

UC Berkeley

Boalt Working Papers in Public Law

Title

The Scope of the Commerce Clause after Morrison

Permalink

<https://escholarship.org/uc/item/5m46100p>

Authors

Choper, Jesse H.

Yoo, John C.

Publication Date

2000-06-01

The Scope of the Commerce Clause After Morrison

By Jesse H. Choper and John C. Yoo

In 1994, Christy Brzonkala, a student at Virginia Polytechnic Institute, allegedly was assaulted and raped by two male members of the football team.¹ The two men later allegedly made numerous vulgar remarks about women. Brzonkala alleged that the attack caused her to become emotionally distressed, and soon after she withdrew from the university. After university disciplinary procedures allegedly failed to adequately punish the students, Brzonkala filed suit against the students and the university under the federal Violence Against Women Act (VAWA), which provides a civil remedy for “a crime of violence motivated by gender.”² In enacting the law, Congress had found that violence against women because of gender animus affected interstate commerce – by deterring interstate travel, by lost wages and increased medical costs, and reduced demand for goods and services.³

In *United States v. Morrison*, the Court held that VAWA’s civil remedy provision exceeded even the outer boundaries of Congress’s commerce power.⁴ Even though, as the Court acknowledged, its “modern, expansive interpretation of the Commerce Clause” has allowed Congress enormous regulatory authority, the Court made clear that there still remained “effective bounds” on the legislature’s power.⁵ Because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity,” the Court concluded that VAWA represented an attempt by Congress to regulate an area that lay beyond federal power.

Federalism has become the defining issue of the Rehnquist Court. To the extent that its five justice conservative majority has changed American constitutional law, its reasoning in re-defining the balance of power between the national government and the states will likely prove to be what the Rehnquist Court is best known for. Much of the Court’s recent activity has been in the sphere of state sovereignty – protecting states as institutions from federal power.⁶ *Morrison* also underscored another piece of the Court’s federalism plan, indicating that the Court is serious about the second half of its federalism project – limiting national power itself, regardless of a law’s effect on states as institutions. While the Court has

Earl Warren Professor of Public Law, and Professor of Law, respectively, University of California at Berkeley School of Law (Boalt Hall). We thank _____.

¹ These facts are taken from *United States v. Morrison*, 529 U.S. ____ (2000), slip. op. at 1-4.

² Violence Against Women Act, 108 Stat. 1941-42, 42 U.S.C. § 13981.

³ See H.R. Conf. Rep. No. 103-711, at 385; S. Rep. No. 103-138, at 54.

⁴ U.S. Const. Art I, § 8, cl. 3.

⁵ *Morrison*, slip op. at 7.

⁶ See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Seminole Tribe v. Florida*, 517 U.S. 44 (1995), *United States v. Printz*, 521 U.S. 898 (1997); *Alden v. Maine*, 527 U.S. 706 (1999).

made some important decisions restricting Congress's powers to expand the Justices' decisions defining individual constitutional rights that cannot be abrogated by states,⁷ *Morrison* declares the Court's firm intention to restore limits on Congress's basic power to regulate private individuals as well.⁸ This paper will discuss the developments in the Court's thinking on these questions, with particular focus on *Morrison* and its implications for the ability of the federal government to implement national policies.

I.

Federalism, a governmental system of different sovereigns which have different, and at times overlapping, competencies, is one of the defining characteristics of our constitutional plan. The Constitution makes clear that the federal government has virtually exclusive control over military, diplomatic, and foreign affairs, at the expense of the states.⁹ The national government also has authority over interstate and international commerce, it controls discrete subjects such as bankruptcy and intellectual property rules, and it operates its own financial system. Much evidence from the Framing period indicates that the drafters and ratifiers of the Constitution believed that the states were incompetent in these areas, in part because they could not overcome collective action problems that encouraged states to act in conflict with the national interest.

The Constitution also recognizes the sovereignty of the state governments. In the upper house of the national legislature, each state receives two Senators – a provision so fundamental that it is the only one that the Constitution forbids the people from amending. Constitutional amendments require approval by three-quarters of the states. An electoral college that is allocated by states chooses the President. The Tenth Amendment provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” States also receive protection due to their superior institutional advantages in the national political process¹⁰

⁷ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000).

