld (such as the Agricultural Adjustment Act upheld in *Wickard v. Filburn*).[102] The chains of reasoning underlying the relevant statutes might be depicted as follows:

(1) Filburn consumes homegrown wheat → Filburn does not purchase wheat on the market → other farmers do the same → demand for interstate wheat is affected; and

(2) Brzonkala is a victim of gender-motivated violence → Brzonkala is deterred from traveling, seeking employment, transacting business in interstate commerce[103] → other women are deterred from the same → demand for interstate products/supply of interstate labor is affected.

It is worth noting, first, that in strictly quantitative terms, each of these chains involves three inferential steps. In this (perhaps superfi-

101 *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 567.

102 Critically, neither *Lopez* nor *Morrison* purports to overturn any prior cases.

103 *Morrison*, 529 U.S. at 634–35 (Souter, J., dissenting).

cial) way, the VAWA example does not appear more attenuated than the *Wickard* case—no more inferences are "piled on top of each other" in one case than in the other.[104]

But perhaps the *Lopez-Morrison* doctrine reflects an attempt to look behind this surface equivalence. The Court's application of the attenuation principle might be taken to imply that in the second scenario outlined above (*Morrison*), a series of smaller inferences are actually smuggled into the chain of reasoning, whereas no such smuggling is necessary to connect the dots in scenario 1 (*Wickard*).

One could argue, for example, that in order to arrive at the first conclusion drawn in the *Morrison* chain, namely that gender-motivated violence will deter a victim from participating in commercial activities, a series of intermediate inferences are necessary. Specifically, in order to connect the regulated activity to commercial conduct, one must draw conclusions about how people respond to violence—they fear future harm—and about how they respond to fear of harm—they take precautions which may involve abstaining from interstate commercial activity. In contrast, the argument goes, only a single direct inference is required to arrive at the first conclusion in the *Wickard* chain, i.e., that if Filburn consumes homegrown wheat, he does not purchase as much of this good on the market. Seen in this light, a "piling of inferences" *is* required in order to establish a link between the activity regulated under VAWA and interstate commerce; critically, this piling of inferences seems unnecessary in the *Wickard* scenario.

On closer inspection, however, it becomes apparent that the first inference in the *Wickard* example could be broken down into a series of sub-inferences—in this case about economic rationality—just as the *Morrison* example was broken down into a set of sub-inferences about how individuals respond to being victims of gender-motivated violence. Specifically, in order to connect the regulated activity at issue in *Wickard* to market behavior one must draw intermediate conclusions about how people respond to consuming homegrown wheat—they get less utility from additional market-purchased wheat—and about how they respond to this drop in utility—they are less willing to

104 In fact, it could be argued that in strictly quantitative terms, the chain of reasoning at play in *Morrison* is actually shorter than that employed in the *Wickard* scenario. The second component of the *Morrison* chain might be excluded. It is not necessary that a specific victim be deterred from participating in interstate commerce in order for the regulated activity—violence against women—to affect interstate commerce substantially. So long as many women are deterred from interstate commercial activities, the necessary effect exists.

purchase wheat on the market. As with *Morrison*, we can see, the inferential chain employed in the *Wickard* example is subject to expansion.

The *Morrison* Court's concern with "attenuation," therefore, must be rooted in something other than the fact that inferences are "piled on top of one another" to identify a connection to interstate commerce. A more likely explanation for the Court's reasoning is that the sub-inferences employed in the *Morrison* scenario—regarding how women respond to gender-motivated violence—were simply less familiar to the Court than the sub-inferences pertaining to economic rationality that were at issue in *Wickard*.[105] Seen in this light, the Court's conclusion in *Morrison* seems to rest on a judgment as to the *quality*, rather than the *quantity*, of the inferences at issue.[106]

Cast as a statement about the quality of the inferences employed by Congress—i.e., about the Court's willingness to accept the validity of the facts presented and inferences drawn by Congress or about the Court's readiness to concede that these facts and inferences justify legislative action—this facet of the *Lopez-Morrison* doctrine appears uniquely intrusive.[107] It is one thing for the Court to overturn a statute on the ground that the procedure employed by Congress to estab-

105 *Cf. Lopez*, 514 U.S. at 608 (Souter, J., dissenting) ("[I]f it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago.").

106 As Professor Resnik has illustrated, the inferential steps necessary to link violence against women and interstate commerce may be quite small indeed. Judith Resnik, *Categorical Federalism: Justice, Gender, and the Globe*, 111 YALE L.J. 619, 633 (2001) ("[F]raming the problem of violence against women as embedded in commerce provides descriptive accuracy and normative instruction about the degree to which the current economy is formed by gendered allocations of work that subordinate women."). Moreover, to the women who are victims and potential victims of gender-motivated violence, the linkage between such acts of violence and their (non)participation in interstate commerce may be every bit as intuitive as the linkage between having a surfeit of wheat and not purchasing more.

107 The intrusiveness of the majority's review is one of the focal points of the dissenting opinions in *Lopez* and *Morrison*. *See, e.g.*, *Morrison*, 529 U.S. at 628 (Souter, J., dissenting) (noting that the question of whether regulated activity has a substantial effect on interstate commerce "is not an issue for the courts in the first instance . . . but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours"); *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) (taking note of "[t]he practice of deferring to rationally based legislative judgments" and pointing out that this practice "reflects our respect for the institutional competence of the Congress"); *id.* at 616 (Breyer, J., dissenting) (emphasizing that "[c]ourts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce . . . because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy").

lish the predicate for legislative authority is defective. To reject Congress's effort to establish this predicate on the ground that its analysis is unfamiliar or substantively disfavored, is quite another.

* * *

The fact that the attenuation principle was employed carelessly by the *Morrison* Court does not mean that it is devoid of content. There can be no doubt that among the many activities that substantially affect interstate commerce, some affect it more directly than others.[108] Moreover, as I will discuss in Parts III and IV, the fact that a given activity has an attenuated effect on interstate commerce may signal that federal regulation of that activity via the commerce power is constitutionally problematic. But it is not, as the modern Court seems to believe, that an attenuated effect on interstate commerce *per se* disqualifies activity from being the target of Commerce Clause regulation. Instead, the existence of such an attenuated effect may serve as *evidence* that something constitutionally troubling is afoot. But we are getting ahead of ourselves. For present purposes, let us focus on what is wrong with *Lopez-Morrison*, leaving until later the question of how to make it right.

2. The Economic/Non-Economic Distinction

The majority opinions in *Lopez* and *Morrison* also make much of the fact that the statutes under consideration in those cases take aim at conduct that is not commercial in nature.[109] The *Morrison* majority emphasized that "the noneconomic, criminal nature of the conduct at issue [in *Lopez*] was central to our decision in that case," and it criticized the dissenters and the Government for "downplay[ing] the role that the economic nature of regulated activity plays in our Commerce Clause analysis."[110]

The Court stopped short of stating that only economic activity may be regulated under the substantial effects prong of Commerce Clause jurisprudence.[111] Still, the cases take a determined step in that

108 Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2233 (1998) ("It is possible to identify greater and lesser degrees of connection between enumerated powers and regulated conduct.").

109 *See supra* notes 79–80, 93 and accompanying text.

110 *Morrison*, 529 U.S. at 610.

111 *Id.* at 613 ("[W]e need not adopt a categorical rule against aggregating the effects of any noneconomic [sic] activity in order to decide these cases."). The Court did not question the notion that non-economic activity is subject to regulation under, for example, the "channels and instrumentalities" components of Commerce Clause doctrine. *See, e.g.*, Scarborough v. United States, 431 U.S. 563 (1977) (upholding a

direction. There is much to say about the economic/non-economic distinction and its uncomfortable relationship to the rest of the Court's Commerce Clause doctrine; I will take up this issue later on in this Part. For the time being, however, I wish only to express doubt as to whether courts can apply this distinction with consistency.

For starters, *Lopez* itself is witness to disagreement as to what qualifies as "economic activity." While Chief Justice Rehnquist characterized the activity at issue in *Wickard*—consumption of homegrown wheat—as economic in nature,[112] the dissenting Justices disagreed, arguing that "consumption of homegrown wheat '. . . *may not be regarded as commerce.*'"[113] Similarly, while the *Lopez* majority distinguished cases such as *McClung* and *Heart of Atlanta* from the case before it on the ground that *McClung* and *Heart of Atlanta* involved regulation of "economic activity,"[114] the dissenters classified the activity at issue in *McClung* as "race-based exclusion," a practice they labeled as "not itself 'commercial.'"[115] Thus, even if the entire Court agreed that the commercial/non-commercial distinction ought to feature prominently in its Commerce Clause jurisprudence, it is questionable whether consensus as to how to decide particular cases would emerge.[116]

In fact, there is some evidence that the lower federal courts are already experiencing difficulty in their efforts to distinguish economic from non-economic activity. In *Gibbs v. Babbitt*,[117] for example, the Fourth Circuit assessed the constitutionality of a regulation promulgated pursuant to the Endangered Species Act, which prohibits the "taking" of certain red wolves in North Carolina.[118] The majority held that "economic activity must be understood in broad terms," and concluded that "[i]t was reasonable for Congress and the Fish and Wildlife Service to conclude that [the provision in question] regulates

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law making it illegal for convicted felons to possess a firearm that has traveled in interstate commerce).

112 *Lopez*, 514 U.S. at 560 ("Even *Wickard* . . . involved economic activity.").

113 *Id.* at 628 (Breyer, J., dissenting) (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

114 *Id.* at 560.

115 *Id.* at 628 (Breyer, J., dissenting).

116 The *Lopez* majority acknowledged that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." *Id.* at 566. The Court concluded, however, that such uncertainty was a necessary cost of trying to enforce federalism-based limits on the commerce power. *Id.* ("The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize the enactment of every type of legislation.").

117 214 F.3d 483 (4th Cir. 2000).

118 *Id.* at 489.

economic activity."[119] A dissenting judge, however, insisted that the regulation covered "[a]n activity that not only has no current economic character, but one that concededly has had no economic character for well over a century now . . . . [and] that has no foreseeable economic character at all . . . ."[120]

Likewise, in *United States v. Wilson*,[121] the Seventh Circuit considered whether the Freedom of Access to Clinic Entrances Act, which forbade physical obstruction of access to facilities providing reproductive health services, represented a valid exercise of the commerce power.[122] The majority insisted that "the Access Act . . . regulates a commercial activity—the provision of reproductive health services."[123] The dissent, on the other hand, contended that the Act "does not regulate the business or commercial practices of abortion clinics. Rather, the Act criminalizes the purely non-economic activity . . . of protestors."[124]

Of course, the fact that some circuit courts have failed to reach unanimous decisions in these cases is hardly conclusive proof that the doctrine they are applying is impossible to administer. Still, these split decisions, coupled with the Supreme Court's inability to achieve consensus in classifying the regulated activity in *Wickard*, *McClung*, and *Heart of Atlanta* (among other cases) suggest that the economic/non-economic distinction might prove uniquely troublesome.

Unsurprisingly, the debate within the judiciary as to what qualifies as "economic activity" is echoed in the scholarly analysis of *Lopez* and *Morrison*. Thus, one commentator has asked "[i]f the home consumption of wheat is economic activity, what is not?",[125] implying thereby that the activity at issue in *Wickard* cannot meet any useful definition of "economic activity." On the other hand, another commentator has insisted that "growing wheat on a farm is commercial behavior."[126] Perhaps the only thing about which there is at least lim-

119 *Id.* at 491–92.

120 *Id.* at 508 (Luttig, J., dissenting); *see also, e.g.*, Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1064 (D.C. Cir. 1996) (Sentelle, J., dissenting) (arguing that the application of the takings clause of the Endangered Species Act "does not control a commercial activity or an activity necessary to the regulation of some commercial activity").

121 73 F.3d 675 (7th Cir. 1995).

122 *Id.* at 676–77.

123 *Id.* at 683.

124 *Id.* at 689 (Coffey, J., dissenting).

125 Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 547, 558 (2001).

126 Donald H. Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 564 (1995).

ited consensus among scholars in this respect is that clarifying the line between economic and non-economic activity is sure to be a contentious and difficult undertaking.[127]

B. The Economic Activity Requirement in Context

1. Methodological Similarities to the Pre-1937 Cases

As noted in Part I.A, the Court's prior struggles with Commerce Clause interpretation were motivated, in part,[128] by a desire to keep the federal government from intruding into state affairs. The Court was, as it is today, concerned that a broad interpretation of the Commerce Clause would make nonsense of the Framers' commitment to a federal government of enumerated powers. While the pre-1937 Court relied on different formal categories from the ones crafted in *Lopez* and applied again in *Morrison* in order to limit the federal government,[129] the methodology employed by the Court during the two eras is closely parallel.

In both sets of cases, the Court focused on the question of how remote are the effects of regulated activity on interstate commerce. In addition, during both eras, the Court employed a formal distinction, based upon the character of the regulated activity, as a mechanism for identifying statutes that rely on too attenuated a link to interstate commerce. These methodological similarities between the

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127 *See* Lessig, *supra* note 23, at 205:

> The point is this: Not that a line couldn't be drawn [distinguishing economic and non-economic activity], but that the activity of drawing it, across the full range of cases, will be extremely difficult. . . . Even if one could easily define the activity being regulated, what is it that determines whether the activity is "commercial" or not?

See also Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After* Morrison, 25 OKLA. CITY U. L. REV. 843, 867 (2000) ("*Morrison*'s commercial/non-commercial distinction contains . . . ambiguities that may prove difficult for the Court to enforce as an objective test.").

Of course, even if one were confident that a clear line distinguishing commercial from non-commercial activity could be drawn, the question remains whether it is sensible to attribute doctrinal significance to this line. I take up this question below.

128 *See supra* note 24 (acknowledging the role played in the Commerce Clause cases by laissez-faire economic theory).

129 There can be no doubt that many activities that would not be subject to federal regulation under the production/commerce distinction of the pre-*Jones & Laughlin* era would survive constitutional scrutiny under the modern doctrine. For example, the conduct at issue in cases such as *Schechter Poultry* and *Carter Coal* would surely meet the current Court's definition of "economic activity" and hence would be amenable to federal control, though regulations of that conduct failed constitutional scrutiny in the 1930s.

modern and the pre-1937 approaches to Commerce Clause interpretation render the two doctrines susceptible to comparable lines of criticism.

Consider *A.L.A. Schechter Poultry Corp. v. United States*,[130] which was decided in 1935. In that case, the Court assessed the constitutionality of the "Live Poultry Code," which regulated the poultry industry in the New York area. The Government argued that such regulation was constitutional given that (1) working conditions (wages and hours) in the New York poultry industry had a demonstrable effect on the price of and demand for poultry on an interstate basis,[131] and (2) under existing doctrine, "'the effect upon interstate commerce,' not the 'source of the injury' . . . [was] 'the criterion of congressional power' [under the Commerce Clause]."[132]

Nevertheless, the Court invalidated the challenged provisions. It did so *not* on the ground that the regulated activity had an insubstantial effect on interstate commerce, but on the ground that these effects, though extant, were "indirect." The Court explained that if such "indirect" effects on interstate commerce were sufficient to give rise to federal regulatory power, then "the federal authority would embrace practically all the activities of the people."[133] This, the Court insisted, could not be reconciled with the Constitution's commitment to a national government of limited power.[134] The attenuation theme we see in the modern cases is clearly a descendant of this "indirect effects" concern.

This theme played a pivotal role in many of the key cases from this earlier generation of Commerce Clause cases.[135] As with *Schechter Poultry*, these cases do not rest on the notion that the activity regulated by the challenged provisions failed to affect interstate commerce substantially. Rather, in each case, the Court conceded the existence of such effects, but held nonetheless that principles of federalism precluded these "indirect" effects from underwriting federal regulatory authority.

Lopez and *Morrison* likewise do not proceed from the premise that the activities regulated under the relevant statutes fail to have a sub-

130 295 U.S. 495 (1935).

131 *Id.* at 548–49.

132 *Id.* at 544 (quoting Second Employers' Liability Cases, 223 U.S. 1, 51 (1912) (internal quotation marks omitted)).

133 *Id.* at 546.

134 *Id.*

135 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 307–10 (1936); United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895).

stantial effect on interstate commerce.[136] Rather, they signal that the existence of such effects is insufficient to justify regulation under the Commerce Clause.

Another important similarity between these two generations of Commerce Clause cases lies in the fact that like the modern Court, which employs the economic/non-economic distinction in order to smoke out those regulations that rely on too attenuated a link to interstate commerce, the pre-1937 Court applied a rigid formal distinction—between "production" and "commerce"[137]—to identify activities that exert only an indirect effect on interstate commercial matters. The *E.C. Knight* Court, for example, explained,

> Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent . . . .[138]

The *Carter Coal* Court likewise conceded that "the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce . . . ."[139] Nevertheless, it held that this effect was "indirect," and federal regulatory was found to be lacking.[140] The categories of activity discussed in these cases—mining, manufacturing, production, etc.—were, *as a matter of definition,* deemed to exert only an indirect effect on interstate commerce.

The relationship we see in these excerpts between the formal distinction and the attenuation concern is familiar. The *Lopez-Morrison* doctrine relies on the same technique. Those activities that fit into

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136 Nothing in *Lopez* suggests that the connections identified by Justice Breyer between interstate commerce and gun possession in school zones do not exist. Nor does the *Morrison* majority refute the evidence collected by Congress in support of the notion that violence against women has a dramatic effect on interstate commerce. *See* Dorf, *supra* note 80, at 2172:

> [The *Lopez* majority] made no attempt to dispute the obvious point documented at length by Justice Breyer in dissent—that the presence of guns near schools has a substantial impact on students' abilities to learn, which in turn has a substantial effect on their ability, upon entering the workforce, to contribute to the national economy.

137 *See supra* Part I.A.2.

138 *E.C. Knight Co.*, 156 U.S. at 16.

139 *Carter*, 298 U.S. at 307.

140 *Id.* at 308–09. Here, too, the Court insisted that "if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all activities of the people . . . ." *Id.* at 309.

the "wrong" category—in the modern cases, activities that are "non-economic"—are deemed to have too attenuated (that is, an "indirect") effect on interstate commerce.[141]

2. The Recurring Problem of Arbitrariness

Given the similarities noted above between the *Lopez-Morrison* doctrine and the Commerce Clause jurisprudence of the early twentieth century, it is hardly surprising that the two are susceptible to parallel lines of criticism. One commentator has described the defects in the pre-*Jones & Laughlin* doctrine as follows: "The problem with the pre-1937 doctrine was not so much that it attempted to define commerce . . . as that it did so in arbitrary ways, ways seemingly insensitive to economic realities."[142] By placing the formal, commerce/production distinction at the heart of the doctrine, the Court afforded different treatment to activities that, from an economic perspective, i.e., in terms of their effect on interstate commerce, were indistinguishable. For this reason, the jurisprudence of the period seemed arbitrary. The *Lopez-Morrison* doctrine is similarly insensitive to economic reality.[143] The economic/non-economic distinction it employs requires that activities with similar effects on the national economy be treated differently.[144]

This line of criticism highlights the incompatibility of the "economic activity" requirement and the substantial effects test. The incongruity of these doctrinal tools was acknowledged by the *Wickard*

141 Though the *Lopez-Morrison* Court did not make the relationship between the economic activity requirement and its attenuation concerns explicit, it is clear that they are deeply intertwined. The additional inferences required in order to discern a link between interstate commerce and the activity regulated under VAWA, for example, are necessitated by the fact that (at least from the Court's perspective) the statute regulates non-commercial activity. Once a link to commercial activity could be identified, the process of establishing a substantial effect on interstate commerce could follow the familiar (and, in the Court's view, not-too-attenuated) path blazed in *Wickard* by way of the aggregation principle.

142 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 822 (3d ed. 2000).

143 Dorf, *supra* note 80, at 2172–73 (noting that under *Lopez-Morrison*, "if the activity that Congress chooses to regulate is not itself commercial, it does not matter whether, in the aggregate, non-commercial activities of that sort have a substantial effect on interstate commerce").

144 United States v. Morrison, 529 U.S. 598, 644–45 (2000) (Souter, J., dissenting) (criticizing the Court on the ground that its interpretation of the Commerce Clause "does not turn on . . . the realism of the majority's view of the national economy"). It should be noted that criticisms of the Court for (1) insensitivity to economic reality, and (2) arbitrariness are opposite sides of the same coin. The doctrine functions arbitrarily insofar as it permits activities with similar economic consequences to be treated differently.

Court itself, which explicitly rejected the notion that the character of regulated activity is relevant to Commerce Clause adjudication. The Court maintained that "even if appellee's activity . . . 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."[145]

Post-*Wickard* cases likewise contain no explicit signals that the economic/non-economic distinction played any role in the development of the doctrine.[146] The reason for this is clear enough, for once it is acknowledged that federal power to regulate "Commerce . . . among the several States"[147] ought to encompass those things that substantially affect interstate commerce, it is difficult to see why it should matter whether that which has the relevant effect is itself commercial in nature. In his dissenting opinion in *Morrison*, Justice Breyer provides an example to illustrate this point. He asks, "If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a state, why should it matter whether local factories or home fireplaces release them? The [Constitution] says nothing about either the local nature, or the economic nature of an interstate-commerce-affecting cause."[148]

Variations of this argument have been presented by numerous commentators on *Lopez* and *Morrison*. Judge Pollak, for example, has noted,

> The examples the [*Lopez*] opinion cites are, to be sure, instances in which the regulated activity substantially affecting interstate commerce happens to be of a kind that can be characterized as "economic," but it is not clear why that descriptive fact should be turned into a limiting constitutional principle. From a constitutional perspective, the important question should be whether the activity sought to be regulated has a substantial effect on commerce—in

145 Wickard v. Filburn, 317 U.S. 111, 125 (1942) (emphasis added).

146 *See* United States v. Lopez, 514 U.S. 549, 628 (1995) (Breyer, J., dissenting) (noting that "[a]lthough the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate 'economic activity,' . . . the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce"); *see also* Regan, *supra* note 126, at 564 (noting that the economic/non-economic distinction "while not inconsistent with the existing cases, is a highly tendentious gloss on them").

147 U.S. CONST. art. 1, § 8, cl. 3.

148 *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting).

> other words, a substantial "economic" effect—not whether the activity is itself "economic."[149]

Thus, even if a sufficiently clear line distinguishing commercial from non-commercial activity could be drawn, it is unclear, in light of the whole of the Court's Commerce Clause jurisprudence, whether attributing doctrinal significance to this line makes any sense. Indeed, doing so seems to be a formula for the very sort of arbitrary decision-making that led to the Court's striking about-face in *Jones & Laughlin.*

Of course, one could (and the Court does) attempt to justify using the economic/non-economic distinction on the ground that without it the substantial effects test would permit Congress to regulate absolutely anything, thus upsetting the balance of federal and state power embodied (albeit implicitly) in the constitutional design. But this argument is incomplete; for it could just as easily support prohibitions on federal regulation of manufacturing, production, or, for that matter, activities that are undertaken on Tuesdays. While it is undeniably possible to craft rules limiting federal authority under the Commerce Clause in order to prevent the commerce power from taking on the character of a federal police power, this does not mean that such rules will fit neatly into the existing edifice of Commerce Clause doctrine. Therefore, even if it were conceded that *some* limit on federal power under the Commerce Clause were necessary, this concession would provide no guidance as to how that limit ought to be crafted, and the *Lopez-Morrison* Court did little to explain why the particular distinction it relied on is required.[150]

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149 Louis H. Pollak, *Reflections on* United States v. Lopez*: Foreword*, 94 MICH. L. REV. 533, 547 (1995); *see also* Dorf, *supra* note 80, at 2175 (explaining that the Court's federalism concerns are "understandable," but that they "do[ ] not explain why the Court settles on this limiting principle"). One might adhere to the substantial effects principle and still confer doctrinal significance on the economic character of the regulated activity if one believed that there is a great deal of overlap between the class of activities that are economic in nature and those activities that, in the aggregate, exert a substantial effect on interstate commerce. Yet nothing in *Lopez* or *Morrison* suggests that the Court believed the category of "economic activity" to be this sort of proxy for "substantial effects," and even perfunctory consideration demonstrates that such a view is unsupportable. While it is plausible that the effects of activities such as gun possession in school zones and gender-motivated violence on interstate commerce are indirect, this is quite different from concluding that these effects are "insubstantial." *See Morrison*, 529 U.S. at 631–34 (Souter, J., dissenting); *Lopez*, 514 U.S. at 619–24 (Breyer, J., dissenting).

150 The majority might contend that the commercial activity requirement is grounded in the text of the Constitution insofar as the relevant constitutional provision employs the word "commerce." As Professor Regan has pointed out, however, this rule is difficult to justify "once we have expanded the federal power beyond directly regulating interstate commerce to regulating what *affects* interstate commerce."

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The dissonance between these two features of Commerce Clause jurisprudence—the substantial effects rule and the economic/non-economic distinction—is rooted in a fundamental tension within the *Lopez-Morrison* doctrine. The conventional wisdom relating to *Lopez-Morrison* is that these cases are witness to the revival of federalism in Commerce Clause jurisprudence, the injection of a forgotten constitutional value into this body of law.[151] Of course, it is not without reason that many hold this view, for there can be no doubt that *Lopez* and *Morrison* establish more robust protections for state autonomy than existed in decades prior. Nevertheless, this narrative of "federalism revived" overlooks a critical feature of the jurisprudence that emerged during the New Deal and, relatedly, it obscures a basic tension within the *Lopez-Morrison* doctrine.

The substantial effects principle is emphatically a doctrine of federalism.[152] It reflects a choice among competing visions of "interstate commerce" driven by the ramifications of the selected vision for the distribution of power between state and federal government.[153] This

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Regan, *supra* note 126, at 565. Once this interpretive move has been made, Regan explains, "the language of the Commerce Clause does not require or even suggest limiting the relevant *sources* of effects to commercial behavior. The force of the reference to 'commerce' in the text is exhausted by the requirement that it must be commerce that is affected." *Id.*

151 *E.g.*, Jackson, *supra* note 108, at 2181 & n.1 (noting that "[t]he constitutional law of federalism-based constraints on the federal government has risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power," and citing *Lopez* in support of this claim).

152 *But see* Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 958 (1997) ("[T]he Commerce Clause test on which the decision in *Lopez* turned—whether the regulated activity has a substantial effect on interstate commerce—does not appeal to federalism values.").

153 One could argue that to characterize the substantial effects doctrine as a doctrine "of federalism" is akin to labeling a rule that permits police officers to torture suspects in an effort to obtain confessions a doctrine of "defendant's rights." We have already seen that increasing economic integration has rendered it possible for the federal government to regulate most anything under the substantial effects rule. Seen in this light, the substantial effects rule appears to be a doctrine of federalism only insofar as it signals that federalism constraints are not to be taken seriously. Put otherwise, one could argue that because the substantial effects doctrine does not identify any activity that is wholly and forever insulated from federal intrusion, it cannot qualify as a doctrine of federalism.

But this criticism misses the mark. For, even if application of the substantial effects doctrine ultimately precludes there being any judicially enforceable limits on federal power under the Commerce Clause, this does not mean that there is *no* vision of federalism contained in the doctrine. It simply means that this vision endorses a

vision is functional in nature and expansive. It is predicated on the important notion that "[t]here are . . . two sides to Federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable."[154] The effects test reflects the view that federal authority is "desirable" to help resolve a particular class of problems—those with substantial economic effects in more than one state.

Thus, it is not the case that the *Lopez-Morrison* doctrine includes considerations of federalism in the Commerce Clause discourse while the post-New Deal doctrine ignored them; rather, the two doctrines embody competing visions of what the constraints of federalism require.[155] That the *Lopez* majority felt it necessary to rethink the relationship between principles of federalism and the Commerce Clause

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federal government of potentially breathtaking power controllable only through the political process. One might argue, and the current Supreme Court majority surely would, that this is an *unattractive* account of federalism, but this does not mean that the doctrine is not grounded in a conception of federalism *at all.*

154 Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994).

155 Even the dissenting Justices in *Lopez* and *Morrison* seem needlessly (and inaccurately) to concede that while the majority viewpoint is driven by a particular theory of federalism, the substantial effects doctrine involves no such account. Thus, in *Morrison*, Justice Souter argues:

> Just as the old formalism [of the pre-*Jones & Laughlin* period] had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy.

United States v. Morrison, 529 U.S. 598, 644–45 (2000) (Souter, J., dissenting). Justice Souter's analysis of the role played by federalism in the majority opinion is undoubtedly correct. However, this passage masks the fact that, like the formalisms he finds so unappealing, the functional approach embodied in the substantial effects doctrine "is useful in serving a conception of federalism" as well. The decision to make economic reality the touchstone of Commerce Clause analysis is itself predicated on a specific conception of the proper extent of federal power. By suggesting that a proper theory of the commerce power must be driven, for the most part, by (1) reasoning directly from constitutional text, and (2) a conception of economic reality, this excerpt understates the role played by federalism in *any* interpretation of this vague constitutional provision.

Indeed, as cases stretching all the way back to *Gibbons* demonstrate, the Court's efforts to interpret the term "Commerce . . . among the several States" have always been driven by one account of federalism or another. And, given the vagueness of the relevant constitutional language and the ramifications for the organization of our government, it hardly seems possible or desirable to interpret the term without refer-

is not inherently problematic; this would surely not be the first time that the Court dramatically reconceptualized a particular constitutional passage. What is troubling is that the Court introduced its new vision of federalism without entirely abandoning the old.

The economic/non-economic distinction is supposed to supplement, rather than supplant, the jurisprudential scheme fashioned during the New Deal era. As a result, the *Lopez-Morrison* doctrine is at war with itself in the most fundamental of ways. For the substantial effects test and the economic/non-economic distinction speak in radically different voices about what our federalism entails. The former reflects a commitment to functionalism in identifying the line between state and federal power; from this point of view, the *character* of activity that affects interstate commerce cannot be relevant, else the federal government could not, in some subset of cases, serve its constitutionally designated function. The latter relies on a formalistic, categorical vision of the limits of national authority; from this standpoint, the actual effects of regulated activity cannot be determinative, else economic integration could trigger the ouster of state governments from their constitutionally assigned role. The *Lopez-Morrison* doctrine's simultaneous commitment to these conflicting accounts of federalism gives it the character of a split personality, and it renders current Commerce Clause jurisprudence inherently unstable.