⁸ While the Court in *United States v. Lopez*, 514 U.S. 549 (1995), struck down a law on Commerce Clause grounds, many commentators were unsure whether this was to be a one-time event, given certain deficiencies in the federal law at issue there. We will discuss *Lopez* in greater detail *infra*.

⁹ See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996).

¹⁰ See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 24-25 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum.L.Rev. 543 (1954).

and their key roles in serving as the organizing template for the national political parties.¹¹

The powers of the states are not defined in the Constitution. The powers of the federal government are described in the Constitution because the national government was not intended to have general regulatory authority (i.e., the police power), but rather to be one of limited, enumerated – albeit significant – powers. As the Tenth Amendment makes clear, the Framers understood that all other powers, which were left unenumerated in the text, would be reserved to the States. As a result, the states historically have exercised extensive authority over many areas, such as crime, education, and family law, which Congress has ordinarily recognized as not falling within the federal government’s authority over foreign affairs or interstate commerce. Control over these areas of “local” concern, in addition to the institutional participation of the states in the federal government and the limited nature of federal power, provides states (and American federalism) with the vitality it continues to enjoy to this day.

To be sure, the privileged standing of states in the constitutional system is due in part to the politics of the Founding itself. Under the Articles of Confederation, states alone made up the Congress. In order to win the agreement of the smaller states to a new Constitution, the Great Compromise only allowed seats in the lower house of the new Congress to be allocated by popular representation; the upper house would continue to represent state interests by giving each state two Senators. Most observers today, however, believe that federalism serves significant benefits beyond assuring assent to the Constitution in 1787.¹² Federalism creates a decentralized decisionmaking system that is more responsive to local interests. Because state governments are closer to the people and more knowledgeable about local circumstances, they can tailor programs to local preferences and needs. A decentralized system also allows for experimentation in public policymaking; different units of the system can innovate by creating new and diverse policies to address similar problems. From this perspective, federalism allows for more effective government throughout the nation by better adapting broad national policies to local conditions.

Besides the benefits for the implementation of public policy, organizing government along state lines may prove more effective at achieving citizens’ well being than centralizing authority in one national government. Economists, for example, have argued that under certain conditions smaller governments can provide a more efficient allocation of

¹¹ See, e.g., Larry Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000).

¹² See John C. Yoo, The Judicial Safeguards of Federalism, 70 S. Cal. L. Rev. 1311, 1402-04. (1997).

resources that maximizes citizen utility.¹³ State governments seek to attract households and businesses by enacting competitive policies; this jurisdictional competition produces overall efficiency for the nation in the long run, much in the way a market forces corporations to adopt efficient business practices, which leads to overall increases in consumer welfare. A decentralized, federal system also benefits citizens by enhancing democracy. Smaller units of government that are closer to the people increase political participation at the state and local level, and they make it more difficult for powerful national interest groups to buy rent-seeking legislation at the national level.

Finally, federalism may make the national government inefficient, but in a beneficial manner. By dispersing governmental power, the Framers hoped that the Constitution would prevent tyranny by a federal government dominated by self-interested, ambitious politicians. In this respect, federalism serves the same purpose as the separation of powers: creating checks on the authority of any individual institution makes it less likely that the power will be abused to the detriment of the people. According to Madison in *Federalist No. 51*, “In the compound republic of America, the power surrendered by the people, is first divided between two distinct and separate departments,” here the federal and state governments, “and then the portion allotted to each, subdivided among distinct and separate departments,” in other words, the legislative, executive, and judicial branches.¹⁴ “Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.”¹⁵ As separate political units, states impose checks and balances on the exercise of national power. From this competition and checking between federal and state governments, the Framers believed, individual liberty would be enhanced.

II.