III. PRETEXT ANALYSIS AND COMMERCE CLAUSE ADJUDICATION

In keeping with Supreme Court practice established in *Darby* and extended thereafter in cases such as *Scarborough* and *Heart of Atlanta*, the *Lopez-Morrison* Court eschewed analysis of the purpose behind the laws under review. While the Court acknowledged that the relationship between interstate commerce and the activity regulated under the relevant statutes was attenuated, this did not provide the impetus for the Court to assess whether Congress had employed the commerce power pretextually. Instead, like the pre-1937 Court, it sought to channel the attenuation concern into the stuff of workable doctrine by employing an ill-conceived categorical distinction that focuses on the character of the regulated activity.

While the particular method chosen by the Court to constrain Congress's power under the Commerce Clause is unsatisfying, its motivating instinct—that the pre-*Lopez* jurisprudence implicitly sanctioned a federal police power—is sound. The next two Parts of this Article explore an alternative method of limiting the reach of federal

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ence to a vision of how power ought to be divided between state and federal government.

authority to regulate commerce. They are premised on the notion that when activity regulated via the substantial effects rationale bears only an attenuated link to interstate commerce, it should engender skepticism about the *purpose* underlying that regulation. These Parts also describe how judicial scrutiny of legislative purpose might work.

In Part III, I take up the threshold question of whether pretextual use of an enumerated power amounts to a problem of constitutional moment. I will make the case that when Congress employs its power under the Necessary and Proper Clause, it may be appropriate for judicial review to include inquiry into whether Congress has acted pretextually. I will proceed in three steps. First, in Part III.A, relying and building upon analysis in an article by Professor Stephen Gardbaum, I will highlight the role played by the Necessary and Proper Clause in commerce jurisprudence. In Part III.B, I provide support for the view that there is room for inquiry into legislative pretext when Congress proceeds under that Clause. In Part III.C, I describe some of the particular features of purpose analysis in commerce cases.

A. The Necessary and Proper Clause and Federal Power over Commerce

In his article, *Rethinking Constitutional Federalism*, Stephen Gardbaum illustrates the connection between the Necessary and Proper Clause and the expansion of federal power over commerce during the New Deal era.[156] He explains,

> [T]he New Deal Court's own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional measures in question were valid exercises of power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce among the several states. That is, the Court did not simply and directly enlarge the scope of the Commerce Clause itself, as is often believed. Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce.[157]

A careful reading of the relevant cases strongly supports Gardbaum's view. For example, though the Supreme Court does not

156 Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807–11 (1996).

157 *Id.* at 807–08 (citations omitted); *see also* David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 110–11 (1998) ("The Court also upheld . . . the wage and hour terms of the Act [in *Darby*], relying not on the Commerce Clause itself, but [on] . . . the Necessary and Proper Clause.").

expressly refer to the Necessary and Proper Clause in *Darby*, there can be no doubt that its decision to uphold the minimum wage and maximum hour components of the FLSA is grounded squarely on that provision. The *Darby* Court stated:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect commerce or the exercise of the power of Congress over it as to make regulation of them *appropriate means to the attainment of a legitimate end*, the exercise of the granted power of Congress to regulate interstate commerce.[158]

This discussion of "appropriate means" and "legitimate ends" comes straight from Chief Justice Marshall's seminal opinion in *McCulloch v. Maryland* defining the scope of federal power under the Necessary and Proper Clause.[159] And the discourse of "means," "ends," and "appropriate" legislation is sprinkled throughout the *Darby* Court's analysis of the minimum wage and maximum hour provisions.[160] The Court's reliance on *McCulloch* sends a strong signal that federal power to regulate intrastate activity via the substantial effects test does not flow directly from the Commerce Clause; rather, this power is a product of the interplay between the Commerce and Necessary and Proper Clauses.[161]

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158 United States v. Darby, 312 U.S. 100, 118 (1941) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added)).

159 *See McCulloch*, 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, . . . are constitutional.").

160 *E.g.*, *Darby*, 312 U.S. at 121 (explaining that Congress "may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities"); *id.* at 124 (noting that the Tenth Amendment does not deprive the federal government of the power "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end"); *id.* at 119 (stating that "Congress may . . . by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce").

161 Some scholars have argued that the decision in *McCulloch* is not actually rooted in a reading of the Necessary and Proper Clause itself. *E.g.*, Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1134 n.33 (2001) ("Chief Justice Marshall did not rely on the text of the Necessary and Proper Clause to confer broad legislative authority on Congress; rather, he merely interpreted the Clause as confirming his preceding structural argument concerning the broad scope of implied congressional powers."); *see also* TRIBE, *supra* note 142, at 800 n.6 (arguing that *McCulloch* is not, strictly speaking, premised on a reading of the Necessary and Proper Clause). Even if the Necessary and Proper Clause does not serve as the source of Congress's regulatory power in these cases, the question remains whether judicial review of "executory laws," as Caminker refers to them, ought to differ from judicial review of other sorts of provisions. Caminker, *supra*, at 1135.

The role of the Necessary and Proper Clause in commerce cases was addressed more directly in *Wickard*. In reviewing the history of Commerce Clause jurisprudence during the 1800s, the *Wickard* Court lamented that "[i]n discussion and decision the point of reference, instead of being what was 'necessary and proper' to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood."[162] And, as in *Darby*, the *Wickard* Court inquired whether the relevant legislation was an "appropriate means to the attainment of a legitimate end,"[163] thereby referencing, once again, *McCulloch*'s interpretation of the Necessary and Proper Clause.

Sporadic references in the post-*Wickard* case law confirm that the effects test is not grounded in the Commerce Clause alone. For example, in her dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, Justice O'Connor noted,

> The Court based the expansion [of federal power to regulate commerce] on the authority of Congress, *through the Necessary and Proper Clause*, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." . . . It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power.[164]

Likewise, in his dissenting opinion in *Morrison*, Justice Souter explained that "between *Wickard* in 1942 and *Lopez* in 1995 . . . [there was] a stable understanding that congressional power under the Commerce Clause, *complemented by the authority of the Necessary and Proper Clause* . . . extended to all activity that, when aggregated, has a substantial effect on interstate commerce."[165]

As Professor Gardbaum points out, the role played by the Necessary and Proper Clause in the evolution of Commerce Clause doctrine

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Because *McCulloch* involved an exercise of executory power, the Court's opinion speaks directly to this question, even if the Necessary and Proper Clause is, ultimately, superfluous. For ease of reference, I will refer to these laws as "necessary and proper" laws throughout.

162 Wickard v. Filburn, 317 U.S. 111, 121 (1942).

163 *Id.* at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

164 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. at 584–85 (O'Connor, J., dissenting) (emphasis added), *cited in* Gardbaum, *supra* note 156, at 807–08 n.41.

165 *See* United States v. Morrison, 529 U.S. 598, 637 (2000) (Souter, J., dissenting) (emphasis added); *see also id.* at 666 (Breyer, J., dissenting) ("[I]n my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the 'necessary and proper' exercise of legislative power granted to Congress by that Clause.").

has been under-appreciated.[166] The excerpts above notwithstanding, courts and commentators often ignore the leverage provided by the necessary and proper power for congressional regulation of activities that substantially affect interstate commerce. As a result, the relationship between federal power over commerce and the foundational principles articulated in *McCulloch* has received scant attention.[167]

166 Gardbaum, *supra* note 156, at 810 ("[F]ew observers . . . acknowledge[d] the basis upon which the New Deal Court expanded federal power. . . . Usually, opinions explicitly mention only the Commerce Clause and incorporate the test under the Necessary and Proper Clause without reference."); *see also* Engdahl, *supra* note 157, at 114 ("[T]he classic distinction between the Commerce and Necessary and Proper Clauses . . . . [has been] utterly ignored . . . .").

167 In recent years, some commentators have afforded greater attention to the Necessary and Proper Clause and, in some cases, they have carefully mined the text of the *McCulloch* opinion, arguing that it suggests more stringent limits on federal regulatory authority than is generally appreciated. Gardbaum, for example, has focused on the requirement in *McCulloch* that laws be "appropriate" and "consistent with both the letter and spirit of the Constitution." Gardbaum, *supra* note 156, at 815; *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). Gardbaum contends that this discussion of the "spirit of the Constitution" did not refer to "some free-floating, textually disembodied, open-ended and indeterminate metanorm, but was rather referring to certain specific and widely acknowledged background principles—such as federalism and separation of powers . . . ." Gardbaum, *supra* note 156, at 816. Accordingly, Gardbaum argues, regulations of intrastate commerce should not be deemed constitutional unless Congress has taken a "hard look" at the federalism concerns raised by the statute in question and has affirmatively concluded that national action is in order. *Id.* at 831.

Professor Jackson has likewise recommended "gentle use of the Necessary and Proper Clause in conducting review of Congress's regulation of private conduct." Jackson, *supra* note 108, at 2237. In cases where the relationship between a challenged regulation and an enumerated power is not obvious, Jackson would have the federal courts examine the record before Congress as well as formal legislative findings "in order to determine whether the case had been made that the measure was 'necessary and proper' to carrying out enumerated powers." *Id.*

Gary Lawson and Patricia Granger have argued that, in *McCulloch*, Chief Justice Marshall failed to account for the Clause's distinct requirement of propriety and instead concentrated almost exclusively on the question of necessity. Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271, 288 (1993):

> [T]he word "proper" serves a critical, although previously largely unacknowledged, constitutional purpose by requiring executory laws to be *peculiarly within Congress's domain or jurisdiction*—that is, by requiring that such laws do not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals.

B. The Necessary and Proper Clause—A Foundation for Pretext Analysis

1. *McCulloch v. Maryland*

Chief Justice Marshall's opinion in *McCulloch* offers the canonical account of the necessary and proper power. The opinion is noteworthy for its expansive vision of federal regulatory authority. In *McCulloch*, the Court assessed whether Congress's power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the . . . [enumerated] powers"[168] encompasses the power to create a national bank.[169] The Court focused its analysis on whether the term "necessary" ought to be construed narrowly—permitting the federal government to pass only those laws that are "indispensable" to the exercise of an enumerated power—or broadly—permitting Congress to enact regulations that are "convenient" or "useful" means of executing an enumerated power.[170]

The Court embraced the latter formulation and upheld the constitutionality of the bank.[171] In defining the scope of federal power under the Necessary and Proper Clause, the Court stated, "Let the end [pursued by Congress] be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end . . . are constitutional."[172] Chief Justice Marshall explained further that for courts "to inquire into the degree of . . . necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[173]

Relying on these passages, the federal courts have given Congress extremely wide latitude in selecting the means through which its goals

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168 U.S. CONST. art. I, § 8, cl. 18. Though I use the term "enumerated" powers here, Professor Caminker has correctly pointed out that this term "is somewhat misleading since . . . certain congressional powers might be derived from the structure, rather than the explicit text, of the Constitution." Caminker, *supra* note 161, at 1135. And Congress may supplement these powers through necessary and proper legislation as well.

169 *McCulloch*, 17 U.S. (4 Wheat.) at 401. The government argued that the power to create the bank was a necessary and proper means of executing Congress's powers to levy and collect taxes, to pay public debts, to borrow money, to regulate commerce, and to support armies and navies.

170 *Id.* at 413.

171 *Id.* at 413–14 ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.").

172 *Id.* at 421.

173 *Id.* at 423.

are pursued.[174] Indeed, *McCulloch* has come to stand for the proposition that so long as "the effectuating legislation bear[s] a rational relationship to a permissible constitutional end," it is valid.[175] One commentator has gone so far as to claim that this "rational basis" test "is a test that as a practical matter cannot be failed . . . ."[176]

There is, however, more to *McCulloch* than this account captures. Specifically, there is language in the Court's opinion suggesting that more searching judicial review of necessary and proper legislation is appropriate.

The *McCulloch* Court acknowledged that even the broad discretion conferred upon Congress by the Constitution with respect to necessary and proper legislation is not without limit. In fact, the Court offered a clear and specific account of the circumstances in which judicial review would come into play:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.[177]

Far from precluding the judiciary from scrutinizing congressional decisionmaking, this excerpt contemplates direct oversight by the courts—oversight that is crucial to policing the boundary between state and federal government. The Court explained further:

> [W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.[178]

This passage makes clear that only *after* it has been determined that an exercise of the necessary and proper power is neither (1) inde-

174 Caminker, *supra* note 161, at 1136 ("[T]he Court, both in *McCulloch* and thereafter, has interpreted this requirement of tailoring between implied means and enumerated ends in a very relaxed manner, deferring to Congress's choice of legislative means so long as it is 'plainly adapted' or 'conducive to' a legitimate end.").

175 United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (discussing *McCulloch*); *see also* Mills v. Maine, 118 F.3d 37, 44 (1st Cir. 1997) (describing this language from *McCulloch* as the "classic touchstone for determining whether a congressional action is rationally related to a proper end comprehended by a constitutional provision").

176 Graglia, *supra* note 57, at 726.

177 *McCulloch*, 17 U.S. (4 Wheat.) at 423.

178 *Id.*

pendently prohibited by the Constitution, nor (2) pretextual in nature does the deference implicit in the rational basis test take hold.[179]

The prohibition against laws passed "under the pretext of [Congress] executing its powers" (i.e., laws that are not "really calculated to effect any of the objects entrusted to the government") is echoed elsewhere in *McCulloch*. For example, in laying the groundwork for its broad construction of the term "necessary," the Court insisted that "a power appertaining to sovereignty can[ ] be connected with that vast portion of it which is granted to the general government, so far as it is *calculated to subserve the legitimate objects of that government.*"[180] Were the problem of pretext not significant, the Court might have deemed valid all exercises of power "so far as they subserve the legitimate objects of government," omitting any requirement that such exercises be "calculated" to serve these legitimate ends. Similarly, in elucidating the scope of the necessary and proper power, the Court held that "all means which are . . . *plainly adapted* to [a legitimate] end . . . are constitutional."[181] Here too, if the question of legislative object were irrelevant, the Court might have required only that Congress's chosen means be "conducive to" legitimate ends without adding the condition that the means be "plainly adapted" to these ends.[182] Taken together, these passages reinforce *McCulloch*'s commitment to a prohibition against pretextual lawmaking by way of the necessary and proper power.[183]

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179 *See* DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM § 3.09, at 40 (2d ed. 1987) ("[T]he precondition for applying the rational basis test in reviewing a measure under the necessary and proper clause, is that Congress have targeted some legitimate government objective *and fashioned the particular measure with that end in view.*" (emphasis added)), *quoted in* Gardbaum, *supra* note 156, at 822. For an alternative reading, see Caminker, *supra* note 161, at 1136:

> *McCulloch* did teasingly suggest that the Court would independently assess whether the claimed executory status of a particular law was merely a pretext for Congress' effort to exercise a general police power denied it by the Constitution. . . . But the Court quickly made clear that its assessment of "pretext" would consist merely of ensuring that the law is "really calculated to effect any of the objects entrusted to the government."