As a starting point, it may be useful to summarize the reach of the federal government’s powers under the Commerce Clause as of 1995. Commerce included not just the movement of goods, but of people, services, and intangible goods.¹⁶ Congress could prohibit certain articles in interstate commerce, even if its true motive were to regulate the intrastate activities that resulted in the production of those goods or articles.¹⁷ Congress could regulate activities that substantially affect interstate commerce, even if those activities are wholly intrastate, and even if those

¹³ See, e.g., Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956).

¹⁴ The Federalist No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁵ Id.

¹⁶ Robert E. Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 Minn.L.Rev. 289 (1919).

¹⁷ United States v. Darby, 312 U.S. 100 (1941).

activities, taken individually, are trivial so long as Congress has a rational basis for concluding that they are substantial in the aggregate.¹⁸ Congress could regulate interstate commerce or activities that have a substantial effect on that commerce, even if the goal of the law is non-economic in nature.¹⁹ Given power of such scope, Congress not surprisingly resorted to the Commerce Clause to regulate a wide variety of areas, such as racial discrimination, individual rights, crime, the environment, and food and drug safety, among others.

As we know, the broad scope of Congress's Commerce Clause powers did not come about easily. While the Marshall Court initially had given the Commerce Clause a potentially broad sweep,²⁰ the Court at the turn of the 20th Century placed limits on Congress's power to regulate activities that were mostly intrastate in nature.²¹ The Court's determination to enforce a more limited understanding of the Commerce Clause only hardened in reaction to the early statutes of the New Deal, for example, those which sought to impose national price and production controls.²² Efforts to only allow federal regulation of local economic activity that had a "direct effect" on interstate commerce, however, collapsed in the wake of President Roosevelt's threats to pack the Court in order to change its direction.²³ In cases such as *NLRB v. Jones & Laughlin Steel Corp.*²⁴ and *United States v. Darby*,²⁵ the Court established an attitude of deference that gave Congress a relatively free hand under the Commerce Clause in establishing nationwide regulation of many activities, both interstate and intrastate.

In 1995, the Court decided once again to police the use of the Commerce Clause. In *United States v. Lopez*, the Court invalidated a federal law that prohibited the possession of firearms near schools.²⁶ Due to the relative unimportance of the legislation in question in *Lopez*, commentators speculated about the commitment of the Court to this line of action. Last Term, in *United States v. Morrison*, the Court answered those doubts by striking down a provision of the far more important Violence Against Women Act.²⁷ In *Morrison*, the Court re-affirmed its intent to apply *Lopez*'s limits on the Commerce Clause, and in some aspects made those limits more stringent. While important as statements of the principle

¹⁸ *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

²⁰ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

²¹ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

²² See, e.g., *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²³ We only note, without taking a position upon, the historical arguments whether the Court in 1936 really did sharply change jurisprudential directions, and whether that change occurred as a direct result of FDR's Court-packing plan.

²⁴ 301 U.S. 1 (1937).

²⁵ 312 U.S. 100 (1941).

²⁶ 514 U.S. 549 (1995).

²⁷ No. 99-5 & 99-29, slip op. (May 15, 2000).

of the Court's willingness to protect federalism, however, the decisions leave many questions open. It is unclear how the Court's efforts to restore the limits on Congress's use of the Commerce Clause will hold up under cases that present closer factual issues, or that involve other aspects of Commerce Clause power, or that invoke other constitutional provisions. The Court, for example, is likely to have difficulty in distinguishing between economic and non-economic activity for purposes of federal regulatory jurisdiction. It is also unclear how serious the Court is about recalibrating the balance between federal and state powers, given the use that may be made of Congress's power to exclude from interstate commerce, as well as other constitutional sources of regulatory authority that are available to Congress. This section will discuss the recent revolution in Commerce Clause jurisprudence, and it will attempt to sketch out questions that remain.

Summarizing the state of the Court's jurisprudence at the time, *Lopez* identified three broad categories of activity subject to the Commerce Clause. First, Congress may regulate the use of the "channels of interstate commerce."²⁸ Second, Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from purely intrastate activities. Third, Congress may regulate local activities "that substantially affect interstate commerce." In *Lopez*, the defendant challenged his prosecution for possessing a handgun in school. Possession of a handgun, the Court observed, in and of itself did not fall within the first two categories of Commerce Clause regulation. Therefore, the gun law had to survive scrutiny under the third, broadest part of the Court's Commerce Clause jurisprudence, the "substantial effects" test.