180 *McCulloch*, 17 U.S. (4 Wheat.) at 410–11 (emphasis added).

181 *Id.* at 421 (emphasis added).

182 Earlier in the opinion, the Court gestured in this direction. *See id.* at 415.

183 ENGDAHL, *supra* note 179, § 3.10, at 46 (stating that "[i]f . . . *McCulloch* is to be followed, there must be some sufficient indication that Congress *did* have a legitimate objective . . . and *acted upon that ground.*" (second emphasis added)), *quoted in* Gardbaum, *supra* note 156, at 822.

I do not wish to overstate my point. The *McCulloch* Court failed to elaborate on precisely what it means for a law to be "plainly adapted" or "really calculated" to achieve a particular end. And there are, no doubt, many possible interpretations of these requirements.[184] Chief Justice Marshall supplies no finely wrought test for lower courts to apply when assessing these matters. Nevertheless, there is no mistaking the significance of these passages to the *McCulloch* decision. In stark contrast to the guidelines the case establishes with respect to judicial review of a law's necessity, *McCulloch* states explicitly that courts may inquire into legislative pretext without "pass[ing] the line which circumscribes the judicial department . . . ."[185]

2. Marshall's Defense

Further evidence in support of this reading of *McCulloch* can be found in a series of essays published in Philadelphia and Virginia newspapers during the months immediately following the Supreme Court's decision in that case.[186] These essays, written in response to sharp criticism of *McCulloch* in the pages of the *Richmond Enquirer*, were penned by the Chief Justice himself and published under the pseudonym "A Friend to the Union."[187] Marshall's defense of the decision in *McCulloch* strongly reinforces the argument that the limits on pretextual legislation discussed in his opinion for the Court were meant to be taken seriously.

The commentators in the *Richmond Enquirer*—publishing under the names "Amphictyon" and "Hampden"—forcefully argued that *McCulloch* endorsed a federal government of limitless power.[188] By "giving to the term 'necessary' [a] liberal and latitudinous construction," Amphictyon contended, only a "small . . . remnant of power [would be] left in the hands of the state authorities."[189] Accordingly, the au-

184 For example, one dictionary offers both "deliberately planned or intended" and "apt or likely" as definitions of "calculated." *See* WEBSTER'S NEW WORLD DICTIONARY 200 (2d college ed. 1982). The former definition would leave considerably less room for necessary and proper regulation than the latter.

185 *McCulloch*, 17 U.S. (4 Wheat.) at 423.

186 *See* JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969) [hereinafter JOHN MARSHALL'S DEFENSE].

187 *See* Gerald Gunther, *Introduction* to JOHN MARSHALL'S DEFENSE, *supra* note 186, at 2.

188 *E.g.*, Spencer Roane, *"Hampden" Essays, reprinted in* JOHN MARSHALL'S DEFENSE, *supra* note 186, at 110 ("The supreme court of the United States have . . . granted [a] *general* power of attorney to congress.").

189 *"Amphictyon" Essays, reprinted in* JOHN MARSHALL'S DEFENSE, *supra* note 186, at 53, 55.

thor insisted, "[a]lthough everyone admits that the government of the United States is one of limited powers . . . it will, (if the construction be persisted in) really become a government of almost unlimited powers."[190]

Chief Justice Marshall's response to these charges repeatedly adverts to the constraints on pretextual legislation. He wrote:

> It is not pretended that [Congress's] right [to select the means by which it will pursue legitimate ends] may be fraudulently used to the destruction of the fair land marks of the constitution. Congress certainly may not, under pretext of collecting taxes, or of guaranteeing to each state a republican form of government, alter the law of descents.[191]

Marshall vehemently insisted that the *McCulloch* opinion provided explicitly for judicially enforceable limits on federal power. He argued,

> In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court expressly says, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[192]

It is difficult to reconcile these comments with the notion that Justice Marshall was content to have the "pretext" language from *McCulloch* rendered a dead letter.

Marshall also focused on *McCulloch*'s requirement that Congress select means "plainly adapted" to the achievement of a legitimate end. He rejected Amphictyon's suggestion that Congress might, under the guise of a law facilitating the collection of federal taxes, forbid the state governments from imposing property taxes at all. In doing so, Marshall explained that such a prohibition "is not a means 'plainly adapted,' or 'conducive to' the end. The passage of such an act would be an attempt on the part of Congress, 'under the pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted [sic] to the government.'"[193]

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190 *Id.*, *reprinted in* JOHN MARSHALL'S DEFENSE, *supra* note 186, at 65.

191 John Marshall, *A Friend of the Constitution Essays*, *reprinted in* JOHN MARSHALL'S DEFENSE, *supra* note 188, at 155, 173.

192 *Id.*, *reprinted in* JOHN MARSHALL'S DEFENSE, *supra* note 186, at 155, 186–87.

193 *Id.*, *reprinted in* JOHN MARSHALL'S DEFENSE, *supra* note 186, at 100.

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The "Friend to the Union" essays create the strong impression that, contrary to Amphictyon's and Hampden's charges, *McCulloch* neither sanctioned a federal government of unlimited power nor required judicial deference to congressional judgments in all cases involving the necessary and proper power. Marshall's defense of the *McCulloch* opinion reinforces the notion—already evident in the text of *McCulloch* itself—that a prohibition on pretextual legislation was to serve as the centerpiece of judicial policing of congressional action under the Necessary and Proper Clause.[194]

3. *Darby* and the Apparent Abandonment of Purpose Analysis

Of course, the fact that John Marshall (arguably) thought that the Constitution requires the judiciary carefully to review necessary and proper legislation to assure that it is not pretextual does not make it so. The *McCulloch* decision (and Marshall's contemporaneous debate concerning the scope of federal power) do not represent the last authoritative word on the subject of pretext/purpose analysis in cases relating to the commerce power. Indeed, subsequent case law seems to militate powerfully against judicial inquiry into congressional purpose. In particular, the Supreme Court's decision in *United States v. Darby* seems conclusively to reject the notion that courts ought to review federal legislation for improper purpose.

In *Darby*, the Court declined to invalidate the Fair Labor Standards Act's prohibition on interstate shipment of goods produced under substandard labor conditions. In doing so, the Court rejected the argument, urged by the appellee, that this regulation was invalid because it was intended to regulate working conditions and was not designed to achieve any "interstate commerce" goal.[195] The Court insisted that Congress's power over interstate commerce is plenary and

194 It is important to be cautious in drawing inferences from these essays. As Professor Gunther notes, they might be characterized as "clever defensive propaganda" intended simply to discredit Amphictyon's and Hampden's claim that *McCulloch* would underwrite limitless federal power. *See* Gerald Gunther, *Introduction* to JOHN MARSHALL'S DEFENSE, *supra* note 186, at 19. Under this view, the essays do not provide significant insight into Marshall's actual view as to what *McCulloch* requires with respect to federalism. *Id.* My instinct, however, like Gunther's, *see id.* at 19–20, is to read the essays as being of a piece with a Supreme Court opinion that, on its face, seems to retain judicially enforceable limits on federal power—limits animated through pretext analysis. In the very least, a person inclined to classify the "Friend to the Union" essays as propaganda bears the burden of explaining why the discussion of pretext appears in *McCulloch* at all.

195 United States v. Darby, 312 U.S. 100, 113–14 (1941).

that the "motive and purpose of a regulation" are not subject to judicial review.[196] From this perspective, even if one were inclined to credit the reading of *McCulloch* outlined above, *Darby* appears to foreclose the possibility of employing purpose analysis in commerce cases.

However, this understanding of *Darby* is inattentive to the subtle interplay between the Commerce and Necessary and Proper Clauses. The *Darby* Court's discussion of legislative purpose was presented in the context of the Court's assessment of the prohibition on interstate transport of goods. Crucially, the admonitions against inquiry into legislative purpose were not repeated with respect to the minimum wage and maximum hour provisions. And while the shipment prohibition represents a straightforward exercise of Congress's power under the Commerce Clause,[197] the wage and hour provisions—regulations of intrastate activity rendered permissible by virtue of that activity's effect on interstate commerce—were predicated on the necessary and proper power. Thus, *Darby*'s assertions as to the irrelevance of legislative purpose would seem to apply only to laws passed under the Commerce Clause itself and not to necessary and proper legislation. This reading is consistent with the discussion of *McCulloch* above.

As a strictly textual matter, moreover, this two-track approach to federal regulation of commerce—under which purpose analysis is not relevant in Commerce Clause cases but is permissible in necessary and proper cases—is sensible. While the interstate commerce power—"to regulate Commerce . . . among the several states"—is unqualified, congressional authority under the Necessary and Proper Clause is limited by the requirement that laws be "necessary and proper *for carrying into execution* the foregoing powers."[198] Where a constitutional provision, by its own terms, is restricted in application to certain purposes—in this case, "carrying into execution" the enumerated powers—the arguments in favor of plenary power fall out and the case for judicial scrutiny of congressional purpose is strengthened.[199]

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196 *Id.* at 116–17.

197 *See* TRIBE, *supra* note 142, at 803 n.12 (noting that "the interstate shipment provisions of the Fair Labor Standards Act (FLSA) . . . represented a classic exercise of the plenary authority of Congress over interstate commerce itself").

198 U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

199 *See* TRIBE, *supra* note 142, at 803, n.12 ("[I]t is by no means clear that congressional motive is equally irrelevant when Congress is acting under the Necessary and Proper Clause or any other source of authority that contains its own statement of the purposes for which it may be invoked . . . ."); *cf.* Engdahl, *supra* note 157, at 112 (distinguishing exercises of power under the Commerce Clause from congressional action under the Necessary and Proper Clause on the ground that "the power given by the Commerce Clause itself is plenary and, therefore, [unlike the power given by

It is noteworthy, therefore, that the cases upon which the *Darby* Court relies for the proposition that judicial inquiry into legislative purpose is not permitted also involve exercises of plenary power, not the qualified power embodied in the Necessary and Proper Clause. Specifically, the federal regulations challenged in both *McCray v. United States*[200] and *Sozinsky v. United States*[201] were passed under Congress's authority "[t]o lay and collect Taxes, Duties, Imposts and Excises,"[202] a power not restricted—as is the necessary and proper power—to the attainment of particular ends.[203] And, if we trace the doctrinal history a step further and examine the cases cited by the *Sozinsky* Court in support of its contention that "[i]nquiry into the hidden motives which may move Congress to exercise a power . . . is beyond the competency of courts,"[204] we find that these too involved exercises of plenary power.[205] These cases buttress the conclusion

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the Necessary and Proper Clause], not contingent on a telic relation to some enumerated concern").

200 195 U.S. 27 (1904).

201 300 U.S. 506 (1937).

202 U.S. CONST. art. I, § 8, cl. 1.

203 *McCray* involved a tax on manufacturers of oleomargarine, *McCray*, 195 U.S. at 44, while the statute at issue in *Sozinsky* imposed an excise tax on firearms dealers. *Sozinsky*, 300 U.S. at 511.

204 *Sozinsky*, 300 U.S. at 556.

205 *See* A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934) (reviewing an excise tax passed by the state of Washington on butter substitutes); Veazie Bank v. Fenno, 75 U.S. 533 (1869) (tax on banks). The *Sozinsky* Court also relied on *United States v. Doremus*, 249 U.S. 86 (1919), for this proposition. In *Doremus*, the Court reviewed a federal law that, in addition to imposing an excise tax on physicians who distributed certain drugs, forbade the distribution or sale of these drugs except under specified conditions. The Court upheld the restrictions on sales, citing Congress's authority to "lay and collect Taxes" and relying on cases establishing that inquiry into congressional motive is improper in such cases. *Id.* at 93. The *Doremus* Court thus mistakenly held that the Taxes and Excises Clause itself authorized Congress to pass laws that bear "some reasonable relation to the exercise of the taxing authority conferred by the Constitution . . . ." *Id.* As we know from the discussion in Part III.A, a more careful analysis would have led the *Doremus* Court to conclude that the challenged provision was constitutional, if at all, as an exercise of Congress's "necessary and proper" authority. Because the *Doremus* Court believed it was reviewing a law passed pursuant to a grant of plenary power, the portion of the opinion that addresses the possible relevance of congressional motive does not speak directly to the question that concerns us—namely whether purpose analysis has a role in necessary and proper cases.

This analysis holds even if one characterizes the whole of Congress's power to lay taxes as emanating from the Taxes and Excises Clause itself. *Cf. supra* note 161. If one proceeds from this premise, the problem with the *Doremus* opinion is that it fails to acknowledge that some exercises of particular enumerated powers are more peripheral than others. The Court did not consider the possibility that there might be a

that the *Darby* Court's discussion of legislative purpose does not speak directly to its relevance in necessary and proper cases.[206]

* * *

This Part has identified textual and precedential support for the notion that courts may inquire into legislative purpose when reviewing congressional action under the Necessary and Proper Clause. It has also shown that Supreme Court cases thought to establish the irrelevance of legislative purpose in this context are best read as restricted to laws passed strictly under the Commerce Clause.[207] Precedent aside, the arguments in favor of scrutinizing legislative purpose when Congress relies on the substantial effects test to regulate

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distinction, for purposes of judicial review, between the actual imposition of a tax and a provision that is not itself a tax, but might be construed to fall within the tax power nonetheless.

206 The *Darby* Court also upheld the maximum hour and minimum wage components of the FLSA. These fragments of the statute were justified under the substantial effects test and, hence, are grounded in the necessary and proper power. Still, it is difficult to draw any conclusions from the Court's analysis about the role of legislative purpose in judicial review of such regulations.

The *Darby* Court offered two distinct justifications for the regulations of labor conditions, and these justifications point in different directions with respect to purpose analysis. On the one hand, the Court insisted that the minimum wage and maximum hour provisions could be upheld as necessary and proper means of effectuating the interstate shipment prohibition. United States v. Darby, 312 U.S. 100, 121 (1941). Under this approach, the question of legislative purpose would seem to be irrelevant. This scheme would permit Congress to circumvent any prohibition against pretextual legislation by first passing a regulation governing the passage of goods across state lines and then propping that law up with a necessary and proper law. The law passed at the second step would always be justified, even under purpose-based review, by the contention that it serves the legitimate purpose of buttressing the interstate shipment provision.

But the Court's second justification cuts in the opposite direction. In arguing that the labor regulations could be justified independently of the interstate shipment provision, the Court refined its assessment of the purpose served by the FLSA. Instead of conceding (as it seemed inclined to do earlier in the opinion) that the Act was intended strictly to regulate working conditions, the Court concluded that "the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions." *Id.* at 122. That the Court felt it necessary to craft this "unfair competition" rationale suggests that it was not content simply to uphold the regulations on the ground that labor conditions affect interstate commerce and hence are subject to federal control, whatever the ultimate purpose of Congress's action.

207 Or, to put it another way, cases signaling that purpose-based analysis ought not to be employed when reviewing legislation premised on the commerce power do not involve exercises of "executory" power. *See supra* note 161.

intrastate activity are powerful. If the judiciary does nothing to check Congress's ability to legislate pretextually, then Congress might easily parlay the enumerated powers into a general police power. Where pretextual legislation is permissible, any possible limits on the ends that the federal government might pursue under particular Clauses would be subject to easy evasion. Thus, for a Court concerned—as the modern Supreme Court clearly is—with Congress's ability to funnel a federal police power through the Commerce Clause, a focus on pretextual legislation would seem to be a potentially fruitful, and arguably necessary, component of a doctrinal scheme that is to strike the desired federalism balance.

C. Pretext Analysis and the Commerce Power: Definitions

Before delving into the precise mechanics of purpose-based review in commerce/necessary and proper cases, two important threshold questions must be answered. First, what do we mean by legislative purpose? That is, when courts seek to ascertain the purpose of a piece of legislation, what exactly are they looking for? Second, what counts as a legitimate purpose when Congress regulates commerce via the Necessary and Proper Clause?

1. Legislative "Intent" and Legislative "Aim"

For two reasons, calls for incorporating purpose analysis into judicial review tend to set off alarm bells. First, it is questionable whether the actual purpose motivating the passage of any particular law can be conclusively determined.[208] A legislator might vote for a bill because she desires one, some, or all of its likely consequences; alternatively, a lawmaker might vote for a bill in order to secure a colleague's vote on another piece of legislation, because she owes someone a favor, or for some other reason not directly related to what the bill seems designed to accomplish.[209] In a multimember legislative body, moreover, the

208 *E.g.*, Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting [a] statute, is to be honest, almost always an impossible task."); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 323 (1997) (questioning "whether legislative purpose is ever definable in a meaningful sense, since the hidden motivations of legislators are rarely known, and because attributing one defined 'intent' to a multimember body is necessarily a fictitious enterprise").

209 *E.g.*, *Edwards*, 482 U.S. at 636–37 (Scalia, J., dissenting) (noting that "[t]he number of possible motivations . . . is not binary, or indeed even finite").

likelihood of identifying with confidence a single legislative intent is further diminished.[210]

Second, even if the aggregate intention of a legislative body could be established, it is not clear why the motivations of lawmakers ought to be relevant to the question of whether a statute falls within a constitutional grant of power.[211] As Justice Scalia has explained, "[i]t is the *law* that governs, not the intent of the lawgiver."[212] What difference should it make whether a lawmaker intends to accomplish something that is beyond the legislature's authority so long as the statute, as written and in effect, is within the power of the lawmaking body?

These criticisms can be sidestepped by employing a conception of "purpose" that focuses on "legislative aim"—the goal (or goals) that a statute is well-adapted to achieve—rather than "legislative intent"—the subjective motivations or desires of particular legislators.[213] To identify a statute's aim, judges need not plumb the depths of any legislator's mind; instead, under this view of "purpose," courts "look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law . . . ."[214] In contrast to the (arguably fruitless) search for subjective legislative motive, courts are capable of examining the text of a statute, considering its likely effects, and inferring from these what "purpose" the law is adapted to achieve. Justice Scalia, a steadfast opponent of purpose inquiries where purpose is construed as "intent," has conceded that "[i]t is possible to discern the objective 'purpose' of a statute[,] *i.e.*, the public good at which its provisions appear to be directed."[215] Likewise, Professor Pildes has explained,

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210 *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body."); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

211 *See, e.g.*, Litman & Greenberg, *supra* note 152, at 935 ("[I]t is difficult to see why the actual psychological process of members of Congress should have any bearing on whether a statute is within the commerce power.").

212 ANTONIN SCALIA, A MATTER OF INTERPRETATION: COMMON LAW COURTS IN A CIVIL LAW SYSTEM 17 (1997). Justice Scalia makes this point in support of his view that legislative history ought to be irrelevant to the process of statutory interpretation.

213 *But see* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1227–32 (1970) (arguing that this distinction, between legislative intent and legislative object, is not meaningful).

214 SCALIA, *supra* note 212, at 17.

215 Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (parenthesis omitted).

> [T]he purported difficulties with purpose analysis often rest on misconceptions about the task—for example, the view that it requires courts to probe the subjective states of mind of public actors. . . . Evaluating the justifications for public actions does not require divining the hidden, private motives behind them. Indeed, at times, the justifications are explicitly articulated. . . . Even when no such explicit justification is available, the process is one of constructing a narrative account that provides the most convincing explanation of the reasons that an action has been taken—just as with any judicial act of purposive statutory interpretation.[216]

Thus, when the search for legislative purpose is restricted to identification of the aim that can reasonably be inferred from a statute's text, context, and likely effects, the process of judicial review stands on considerably firmer ground. It is this form of purpose inquiry that concerns us here.

2. What Counts as a Legitimate Purpose?

a. A Commercial Purpose Requirement

Having clarified the important distinction between legislative intent and legislative object, the question of what qualifies as a legitimate purpose in cases involving the commerce/necessary and proper power remains. I offer what I think is a strikingly obvious answer: exercises of the commerce power—at least when predicated on the substantial effects rationale—ought to have a *commercial* purpose. That is, when Congress justifies regulation of an activity on the ground that it substantially affects interstate commerce, the purpose the regulation must be to "get at" that effect.

Support for this view can be found, first and foremost, in the text of the Constitution. As noted above, the Commerce Clause confers upon the national government the authority to regulate "*Commerce* . . . among the several States . . . ."[217] While this language is not self-defining, it seems perfectly straightforward to read it as singling out *commercial* concerns as the proper targets of federal action. In the very least, requiring Congress to have a commercial purpose when it acts under

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216 Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 729 n.45 (1994); *see also* Bhagwat, *supra* note 208, at 330 ("[W]hen the case requires it to do so the Court is willing and able to identify the true purpose behind challenged legislation . . . ."). In certain contexts, moreover, notwithstanding the concerns outlined above, the Court seems willing to inquire into lawmakers' subjective motivations. *See generally* RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 90–91 (2001) (summarizing contexts in which the Court scrutinizes legislative motive).

217 U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

this head of power (in tandem with the Necessary and Proper Clause) is plainly consistent with (though arguably not required by) constitutional text.[218]

There is, moreover, tacit support for this view in the case law. In *Heart of Atlanta Motel v. United States*, for example, the Court explained that given "[t]he "overwhelming evidence of the disruptive effect that racial discrimination has had on interstate commerce,"[219] it is permissible for Congress to regulate such discriminatory conduct. The Court held as much notwithstanding the "fact that the particular obstruction to interstate commerce with which it was dealing was . . . a

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218 This begs the question of why purpose analysis is appropriate with respect to regulations passed via the Necessary and Proper Clause, but not in cases involving "true" Commerce Clause regulations. It is odd, indeed, that the text of the Commerce Clause should give rise to a constraint on federal power that does not apply to lawmaking under the Commerce Clause itself!

There are two possible justifications for this admittedly strange scheme. First, as noted earlier, the default rule in constitutional analysis is that purpose-based scrutiny with respect to federal legislation is inappropriate. However, Congress's authority under the Necessary and Proper Clause is limited to regulations "for carrying into execution" Congress's other powers. Thus, the framers toggled off the default rule with respect to necessary and proper laws while the default rule remains in place with respect to "actual" Commerce Clause regulation. *See* TRIBE, *supra* note 142, at 803 n.12 ("[I]t is by no means clear that congressional motive is equally irrelevant when Congress is acting under the Necessary and Proper Clause or any other source of authority that contains its own statement of the purposes for which it may be invoked . . . .").

A second reason to employ a commercial purpose requirement in necessary and proper cases, but not Commerce Clause cases, is that the former might reasonably be perceived as a greater threat to state autonomy than the latter. *Cf.* Jackson, *supra* note 108, at 2233 ("[I]t seems reasonable to expect that, as Congress regulates conduct that lies farther afield from the specifically enumerated subject matters of its grant, the need for an explanation, or justification, of the connection should increase.").

Professor Lessig has suggested similar justifications for restricting purpose-based review to necessary and proper cases (though he ultimately does not recommend employing pretext analysis even in this context):

> So understood, when Congress regulates directly under an enumerated power, its power is "whole," and the Court has no power to limit it because of a view that it has been exercised for an improper purpose. On the other hand, when Congress regulates according to the Necessary and Proper Clause, either because of the textual requirement of "propriety" or because of the need to assure that this clause not become the demise of Congress's limited power, the Court should assure that the invocation of this clause not be for improper ends.

Lessig, *supra* note 23, at 202.

219 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964).

moral and social wrong."[220] Presumably, had the "wrong" in question been commercial—that is, had the legislation been targeted at remedying a strictly commercial, rather than moral, problem—it would have been unnecessary to confirm that federal power extended so far.[221]

A similar negative inference might be drawn from a series of cases decided in the early 1900s endorsing federal authority to exclude goods from interstate commerce. In *Hoke v. United States*,[222] the Court upheld a statute prohibiting the transportation of women in interstate commerce for immoral purposes.[223] And, in *Champion v. Ames*,[224] the Court upheld a prohibition on the interstate transportation of lottery tickets.[225] In both cases, the Court emphasized that Congress's regulatory authority was not limited by the fact that the regulations targeted moral, rather than commercial wrongs.[226] The Court went out of its way to confirm that federal regulatory authority extended to non-commercial purposes, lest anyone mistakenly presume that only commercial purposes could be served under the Commerce Clause. Once again, had the challenged provisions been designed to serve commercial ends, the Court would not have found it necessary to assert that congressional purpose was not pertinent.[227]

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220 *Id.*

221 *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 712 (1996) ("The cases upholding the constitutionality of the Civil Rights Act of 1964 indicated that Congress no longer even needed an economic motivation to exercise its commerce power.").

222 227 U.S. 308 (1913).

223 *Id.* at 323.

224 188 U.S. 321 (1903) (*The Lottery Case*).

225 *Id.* at 363–64.

226 *Hoke*, 227 U.S. at 323; *Champion*, 188 U.S. at 357. There is language in *Hoke* suggesting that even regulations passed pursuant to the necessary and proper power need not have a commercial purpose. The Court explained that Congress's power to regulate commerce "is complete in itself, and that Congress, as an incident to it, may adopt not only means *necessary but convenient* to its exercise, and the means may have the quality of police regulations." *Hoke*, 227 U.S. at 323 (emphasis added). *Hoke*'s use of the terms "necessary" and "convenient" is an unmistakable reference to Chief Justice Marshall's opinion in *McCulloch*. And here the Court states that such measures "may have the quality of police regulations." *Id.* Decades later, however, when the *Darby* Court reaffirmed Congress's authority to regulate via the Commerce Clause for whatever purpose it saw fit (after the Court's brief foray into purpose analysis in *Hammer*), it relieved heavily on the "plenary" nature of the power granted Congress under the Commerce Clause itself. Subsequent cases have not relied on this language from *Hoke* at all, perhaps because it is dictum.

227 Several commentators have drawn similar inferences from these cases. Professor Currie, for example, explained that *Hoke* and *Champion* signaled that "it was no

Perhaps the strongest argument in favor of this commercial purpose requirement is a logical one. The notion that a substantial effect on interstate commerce ought to give rise to federal regulatory authority makes the most sense when federal regulation is targeted at these effects. Under these conditions, the substantial effects test explains *why* something is a matter of federal concern and the regulation signals *how* Congress intends to deal with that specific concern. In contrast, when Congress relies on the effects test in order to achieve a non-commercial goal, the symmetry between the predicate for federal authority and the specific exercise of federal power breaks down. We are left, instead, with the non-sequitur of an argument that because an activity substantially effects interstate commerce, Congress may regulate that activity so as to achieve whatever goal it pleases, commercial or otherwise.

b. Objections

There are at least three objections one might have to the establishment of a commercial purpose requirement. First, one might argue that because this requirement relies on a distinction between commercial and non-commercial goals, it is susceptible to the same criticisms that have been directed at the modern Court for its use of the commercial/non-commercial distinction in *Lopez* and *Morrison*.[228] More specifically, one might argue that distinguishing between regulations with and without commercial purposes is arbitrary and insensitive to economic reality. The existence of federal regulatory authority, the argument goes, ought to turn on whether targeted activity substantially affects interstate commerce, nothing more.

But any similarity between the commercial purpose requirement outlined above and *Lopez-Morrison*'s economic activity rule is purely

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objection to the validity of Congress's enactment that the purpose and effect of the statute were to promote morality *rather than to prevent obstructions to commerce.*" David P. Currie, *The Constitution in the Supreme Court: 1910–1921*, 1985 DUKE L.J. 1111, 1121 (emphasis added); *see also id.* at 1122–23 ("As an original matter, a respectable argument could have been made that the commerce power should be construed, in light of its purpose, only to authorize measures that removed obstructions to commerce.").

Let me be clear, the cases discussed above do not suggest that courts ought to undertake purpose-based review in cases involving the commerce power. I rely on them only for the argument that *if* review of legislative purpose were appropriate, it would be sensible to read the Commerce Clause as requiring a showing of *commercial* purpose.

228 *See supra* Part II.A.

superficial.[229] The *Lopez-Morrison* doctrine reflects deep ambivalence as to the substantial effects rule. The economic activity requirement employed in those cases diminishes the significance of the effects component of the doctrine by distinguishing categorically among activities that might have identical effects on interstate commerce. In contrast, a requirement of commercial purpose entails singular focus on, rather than half-hearted commitment to, the substantial effects rule. By insisting not only that regulated activity have a substantial effect on interstate commerce, but also that Congress target these effects when legislating, the commercial purpose rule amplifies, rather than dilutes, the significance of the effects requirement. In the same vein, the commercial purpose requirement, unlike *Lopez-Morrison*'s economic activity rule, does not reflect insensitivity to economic reality. Instead, it rivets congressional attention on economic reality by requiring that federal law be designed to affect that reality.

A second objection one might have with respect to the approach outlined here is that, by retaining the substantial effects rule, it takes too much of existing doctrine for granted. Since the decision in *Lopez*, a number of commentators have argued that Congress's power to regulate commerce ought not to turn simply on whether federal regulation is related to (or even targeted at) an economic problem that is national in scope. Instead, in the view of these scholars, only where the targeted problem is truly *federal* should Congress be empowered to act.

What does it mean for a problem to be "federal" in nature? Professor Regan has argued that "[i]t was the *practical* incompetence of the states to deal separately with certain problems that was relevant to thinking . . . about what powers the federal government should have."[230] Accordingly, he contends, "when we are trying to decide whether some federal law or program can be justified under the commerce power, we should ask ourselves the question, 'Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?'"[231] Similarly, in justifying the Supreme Court's decision in *Lopez*, Professor Calabresi has argued that "[c]arrying guns near a school is undoubtedly a *national*

229 For starters, in obvious contrast to the *Lopez-Morrison* doctrine, a requirement that uses of the commerce/necessary and proper power have a commercial purpose does not turn on the character of the regulated activity. It makes no difference, from the commercial purpose perspective, whether regulated activity is non-commercial so long as (1) this activity exerts a substantial effect on interstate commerce, and (2) the regulation is designed to modify, remedy, or otherwise alter these effects.