In reviewing whether gun possession in school zones substantially affected interstate commerce, the Court introduced several innovations in its jurisprudence that narrowed the sweep of the Commerce Clause. First, the Court observed that the handgun law was "a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise."²⁹ In previous cases, such as *Wickard*, *Darby*, or *Heart of Atlanta Motel*, the Court claimed that it had applied, although not stated clearly, a test in which the intrastate activity in question was commercial or economic in nature: "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not."³⁰

Second, the Court stated that the presence of a "jurisdictional element" could provide the grounds for finding that an intrastate activity has a substantial impact on interstate commerce. A jurisdictional element, for

²⁸ 514 U.S. 549 (1995).

²⁹ *Id.* at 561.

³⁰ *Id.* at 560.

example, could require that the prosecution prove that the defendant had transported the gun across state boundaries on the way to the school zone. A jurisdictional element might even be met by requiring the prosecution to prove only that the defendant had purchased the gun from someone engaged in interstate commerce, or even perhaps only that the gun itself had traveled at some point in interstate commerce. The Court did not have to define the jurisdictional element test clearly because the statute in *Lopez* clearly lacked any such provision. Third, the Court found significant that Congress had not made any findings – either in the text of the statute or in the legislative history – which demonstrated a link between handgun possession near schools and interstate commerce. Although such findings were not required, the Court observed that they could enable it “to evaluate the legislative judgment that the activity in question substantially affects interstate commerce.”³¹

In response, both the government and Justice Breyer’s dissent argued that the Court could determine for itself that handgun possession near schools had a substantial effect on interstate commerce. According to the government, handgun possession could lead to violent crime, and violent crime had several costs. It led to economic costs (through insurance, medical care, and so on) and it deterred interstate travel to high-crime areas. According to Justice Breyer, handgun possession in schools threatened the educational process, which led to a less efficient workforce, which led to reduced national productivity and thus produced a negative effect on interstate commerce. Justice Breyer even included an appendix of economic studies that sought to demonstrate that higher rates of violent crime in schools produced measurable reductions in national productivity.

Answering this claim, the Court introduced another innovation. It found the link between handgun possession and interstate commerce too “attenuated” to justify federal regulation. In part, the Court reasoned that one had to “pile inference upon inference” to travel from handgun possession to reach substantial effects upon interstate commerce. The Court’s major concern, however, was that these arguments would allow Congress to “regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.” Similarly, the national productivity reasoning permitted Congress to “regulate any activity that it found was related to the economic productivity of individual citizens.” Under these theories, the Court observed, “it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. ... If we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.” In a separate concurrence, Justice Kennedy emphasized that given the nationalization of the markets and society, the Court also had to determine whether the

³¹ Id. at 563.

exercise of congressional power “seeks to intrude upon an area of traditional state concern.” The government’s arguments infringed two of the core elements of constitutional federalism: the notion that the federal government possesses only limited, enumerated powers, and the Constitution’s reservation of substantial areas of private conduct for state regulation.

Last Term’s decision in *Morrison* made clear that *Lopez* was no sport. The civil remedy provision of VAWA declares that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” VAWA defines a crime of violence to include actions that would constitute a felony under state or federal laws. It then enforces that right by making anyone who commits such a crime liable to the injured party for compensatory and punitive damages as well as injunctive and declaratory relief. As the Court noted, the provision “covers a wide swath of criminal conduct.”