230 Regan, *supra* note 126, at 583.

231 *Id.* at 555.

problem . . . . But, it is not a *federal* problem. . . . Nothing . . . suggests that this is a problem that we need federal action to solve."[232]

To the extent that these approaches raise the question of what sort of problems exercises of the commerce power ought to target, they carry the promise of moving the jurisprudence in a more purpose-centered direction. But there is simply no warrant in the Constitution for conferring upon Congress, through the commerce power, the authority to regulate problems simply because they are, in some sense, uniquely federal. This view reads the relevant constitutional provision as though it were an "interstate clause," rather than an "interstate *commerce* clause."[233]

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232 Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 802–03 (1995); *see also* Bednar & Eskridge, *supra* note 72, at 1469 ("The most obvious role for the national government is to provide public goods that the states are unlikely to provide through ordinary cooperation . . . . An equally important role for the national government is to prevent destructive interstate competition . . . .").

233 Regan argues that "if we tried to figure out from the specific grants [of federal power in the Constitution] what the principle of inclusion was," we would conclude that federal power extends to "general interests of the union, and also . . . those [cases] to which the States are separately incompetent." Regan, *supra* note 126, at 555–56 (quoting NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 380 (W.W. Norton & Co. ed., 1966)). But even if this point is conceded, it is not at all clear why particular regulations of these "federal problems" ought to be funneled through the Commerce Clause. For example, Regan argues in favor of the decision in *Jones & Laughlin* on the ground that "[w]here the matter to be regulated is the ongoing relations of two large, multistate organizations, no individual state can deal effectively with [such matters]. . . . Neither the steel company nor the union cares about state lines as such, and a dispute in Pennsylvania can embitter relations in West Virginia." *Id.* at 603. Regan is surely correct that labor strife in one state might spill over into another. And it is precisely this insight into the degree of our economy's integration that motivated the New Deal Court to abandon strict limits on federal authority to regulate intrastate activity. But spillover effects alone cannot give rise to federal power. To paraphrase John Marshall: we must remember, it is the *Commerce* Clause we are expounding. Accordingly, spillover effects must be of a certain character—i.e., they must be *commercial* in nature—if federal authority under this Clause is to be upheld. Hence the *Jones & Laughlin* Court's repeated discussion of "the effect *upon interstate commerce* of the labor practice involved." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 40 (1937) (emphasis added); *id.* at 41 (noting that "the stoppage of those operations by industrial strife would have a most serious effect upon *interstate commerce*" (emphasis added)); *cf.* Nelson & Pushaw, *supra* note 18, at 97:

> Regan's thesis illustrates the danger of inferring from the Constitution a "principle" of federalism to help "interpret the vaguer of the grants of power, like the Commerce Clause." In our view, his methodology is backwards: Judicially applicable "principles" can and should be derived directly from the Commerce Clause, with "vaguer" (albeit not wholly indeterminate)

Conversely, Congress should not be prevented from passing laws to address national economic concerns simply because the states might, if they felt so inclined, tackle them on their own. There is certainly nothing explicit in the Constitution that suggests limiting the commerce power in this way. The "interstate" component of the Commerce Clause has, since the time of *Gibbons*, been construed to confer on the federal government authority over "commerce which concerns more states than one," rather than problems of commerce that the states are individually ill-equipped to handle.[234] Where Congress finds a set of national economic conditions intolerable, it ought to be empowered to alter those conditions.[235]

Finally, one might object to the scheme outlined here on the ground that, insofar as it is restricted to statutes that rely on the substantial effects rationale, it will prove unable to prevent Congress from exercising a general police power. As discussed in Part I, the expansion of Congress's authority under the Commerce Clause was accomplished not only through the substantial effects test, but also by way of laws predicated on so-called jurisdictional nexus requirements—statutes regulating activities involving goods that have previously passed through interstate commerce.[236] In jurisdictional nexus cases, federal regulatory authority is not premised, as it is under the substantial effects component of the doctrine, on the notion that regulated activity has national economic ramifications.[237] Rather, it is justified on the ground that Congress ought to be allowed to prevent interstate com-

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concepts of federalism serving as a secondary source to explain the rules of the Clause.

(citations omitted).

234 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

235 To be sure, in some cases, national commercial problems will be spawned by complications inherent in the federal system, *e.g.*, United States v. Darby, 312 U.S. 100, 122 (1941) ("[T]he evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions . . . ."), but this ought not to exhaust the class of cases in which federal regulatory authority exists.

236 *See supra* notes 57–68 and accompanying text (discussing United States v. Sullivan, 332 U.S. 689 (1948) and Scarborough v. United States, 431 U.S. 563 (1977), which involve federal statutes relying on jurisdictional nexus requirements to regulate an in-state sale of pills by a pharmacist and possession of a firearm by a felon, respectively).

237 *But see* TRIBE, *supra* note 142, at 829 n.19 (noting that while statutes relying on jurisdictional nexus requirements are "closely related to the category of things 'in' commerce, *Lopez* seems to treat this sort of regulation as falling into the third category (i.e., activities substantially affecting interstate commerce)").

merce from serving as a vehicle toward harm in the receiving state.[238] Under these conditions, the particular purpose-based review scheme described above cannot apply. For the requirement that a law be targeted at interstate commercial effects—i.e., that it be designed to modify, alter, or otherwise "get at" national markets for commercial goods—has no place where such effects do not serve as the predicate for federal authority. Accordingly, one might argue, whatever limits might be imposed on the national government by employing pretext analysis in substantial effects cases can easily be circumvented by redrafting statutes so that they rely on jurisdictional nexus requirements.[239]

There can be no doubt that, as is the case with respect to the substantial effects rationale, the jurisdictional nexus approach carries the potential to expand the power of the federal government dramatically and perhaps even to transform the Commerce Clause into the fount of a general police power. For this reason, the purpose-based method of judicial review outlined above cannot, on its own, assure that Commerce Clause jurisprudence will ultimately include the sorts of limits the current Supreme Court majority is intent on crafting. Still, this is no excuse for failing to prevent Congress from legislating pretextually by way of the substantial effects test.

For starters, forcing Congress to justify regulatory action on the basis of a jurisdictional nexus theory will restrict, albeit minimally, the class of activities that the federal government might reach under the commerce power. Thus, in 1996, Congress passed a new version of the Gun-Free School Zones Act in which it restricted the relevant prohibition to firearms "that ha[ve] moved in or otherwise affect[ed] interstate or foreign commerce . . . ."[240] Under this regulatory scheme, some of the conduct covered by the original Act is beyond Congress's control (though not much, given that most guns travel in interstate

238 Litman & Greenberg, *supra* note 152, at 946 (defending a statute containing a jurisdictional nexus requirement on the ground that it served the legitimate Commerce Clause purpose of "prevent[ing] interstate commerce from being a cause of a health and safety problem").

239 TRIBE, *supra* note 142, at 830–31:

> [I]f one reads *Lopez* as leaving intact an (almost) all-encompassing affirmative congressional power to regulate any item for any purpose, as long as the statute contain a jurisdictional element requiring that item to have some past, present, or future connection to interstate commerce, it would seem doubtful that . . . *Lopez* would limit Congress' Article I powers in any meaningful way.

240 18 U.S.C. § 922(q)(2)(A) (2000).

commerce at one time or another).[241] Inclusion of a jurisdictional nexus requirement in a statute such as the Violence Against Women Act—requiring that either the assailant, the victim, or, perhaps, a weapon used in such a violent attack have traveled in interstate commerce—might contract the set of circumstances governed by the law considerably.[242] Surely a significant number of assaults against women lack this sort of nexus to interstate commerce. Accordingly, if one's goal is to limit the set of private behavior that is subject to federal regulatory authority, compelling Congress to justify exercises of the commerce power by way of a jurisdictional nexus requirement, rather than a substantial effects theory, places such statutes on more solid constitutional ground.[243]

More fundamentally, even if it is true that existing doctrine might allow Congress to funnel vast regulatory authority—even a general police power—through jurisdictional nexus requirements, this does not mean that efforts to restrain federal power should be abandoned altogether. The fact that courts may lack the tools to prevent one theory of commerce from underwriting the limitless expansion of federal power, does not suggest that it ought not try to check Congress's power under another regulatory approach when the means of doing so are available. Thus, the purpose-based review scheme described above is potentially valuable to the extent that the Court wishes to close off at least this avenue toward a federal police power. This is true even if other paths to this end remain accessible. And, as noted in Parts I and II, the direction of the Court's commerce jurisprudence suggests that, precisely because of its potential to authorize limitless federal authority, the jurisdictional nexus approach may be contracted at some point in the future.[244] The purpose-based review scheme described here might supplement approaches toward control-

241 Litman & Greenberg, *supra* note 152, at 953 ("Most guns are manufactured in one of two states and are then shipped to other states.").

242 A bill attempting to resuscitate VAWA's civil rights remedy was presented in the House in 2001. It relied on this jurisdictional nexus theory. *See* Violence Against Women Civil Rights Restoration Act of 2001, H.Res. 429, 107th Cong. § 2(c)(2) (2001).

243 Of course, if one is concerned about securing remedies to victims of gender-motivated violence, the contraction of federal authority implicit in the shift to the jurisdictional nexus theory is something to be lamented.

244 TRIBE, *supra* note 142, at 831:

> Unless the Court takes the additional step of limiting *Sullivan*, *Bass*, and *Scarborough*[,] . . . an adventuresome Congress could tie virtually any regulation to . . . interstate commerce. Thus, although *Lopez* expressed fealty to the important principle that any interpretation of the Commerce Clause that imposes no limit at all on Congress is inconsistent with the principle of

ling federal power under the Commerce Clause that are yet to be developed.[245]

IV. IMPLEMENTING PRETEXT ANALYSIS

In this Part, I consider the question of how pretext analysis might be injected into the Supreme Court's Commerce/Necessary and Proper Clause jurisprudence. Part IV.A details an aggressive form of judicial scrutiny into legislative purpose. Under this model, courts would be called upon to draw explicit conclusions about the purposes served by necessary and proper legislation. Where an illegitimate legislative purpose predominates, courts would be required to invalidate the statute under review on the ground that "under the pretext of executing its powers, [Congress has] pass[ed] laws for the accomplishment of objects not intrusted to the government."[246]

Part IV.B outlines a less intrusive method of policing pretextual lawmaking. Under this approach, the legislative findings requirement gestured at in *Lopez* and quickly abandoned in *Morrison* would be revived and placed at the heart of the jurisprudence. In lieu of a straightforward purpose inquiry, courts would review legislation only to assure that Congress has provided a statement asserting a legitimate commercial purpose. This model would not permit reviewing courts to reject Congress's invocation of a commercial purpose as pretextual.

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enumeration, it is doubtful that the Court would be able to advance that principle without supplementing *Lopez* in some significant way.

Cf. Religious Liberty Protection Act of 1998: Hearing on S.2148 Before the Senate Comm. on the Judiciary, 105th Cong. 218 (statement of Chris Eisgruber in response to additional questions) [hereinafter Eisgruber, *Hearing*]:

> Surely . . . the requirements imposed by *Lopez* are not so formal and hollow as to be circumvented [by the inclusion of a jurisdictional proviso]. Suppose, for example, that the Gun Free School Zones Act had applied only to possession of a gun within 1000 feet of a school "substantially affecting interstate commerce." Would that have been sufficient to save the Act? It seems unlikely, to say the least.

245 Notably, while both the *Lopez* and *Morrison* Courts mentioned that the statutes under review were constitutionally suspect, in part, because they did not contain jurisdictional nexus requirements, *see* United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 562 (1995), the Court did not state explicitly that the inclusion of such a requirement would have saved either statute from invalidation. One cannot infer too much from the Court's failure to speak to this point, given that it was unnecessary for the Court to pass judgment on it in order to decide the cases before it. Still, given the rhetoric employed in *Lopez* and *Morrison*, it is plausible that, in an appropriate case, the Court would make an effort to limit the scope of federal power via the jurisdictional nexus theory just as it did with respect to the substantial effects rationale.

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

Only where the legislature completely fails to identify a rational relationship between a regulation and some legitimate government objective would that regulation be subject to invalidation.

A. A "Direct" Purpose Inquiry

One mechanism for curtailing pretextual use of the substantial effects rationale would be for courts to invalidate laws where "the public good at which its provisions appear to be directed"[247] is not bound up with the activity's effect on commerce.[248] Under this model, the fact that an activity substantially affects interstate commerce would be inadequate, on its own, to justify federal regulation of that activity. As noted earlier, only laws that are principally designed to "get at" that commercial effect would pass constitutional muster.

1. The Framework

Purpose analysis might proceed as follows: first, a reviewing court would examine statutory language to determine whether the challenged provision(s) could conceivably serve any commercial purpose. Where no such purpose is discernable, the analysis ends, for federal power to regulate commerce under the substantial effects rationale cannot underwrite regulations without some commercial object. If, however, a commercial purpose can be identified, the court would consider the likely effects of the statute, as well as the context surrounding its enactment,[249] in order to ascertain whether the asserted

247 Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

248 *Cf.* TRIBE, *supra* note 142, at 801:

> [A] point often overlooked is that there remains a vast difference between those powers reasonably ancillary to an enumerated power—in the sense that the powers thus implied are at least useful in effectuating the power expressly enumerated—and the far larger set of powers that merely relate, in some loose sense, to the power expressly enumerated.

249 By "context," I mean "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993). Justice Scalia contends, in his concurring opinion in *City of Hialeah*, that inquiry into these factors inevitably entails scrutiny of lawmakers' subjective intent. *Id.* at 558 (Scalia, J., concurring). But the fact that this contextual evidence might provide (highly contestable) insight into lawmakers' personal motivations, does not mean that it sheds no light at all on the objective aim of the regulation under review. *Id.* at 540 ("These *objective* factors bear on the question of discriminatory object." (emphasis added)). As we will see below, *infra* notes 251–79 and accompanying text, the Supreme Court has repeatedly examined these contextual factors as part of inquiries into legislative object.

commercial purpose truly represents "the public good at which [the] provisions [are] directed,"[250] or, instead, the asserted commercial purpose has been employed as a pretext for the achievement of non-commercial ends. This analysis will turn, in large part, on how well-tailored the relevant statute is to the attainment of these various purposes. The more directly and precisely a statute serves a particular end, the more likely it is that that end constitutes the genuine purpose.

This methodology for judicial review of legislative purpose is not novel; it has been employed by the Supreme Court in a variety of different contexts. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[251] the Supreme Court was faced with a Free Exercise challenge to a series of municipal ordinances prohibiting animal sacrifice.[252] Members of the Santeria religion claimed that the purpose of the regulations was to inhibit their religious exercise, while the City insisted that the law was designed to serve legitimate purposes relating to mistreatment of animals and public health.[253]

The Court self-consciously inquired into the purpose underlying the challenged regulations, carefully examining the text of the ordinances,[254] their likely effects,[255] as well as their "historical background,"[256] in order to determine whether "the object of [the] law [was] to infringe upon or restrict practices because of their religious motivation."[257] The Court conceded that a prohibition on animal sacrifice implicates legitimate governmental concerns "unrelated to religious animosity" including "the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal."[258]

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250 *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).

251 508 U.S. 520 (1993).

252 *Id.* at 526–28.

253 *Id.* at 535.

254 *Id.* at 533 ("To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.").

255 *Id.* at 535 (acknowledging that "the effect of a law in its real operation is strong evidence of its object").

256 *Id.* at 540. The Court explained that it could "determine the city council's object from both direct and circumstantial evidence." *Id.* Hence, it examined "the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*

257 *Id.* at 533.

258 *Id.* at 535.

It concluded, nonetheless, that the City's assertion of these purposes was pretextual.[259]

In reaching this conclusion, the Court focused intently on the precision with which the ordinances served legitimate and illegitimate goals. The Court pointed out, for example, that "killings [of animals] that are no more necessary or humane [than that necessitated by the Santeria religion] in almost all other circumstances are unpunished."[260] And, the Court found that "[t]he legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice."[261] Thus, the ordinances were both over- and under-inclusive with respect to the attainment of the asserted legitimate goals.[262]

At the same time, the effect of the ordinances on the disfavored religious group was systematic and focused. "[T]he burden of the ordinance," the Court noted, "falls on Santeria adherents but almost no others."[263] The Court found that the statute had been "gerrymandered with care to proscribe religious killings of animals."[264] The exactitude with which the ordinances served the purpose of curtailing Santeria religious exercise, compared to the haphazard manner in which they protected public health and secured humane treatment of animals, provided the basis for the Court's conclusion that "the object of the ordinances [was] to target animal sacrifice by Santeria worshippers because of its religious motivation."[265]

The Court has employed a similar methodology in Equal Protection cases. Thus, in *United States v. Virginia*,[266] the Court assessed whether the refusal of the Virginia Military Institute (VMI) to admit

259 *Id.* at 542 (finding that "[t]he ordinances had as their object the suppression of religion"); *id.* at 535 ("[T]he ordinances when considered together disclose an object remote from . . . legitimate concerns.").

260 *Id.* at 536.

261 *Id.* at 538; *see also id.* at 538–39 ("[T]hese broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health."); *id.* at 536 ("[N]arrower regulation would achieve the city's interest in preventing cruelty to animals.").

262 *Id.* at 543 (finding that the ordinances were "underinclusive for those [legitimate] ends").

263 *Id.* at 536; *see also id.* at 535 (noting that "almost the only conduct subject to [the] Ordinances . . . is the religious exercise of Santeria church members").

264 *Id.* at 542 (finding that the challenged provisions "target[ed] [Santeria] religious exercise").

265 *Id.*

266 518 U.S. 515 (1996).

women violated the Equal Protection Clause.[267] The United States argued that the object of VMI's admissions policy was to secure a unique educational benefit for males only.[268] The State countered by insisting that the admissions policy served the legitimate purpose of providing a diverse array of educational opportunities to its citizens, including single-sex education and education under VMI's "adversative" method.[269]

Here too, the Court scrutinized the practical effects of the admissions policy as well as the historical context surrounding it in order to test the *bona fides* of the legitimate purposes asserted by the state.[270] The Court explained that "a tenable justification must describe *actual* state purposes, not rationalizations for actions in fact differently grounded."[271] While the Court acknowledged that "[s]ingle-sex education affords pedagogical benefits to at least some students" and that "diversity among educational institutions can serve the public good,"[272] it rejected as pretextual the state's claim that the challenged policy was directed at securing these benefits.[273]

The Court emphasized that Virginia's failure to provide single-sex education for women belied its claimed commitment to the provision of diverse educational opportunities (in particular, single-sex education) to its citizens.[274] "A purpose genuinely to advance an array of educational options," the Court explained, "is not served by . . . afford[ing] a unique educational benefit only to males."[275] Likewise, the Court found that the Commonwealth's purported interest in producing "citizen-soldiers" was "not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from

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267 *Id.* at 519.

268 *Id.*

269 *Id.* at 535.

270 *Id.* at 536–40.

271 *Id.* at 535–36 (emphasis added); *cf.* Frickey, *supra* note 221, at 723 (noting that the standard of review in cases involving gender-based classifications "contemplates judicial inquiry into the legislative process, for it seeks to evaluate *the actual governmental objective that motivated the legislature*" (emphasis added)).

272 *Virginia*, 518 U.S. at 535.

273 *Id.* at 536 ("Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single sex educational options."); *id.* at 539 ("[W]e find no persuasive evidence in this record that VMI's male-only admissions policy is in furtherance of a state policy of diversity." (internal quotation marks omitted)).

274 *Id.* at 538 (noting that "[t]he state legislature, prior to the advent of this controversy, had repealed all Virginia statutes requiring individual institutions to admit only men or women" (internal quotation marks omitted)); *id.* at 539 (taking note of "the movement of all other public colleges and universities in Virginia away from single-sex education").

275 *Id.* at 539–40 (internal quotation marks omitted).

the Commonwealth's premier 'citizen-soldier' corps."[276] Thus, while the challenged admissions policy did a very good job of limiting the benefits of a VMI education to men only, it was considerably less well-adapted to achieving the legitimate objects urged by the state.

* * *

These cases signal the Supreme Court's willingness to reject justifications proffered in support of a particular law when consideration of the law's likely effects and the circumstances surrounding its enactment, together with an assessment of the context in which it operates, indicate that the proffered justification is pretextual.[277] Cases such as *City of Hialeah* and *United States v. Virginia* thereby provide a blueprint for the sort of pretext analysis that might be applied in commerce cases.

2. The Problem of Multipurpose Legislation

Though the Court has employed purpose analysis in these other contexts, this form of review is likely to raise acute epistemological difficulties in cases involving the commerce power. In *City of Hialeah* and *United States v. Virginia*, the legitimate justifications asserted in defense of the relevant statutes were so ill-served by the challenged provisions that the finding of pretext was fairly uncontroversial.[278] In contrast, when the commerce power is at issue, it will often be the case that a statute is well-adapted to achieve both commercial and non-commercial objectives. Under these conditions, the process of identifying legislative purpose is considerably more complicated, for courts would be required to determine which of two (or more) purposes that are plausibly served by a particular statute is the "true" object of the legislation.

The Supreme Court has acknowledged the unique problems intrinsic to pretext analysis in cases involving multipurpose legislation. "Rarely can it be said," the Court has noted, "that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose

276 *Id.* at 546.

277 *See* Bhagwat, *supra* note 208, at 322 ("In contrast to the difficulty of locating and evaluating empirical evidence about means, information about legislative ends and purposes is often far more accessible. . . . Statutory text and structure, legislative history, and an examination of political context provide strong and generally adequate tools with which to make these determinations.").

278 *But see Virginia*, 518 U.S. at 583–86 (Scalia, J., dissenting) (arguing that the evidence supported Virginia's claim that it sought to provide a diverse array of educational opportunities to its citizens).

was the 'dominant' or 'primary' one."[279] The Court has also warned that "[t]he search for legislative purpose is . . . elusive enough . . . without a requirement that primacy be ascertained."[280]

There is, moreover, significant danger that aggressive inquiry into legislative purpose under such circumstances will be perceived as transparently political. Thus, Professor Ely has insisted that "only a hopelessly result-oriented judge would be able to assert that he knew which was 'the' motivation or the 'dominant' motivation underlying [a] statute."[281] Likewise, Professor Lessig has argued that this sort of inquiry will compel judges to assess "matters seen as inherently policy driven."[282] Given the Court's chastening experience during the New Deal era—at which time it came under intense fire for rendering decisions that "seemed more the result of extra-judicial judgments than entailed by the legal material"[283]—this concern cannot be taken lightly.

To illustrate the problem, consider *Heart of Atlanta* and *McClung*. On the one hand, it seems perfectly obvious that the public accommodations provisions of Title II were designed to serve non-commercial purposes. As mentioned earlier, the *Heart of Atlanta* Court itself characterized Title II as targeting a "a moral and social wrong,"[284] namely "the deprivation of personal dignity that . . . accompanies denials of equal access to public establishments."[285] It is hard to believe—indeed, one would like *not* to believe—that this country prohibits race discrimination so that restaurants can sell a few more hamburgers.[286]

279 Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 265 (1977); *see also* Lessig, *supra* note 23, at 202 (discussing "[t]he rhetorical burden of claiming pretext, given the multiplicity of reasons any legislation is passed, and given the basic questions about what intent means here").

280 McGinnis v. Royster, 410 U.S. 263, 276 (1973).

281 Ely, *supra* note 213, at 1214 ("So long as the unconstitutional motivation question is thus posed . . . as a determination about which of two compatible goals, one legitimate and one illegitimate, was 'really' or, perhaps, 'dominantly' intended, the . . . characterization of the possible judicial answers as 'guesswork' seems apt.").

282 Lessig, *supra* note 23, at 202.

283 *Id.* at 177 (noting, with respect to the pre-*Jones & Laughlin* jurisprudence, that "[t]he formalisms themselves had been rendered political").

284 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964).

285 *Id.* at 250 (quoting S. REP. NO. 872, at 16–17 (1964)).

286 *See* Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power To Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1214–16 (1998):

> I hope we did not prohibit race discrimination at Ollie's Barbecue [in *McClung*] just because we were worried about the amount of catsup Ollie ordered from other states. It would be ennobling—even affirming to those who have suffered from discrimination—if the Supreme Court admitted that we now have a national commitment to equality that does not countenance

At the same time, one hardly needs to strain in order to identify a legitimate commercial purpose that is served, quite directly, by Title II. This component of the Civil Rights Act promotes interstate commerce by securing citizens' full and equal access to it. A reasonable Congress might very well seek to eliminate race discrimination in places of public accommodation as a means of assuring that the national economy operates on all cylinders, with as many citizens as possible participating freely.[287]

Courts must, therefore, resist the temptation to assume (1) that statutes serve only a single purpose, and (2) that this purpose will be evident on only a cursory glance. Failure to exercise caution will lead to errors akin to those of the pre-1937 era and will expose the courts to criticism for smuggling policy-based judgments into their assessment of "attenuation" and purpose. Courts ought not to invalidate multipurpose legislation on the basis of pretext analysis unless they have the very strong conviction that the legitimate object asserted as the basis for the statute is being employed as a smokescreen for the attainment of noncommercial ends.

Still, purpose analysis might contribute to Commerce Clause jurisprudence by providing a firm basis on which to thwart some of the more egregious of Congress's uses of the substantial effects rationale. For example, a statute such as the Gun-Free School Zones Act would not pass constitutional muster under this scheme. While the Act is "plainly adapted" (to borrow the language of *McCulloch*) to achieve the non-economic objective of eliminating gun violence within school zones, it is far less well-adapted to the goal of promoting national economic productivity. Examination of statutory context only cements the notion that the purpose of the Act is remote from interstate commerce.[288]

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discrimination in any corner of the nation. That commitment, not tangential effects on the economy, explains congressional action to reduce bias.

287 The National Labor Relations Act, which was upheld by the Court in *Jones & Laughlin*, is likewise confounding from the perspective of purpose analysis. On the one hand, the effect on the national economy of the activity regulated under the NLRA can hardly be doubted. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937). The Act represents a perfectly reasonable way for Congress to prevent the national economic trauma that might be caused by the destabilization of labor relations within the steel industry. On the other hand, as one commentator has put it, "The National Labor Relations Act was . . . a pretextual use of the commerce power . . . ; its purpose and effect were not to facilitate trade, but to advance the welfare of the working class." Graglia, *supra* note 57, at 739–40.

288 *See* Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 765 (1996) ("[Two senators] made statements on the floor regarding the legislation, but neither state-

Let me be clear, I do not mean to challenge the arguments presented by Justice Breyer in *Lopez*, which persuasively demonstrate that a prohibition against gun possession in school zones *is* rationally related to the goal of fostering economic productivity.[289] I wish to emphasize, however, that such a prohibition is *no more* than rationally related to this goal. And where a regulation of this sort—i.e., one that relies on the substantial effects test—so directly serves a non-commercial goal that is otherwise beyond Congress's power to attain, the mere fact that it might also be conducive to a commercial end ought to be insufficient to secure its constitutionality.[290]

Purpose analysis might also prove useful in cases where the effect of regulated activity on interstate commerce is undeniably substantial, but is also largely random. The Religious Liberty Protection Act (RLPA), which was considered but not passed by Congress in 1998, exemplifies this sort of provision. The RLPA was designed to establish more robust protections for religious exercise than existing Supreme Court doctrine provided.[291] Reasoning that religious activity exerts a

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ment reflected any sense that commerce was being regulated, nor that the members of Congress even were cognizant that a nexus to commerce was required. Rather, the entire focus was on the tragedy of guns in schools.").

289 United States v. Lopez, 514 U.S. 549, 618–22 (1995) (Breyer, J., dissenting).

290 There is some language in the majority opinion in *Lopez* that speaks, albeit indirectly, to the potential relevance of purpose analysis in these cases. In the course of distinguishing the statute upheld in *Wickard* from the Gun-Free School Zones Act (GFSZA), the majority noted that the *Wickard* statute "*was designed* to regulate the volume of wheat moving in interstate and foreign commerce." *Id.* at 560 (emphasis added). The Court then explored the relationship between Filburn's consumption of homegrown wheat and the attainment of this goal, thus analyzing the "fit" between the regulated activity and the legitimate commercial purpose of regulating wheat production and prices. *Id.*

Immediately following this discussion, the Court stated that "[the GFSZA] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Id.* at 561. The Court's acknowledgement that the GFSZA is most naturally classified as a "criminal statute" signals that the provision is well-tailored to achieving the non-commercial object of curtailing violent activity in schools. At the same time, the fact that (at least on its face) the provision has "nothing to do with 'commerce'" highlights the relatively weaker fit between the regulation and any commercial purpose.

Ultimately, however, the Court drew the wrong lesson from this fragment of *Wickard*. The close relationship recognized by the *Wickard* Court between the consumption of homegrown wheat and interstate commercial markets was taken in *Lopez* as a signal that the consumption of homegrown wheat *was itself* commercial activity. And, as noted in Part II, the Court then distinguished *Lopez* on the ground that gun possession is not commercial activity.

291 The Religious Liberty Protection Act was debated in the wake of the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), striking down the

substantial effect on interstate commerce, Congress contemplated grounding such protections, in part, on the commerce power.[292] As one commentator has explained, however, "[f]rom the standpoint of interstate commerce, religious activity is a random vector. There is no reason to believe that it promotes, diminishes, obstructs, or facilitates interstate commerce. Nor is there any reason to think that [the bill under consideration] . . . would have any predictable effect whatsoever upon interstate commerce."[293] Where the effect of regulated activity on interstate commerce is so haphazard, and the effect of the regulation itself on interstate commerce so arbitrary, the conclusion that Congress has employed the commerce power pretextually is inescapable.[294]

Religious Freedom Restoration Act (RFRA) on the ground that it exceeded federal authority under Section Five of the Fourteenth Amendment. *Id.* at 536. It has been noted that the Act "would reimpose the substantive terms of RFRA upon the states in all federally funded programs and all activities which affect commerce." Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 565 (1999).