The Court found in VAWA a much more difficult case than the one presented in *Lopez*. To be sure, like the Gun Free School Zones Act, the civil remedy provision of VAWA lacked any jurisdictional nexus because of Congress’s intent to address a broader category of intrastate violent crime. Nonetheless, Congress strengthened the constitutional possibilities of VAWA by conducting extensive fact-finding about the link between violence against women and the economy. As it did with the Civil Rights Act of 1964, upheld in *Heart of Atlanta Motel*, Congress created a substantial legislative history that purported to show that gender-motivated violence deterred interstate travel and business, led to lost wages and productivity, increased health care costs, and reduced economic activity. Some of the studies cited by Congress claimed that violence against women costs the nation billions of dollars every year.³²

Without denying the validity of Congress’s fact-finding, the Court conducted its own review of the matter. “Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”³³ Applying the same analysis as in *Lopez*, the Court found that Congress’s fact-finding fell prey to the same crippling defects that afflicted the government and Justice Breyer’s dissent in that case. The link between violent crime and interstate commerce was too attenuated because, as in *Lopez*, if the Court allowed such a causal chain to justify federal regulation, it would be permitting “Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”³⁴ If the Court allowed

³² United States v. Morrison, slip op. at 5-8 (Souter, J., dissenting).

³³ Id. at 14 (quoting *Lopez*, 514 U.S. at 557 n. 2).

³⁴ Id. at 15.

Congress to regulate gender-motivated violence because of its economic effects, it feared that it would concede to Congress the power to regulate *all* crime.

Beyond clarifying *Lopez*'s discussion of congressional findings, *Morrison* also brought into sharper focus the importance not just of limits on the reach of federal power, but the other side of the coin: the reserved powers of the states. *Morrison*'s rejection of the link between violence against women and interstate commerce took two forms, rather than just the one articulated in *Lopez*. In addition to its denial of the chain of causation approach, the Court pursued a vision of what substantive areas may fall outside of federal power, regardless of their effect on interstate commerce. For example, in finding that the effect of violent crime in the aggregate was insufficient to justify federal regulation, the Court observed that it had preserved the line between federal power and areas traditionally given to the states: "Regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."³⁵ Chief among these areas beyond national purview is the "police power," which refers to the government's general power to enact laws to protect the health and safety of its citizens. At least certain subjects traditionally included within the police power, the Court suggests in *Morrison*, may *always* fall outside the Commerce Clause. "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."³⁶ In maintaining this line, the Court believes itself to be preserving "one of the few principles that has been consistent since the [Commerce] Clause was adopted."³⁷

III.

Despite this ringing rhetoric, *Morrison*, like *Lopez* before it, represents an evolution rather than a revolution. To be sure, the Court in *Morrison* struck down a far more politically important statute than in *Lopez*, one that had been enacted after much congressional study and consideration. Its provisions were much more far-reaching – rather than an isolated provision banning guns near schools, the civil damages remedy was part of a comprehensive statute designed to reduce gender-motivated crimes. Nonetheless, placing outer limits on the reach of the Commerce Clause does not amount to a stunning rejection of the modern welfare state. Nor does it necessarily announce the revival of strong norms of states' rights. Rather, *Morrison*'s disposition of the Commerce Clause issues may serve more as a reminder to the political branches that there indeed remain limits upon

³⁵ Id. at 18.

³⁶ Id.

³⁷ Id.

federal powers, and that the prerogatives of the states in regulating daily life do not exist at the mere sufferance of Washington, D.C.

Still, *Morrison* plainly demonstrates that the *Lopez* approach to the Commerce Clause has some real bite to it, and that should the current ideological majority of the Court continue, we may be entering an era where federal powers will continue to be restricted. This seems especially to be the case when we view *Morrison* in light of the Court's activities in regard to the Eleventh and Fourteenth Amendments.³⁸ Nonetheless, this article does not seek to criticize the Court's jurisprudence as a return to *Lochner* or as an effort to return the nation to the Articles of Confederation, both greatly exaggerated characterizations of the Court's recent cases, to say the least. Rather, we seek to point out the limited impact of *Lopez* and *Morrison* themselves on the enforcement of federal policy, and to discuss open questions that may provide some guidance as to the Court's future direction. One way to see the potentially limited practical effect of the Court's recent Commerce Clause rulings is to consider the many alternatives that remain in the wake of *Lopez* and *Morrison* concerning the restraints on federal power.