292 Ultimately, Congress passed the Religious Land Use and Incarcerated Persons Act of 2000, Pub. L. No. 106-214, 114 Stat. 803 (2000), which requires strict scrutiny of land use laws that substantially burden religious exercise and laws which burden the religious exercise of incarcerated persons. *Id.* §§ 2(a)(1), (3)(a). These provisions are grounded in Congress's power under the Spending Clause and the Commerce Clause. *Id.* §§ 2(b), 3(b).

293 Eisgruber, *Hearing*, *supra* note 244, at 219.

294 *See id.* at 217 ("The connection between religious activity and commerce is being used as a constitutional excuse for a regulatory program which Congress wishes to enact for reasons having nothing at all to do with commerce.").

The findings compiled by Congress in support of the Violence Against Women Act raise the question of whether that statute presents a "random vector" case. Congress found, for example, that (1) the United States "spend[s] $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence"; (2) "[t]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason"; and (3) "[a]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." United States v. Morrison, 529 U.S. 598, 632, 633, 634 (2000) (Souter, J., dissenting).

While the latter two of these points suggest diminished commercial activity as a result of violence against women, the first seems to cut in the opposite direction—it suggests that some interstate commercial spending may go *up* as a result of such violence. One would like to believe, moreover, that the purpose of VAWA is to prevent violence against women, and—to borrow Professor Eisgruber's language from the religious liberty context—"to do so regardless of what effect that conduct has upon commerce, or commerce upon it." Eisgruber, *Hearing*, *supra* note 244, at 217.

Still, even if the findings compiled by Congress point in more than one direction with respect to interstate commerce, this does not necessarily mean that the effect of the targeted activity on interstate commerce is entirely random, nor does it mean that

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The fact that an exercise of the commerce power is conducive to the attainment of (i.e., rationally related to) a legitimate end does not mean that this power is not being used pretextually. Rather, the fact that a particular law, in addition to achieving directly a non-commercial object, serves some legitimate commercial purpose may signal nothing more than Congress having done a particularly good job of cramming a square regulatory peg into a round constitutional hole.

Still, there is no denying the difficulties inherent in the application of pretext analysis in substantial effects cases. It calls upon the judiciary to make judgments that—even if restricted to legislative "aim" rather than legislative "intent"—strain the limits of the courts' competence. The utmost of care will be necessary to strike the right balance with respect to this sort of scrutiny. Applied too aggressively, this direct form of purpose analysis may expose the courts to criticism for rendering nakedly political decisions. Applied too passively, it will not meaningfully police the limits of federal power.[295]

Whatever its limitations, the use of purpose-based review in commerce/necessary and proper cases would represent a marked improvement over the *Lopez-Morrison* doctrine. It would shift courts' attention away from the character of activity that Congress chooses to regulate and onto the effects of such activity on interstate commerce. As a result, criticisms for arbitrariness and insensitivity to economic reality would be inapplicable. More fundamentally, the decision to employ purpose-based review would signal a deeper understanding of how the commerce power has grown so dramatically. Courts cannot hope to craft durable tools for reining in the commerce power until they face up to the question of pretextual legislation. "Direct" purpose analysis confronts the problem of pretext by focusing not only on

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VAWA lacks a legitimate commercial purpose. One House Report quoted by the dissenters in *Morrison* states that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce." *Morrison*, 529 U.S. at 634 (citation omitted). This strongly suggests that a purpose of the Act is to promote interstate commerce by attacking the conditions that deter women from engaging in interstate commerce in all of these ways. In this respect, VAWA is a close cousin of Title II of the Civil Rights Act of 1964. The purpose of both provisions could be seen as securing the full and equal participation in interstate commerce of a class of citizens that might otherwise be excluded.

295 Lessig, *supra* note 23, at 202 ("The difficulty of establishing an improper purpose means that [pretext analysis] is just an effective way to ratify, rather than check, the power of Congress. . . . [T]his technique too [will] likely fail effectively to constrain.").

the effects of regulated activity on interstate commerce, but also on the extent to which a particular *regulation* is targeted at those effects.

One final point. Even if it were conceded that the judiciary is capable of identifying the "true" object of a multipurpose statute, one might object to this mode of analysis on the ground that it injects a form of heightened scrutiny into commerce cases.[296] The Supreme Court has stated that "[s]o long as [a statute's] purpose . . . is legitimate and nonillusory, its lack of primacy is not disqualifying. When [legislative actions] do not call for strict judicial scrutiny, this is the only approach consistent with proper judicial regard for the judgments of the Legislative Branch."[297] From this perspective, the method of pretext analysis outlined here ratchets up the level of scrutiny in a manner that threatens to upset the separation of powers.

But, to acknowledge that this scheme might trigger changes in Commerce Clause jurisprudence is not to say that such changes would be unwelcome. Indeed, from the perspective of the current majority on the Supreme Court, such changes are positively necessary in order to preserve the Constitution's federal balance. Moreover, if we proceed from the premise that the Constitution withholds from Congress the authority to employ its enumerated powers as a pretext "for the accomplishment of objects not entrusted to the government,"[298] then perhaps the heightened scrutiny embodied in the method of purpose analysis outlined here is desirable.[299] If the objection to intensified scrutiny is to have bite, it must be accompanied by a defense of a scheme under which Congress is permitted to parlay the enumerated powers into a general police power, and under which *McCulloch*'s signals with respect to pretextual legislation remain a dead letter.

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296 Litman & Greenberg, *supra* note 152, at 945:

> [S]ince whether a purpose, in the relevant sense, is primary or secondary depends on how well calculated the statute is to achieve that purpose as opposed to other purposes, a doctrine that a statute with a perfectly acceptable commerce purpose was not within the commerce power because of other purposes that the statute was more precisely tailored to accomplish would impose something like the narrowly tailored requirement of strict scrutiny on Commerce Clause enactments.

297 McGinnis v. Royster, 410 U.S 263, 277 (1973).

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

299 *Cf.* United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. Any possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers." (citation omitted)).

B. A Legislative Findings Requirement

An alternative to the model for "direct" purpose scrutiny contemplated above would focus the process of judicial review on congressional findings. Under this scheme, when an exercise of the commerce power is predicated on the substantial effects test, Congress would be required to include in the relevant legislation a statement (1) detailing the commercial purpose served by the law in question, and (2) explaining how the regulation serves to further that commercial end. Judicial review would be limited, under this model, to an assessment of whether the explanation offered by Congress in support of the regulation is rational. Only where Congress altogether fails to provide such a statement or where, in the reviewing court's view, legislation is not rationally related to the asserted commercial purpose would it be permissible to invalidate such exercises of the commerce power.[300]

This method of including purpose analysis in the doctrine would avoid some of the complications inherent in direct review of legislative purpose. It would not entail judicial scrutiny of a statute's relative fitness to serve commercial and non-commercial goals, and it would not empower courts to second-guess a congressional assertion of commercial purpose. Thus, neither the epistemological problems that com-

300 Similar models have been suggested elsewhere. *See, e.g.*, Gardbaum, *supra* note 156, at 831. Professor Gardbaum would require courts to review legislative findings in order to assure that Congress has given sufficient consideration to the federalism concerns implicated by challenged legislation and to assure that Congress has taken seriously the question of whether there is a special need for federal action. *Id.* As noted above, however, *see supra* Part III.C, I do not believe that the scope of federal authority to regulate commerce should be tethered to the question of whether federal action is necessary to provide a particular good. Accordingly, I would limit judicial review of legislative findings to the question of whether a commercial purpose has been rationally asserted. This is not to say that the form of scrutiny into legislative findings recommended here is unconcerned with the distribution of power between state and federal government. Instead, it proceeds from the premise that the proper balance is maintained by taking steps to assure that Congress employs the commerce/necessary and proper power only to achieve commercial purposes.

Review of legislative findings also plays a role in Professor Jackson's analysis. Jackson, *supra* note 108, at 2237 (suggesting that the Court "look at the challenged statute and, if its relationship to an enumerated power were not obvious, . . . consider both the record before Congress and any formal legislative findings in order to determine whether the case had been made that the measure was 'necessary and proper' to carrying out enumerated powers"); *see also* Frickey, *supra* note 221, at 720 ("[A]fter *Lopez*, a prudent Congress[,] . . . when exercising the commerce power . . . [might wish to] articulate the judicial standard (the subject of the statute must have a substantial effect upon interstate commerce) and then document the satisfaction of that standard through facts developed in hearings and other legislative methods.").

plicate cases involving multipurpose legislation nor the set of separation of powers concerns triggered by more exacting judicial scrutiny of legislative purpose would arise under this scheme.

This is not to say that a legislative findings requirement would be immune from criticism related to the nature of the judicial role. While the *Lopez* Court criticized Congress for its failure to provide findings detailing the connection between the activity regulated under the GFSZA and interstate commerce, it also noted that "Congress normally is not required to make formal findings as to the [relationship between regulated] activity [and] interstate commerce."[301] And, Justice Souter went a step further in his dissenting opinion, contending,

> If, indeed, the Court were to make the existence of explicit congressional findings dispositive . . . something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply . . . authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. . . . Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied.[302]

From this perspective, then, the separation of powers is compromised by a legislative findings requirement.

Justice Souter is surely correct that requiring Congress explicitly to state the commercial purpose that is served by a particular law entails something more than straightforward rationality review. Of course, this only begs the question of whether some form of heightened scrutiny is called for as a means of preventing Congress from legislating pretextually. If we take Justice Marshall's instruction in *McCulloch* seriously, then the intensified scrutiny implicit in this legislative findings requirement might be welcome.

Moreover, requirements that Congress include certain findings or statements in legislation are a familiar means of keeping the federal government within constitutional bounds. The Court has long employed clear statement rules in order to motivate Congress to contemplate the effect of a given bill on important constitutional values.[303] And the Court has been particularly amenable to using clear-

301 *Id.* at 562 ("'Congress need [not] make particularized findings in order to legislate.'" (quoting Perez v. United States, 402 U.S. 146, 156 (1971) (alteration in original))).

302 *Id.* at 613–14 (Souter, J., dissenting).

303 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (characteriz-

statement rules in cases implicating federalism concerns.[304] This is hardly surprising. Before *Lopez*, the level of protection afforded the states from regulatory incursions by the federal government was, for the most part, left to the political process.[305] Clear-statement rules help to close the gap that is created by judicial underenforcement of federalism norms by making sure that the entity charged with taking these norms into account actually does so.[306]

The legislative findings requirement suggested here operates similarly. Institutional constraints may prevent the judiciary from directly enforcing the prohibition against pretextual legislation. By requiring Congress to include in legislation an explicit statement of purpose, legislative attention is directed to the question of commercial versus non-commercial ends.[307] Like clear statement rules, then, a legislative findings requirement permits courts to police the so-called "political safeguards" of federalism.[308]

To be sure, this sort of requirement does not carry the potential for robust oversight of pretextual lawmaking that is possible via the direct purpose analysis discussed in the previous section. With a legis-

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ing clear statement rules as "a practical way for the Court to focus legislative attention on [constitutional] values").

304 *Id.* (noting that in the 1980s, the Court created "the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything").

305 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

306 Professors Eskridge and Frickey have explained,

> In fact, a good case can be made for such [clear statement rules]: structural constitutional protections, especially those of federalism, are underenforced constitutional norms. They are essentially unenforceable by the Court as a direct limitation upon Congress's power, and are best left to the political process. But the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake, and super-strong clear statement rules are a practical way for the Court to focus legislative attention on these values.

Eskridge & Frickey, *supra* note 303, at 597.

307 Lessig, *supra* note 23, at 185 (discussing the use of "second-best tools" to restrain federal power under the Commerce Clause, given that the first-best tool—judicial enforcement of substantive limits on congressional authority—is untenable). Professor Lessig suggests a rule "requir[ing] that when regulating in an area of primarily intrastate economic activity, Congress make plain the economic effect that it estimates a statute will have on interstate commerce." *Id.* at 207.

308 *Garcia*, 469 U.S. at 551; *see also* Lessig, *supra* note 23, at 207 (noting that the effect of a clear statement rule of this sort "would be to increase consideration of federalism interests").

lative findings requirement in place, so long as Congress details a rational connection between challenged legislation and a commercial purpose, courts would be unable to dismiss that explanation as pretextual. For example, imagine the *Lopez* Court had embraced a findings requirement of this sort and had struck down the Gun-Free School Zone Act solely on the ground that Congress failed to include in it a statement of commercial purpose. Congress might then have amended the Act to include an assertion that the law is meant to prevent gun violence in schools from hindering national economic productivity. Such a statement of purpose would be adequate to secure the constitutionality of the statute notwithstanding the fact that the revised Act, like its predecessor, seems predominantly concerned with the non-commercial purpose of curtailing gun violence in schools. From this perspective, rather than preventing Congress from employing the commerce power pretextually, all a legislative findings requirement seems to do is cause Congress to assert the pretext for its exercise of the commerce power explicitly.

But this line of argument misses the point. While a legislative findings requirement may prove too feeble to prevent a persistent Congress from using the commerce power pretextually, it is to be hoped that such a requirement will help a conscientious Congress stay focused on the constitutional limits of its authority. Perhaps legislators will think twice if forced explicitly to justify regulations such as the Gun-Free School Zones Act in commercial terms. Legislators might abandon efforts to use the commerce power as a lever for the attainment of non-commercial goals if compelled openly to parade their pretexts. And in the best case scenario, this might lead Congress to consider alternative sources of constitutional authority to enact regulations that have only an attenuated connection to interstate commerce.[309]

CONCLUSION

After decades of capitulation to the dramatic expansion of Congress's authority under the Commerce Clause, the Supreme Court is

309 For example, it is possible (though not certain) that Congress's authority under Section Five of the Fourteenth Amendment would look very different than it does today had *Heart of Atlanta* and *McClung* been decided on Fourteenth Amendment, rather than Commerce Clause, grounds. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 443 (2000) (noting that since *Heart of Atlanta* and *McClung*, "[w]e have . . . grown habituated to the use of Commerce Clause power to sustain federal antidiscrimination law, never definitively resolving the shape and reach of Section 5 authority").

now struggling to erect stricter limits on federal power. To accomplish this, it has turned back to the categorical formalism of its pre-1937 jurisprudence. The character of regulated activity is, once again, the hinge on which the question of constitutionality swings. By relying on this technique in order to curb federal power, however, the Court has invited criticism of the same sort that dogged it during the New Deal. The new doctrine is likely to yield arbitrary results, and it is inattentive to the real economic effects of activity that Congress may wish to regulate.

By confronting the problem of pretextual legislation directly, the Court might have crafted sounder methods of curbing federal power. More important, the Court would surely have gained greater insight into how commerce jurisprudence under the substantial effects test has gone awry. Purpose-based analysis offers a more accurate diagnosis of the problem implicit in the pre-*Lopez* scheme than does the Court's current approach. For this reason, though purpose-based review is not without significant complications of its own, it is more likely to be the source of a coherent doctrinal framework for commerce cases.