Spending Clause. While the Court has resurrected its active enforcement of the Commerce Clause, among other federalism protections, it has yet to confront perhaps the most effective and pervasive alternative method for federal regulation – the spending power. The Spending Clause states that "The Congress shall have Power ... [to] provide for the ... general Welfare of the United States"³⁹ While some like James Madison argued that federal spending was limited to the subjects enumerated elsewhere in Article I, Section 8, the Supreme Court adopted the opposite position, espoused most famously by Alexander Hamilton, in *United States v. Butler* in 1936.⁴⁰ In that and subsequent cases, the Court has concluded that Congress enjoys broad discretion to determine which expenditures advance the "general Welfare of the United States."⁴¹

Congress can extend its spending power even further by attaching conditions to the use of federal funds by states and individuals. Many federal programs convince states to adopt national programs or standards not through command, but by attaching conditions to financial grants to states.⁴² *South Dakota v. Dole*, the Court's most recent explanation of the spending power, provides an informative example.⁴³ In *Dole*, Congress required that five percent of allocable federal highway funds be withheld from any state that did not have a 21-year-old drinking age. With then-

³⁸ See, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999); cases cited in note 7 supra.

³⁹ U.S. Const. Art. I, § 8.

⁴⁰ *United States v. Butler*, 297 U.S. 1, 65 (1936).

⁴¹ See, e.g., *Helvering v. Davis*, 301 U.S. 619 (1937).

⁴² See Kimberly Sayers-Fay, Comment, Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection, 88 Cal. L. Rev. 1281, 1294-95 (2000).

⁴³ 483 U.S. 203 (1987).

Justice Rehnquist (the author of both *Lopez* and *Morrison*) writing, the Court upheld the condition on the grant, even though it assumed that Congress could not regulate drinking ages directly.⁴⁴ The Court reaffirmed the principle “that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants,” and emphasized that the major criterion for the validity of conditions on federal grants is that they be “directly related” to the purposes of the congressional program. Because Congress had studies before it concluding that lower state drinking ages increase the number of traffic fatalities on interstate facilities, the Court found that the condition was “directly related to one of the main purposes for which highway funds are expended – safe interstate travel.”

Beyond this, the only operative limits on spending conditions the Court noted would be ones that sought to induce the states to engage in unconstitutional acts, or that were coercive rather than offering states a choice. The first of these criteria (inducing the state to engage in *unconstitutional* acts) is addressed almost exclusively to the protection of individual rights - e.g., invalidating federal education funds offered on condition that state recipients discriminate on the basis of race - and *not* states’ rights. The second restriction (coercing the states to act in ways that Congress could not directly require) carries greater potential for securing principles of federalism. Since 1936, however, just as the Court has very loosely defined its “directly related” test, it has also failed to provide any bite to its “coercion” restriction.⁴⁵

Although several commentators have suggested approaches to cabin the spending power, the most frequently cited proposal has been put forward by Justice O’Connor in her dissenting opinion in *Dole*, urging that the Court ought to distinguish between conditions that effectuate the purposes of Congress’s grant, and conditions that go beyond specifying how the money should be spent and amount to regulations.⁴⁶ It is unclear, however, whether the Court could implement such a test in practice, not to mention whether Justice O’Connor could convince the other four Justices who have made up the *Lopez* and *Morrison* majorities to go along (especially as the Chief Justice was the author of *Dole*). The difference between conditions that advance Congress’s intentions in spending federal dollars, and those that impose regulations unrelated to those intentions, may seemingly be circumvented by the way that Congress articulates its purposes. While some, such as Professor Lynn Baker, believe that the Court will re-examine its spending clause doctrine, “with *Dole*”, as she aptly points out, “the Court [has] offered Congress a seemingly easy end

⁴⁴ The source of this assumption was the explicit reservation of control over alcoholic beverages to the states under the Twenty-First Amendment.

⁴⁵ See Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 *Corn.J. of Law & Pub. Pol.*, 460, 464-65 (1995).

⁴⁶ *Dole*, 483 U.S. at 216 (O’Connor, J., dissenting).

run around any restrictions the Constitution might impose on its ability to regulate the states.”⁴⁷

Given the broad sweep of the spending power as currently construed, the federal government would quite clearly have the ability to evade the direct limits on its Commerce Clause powers. Take the provision struck down in *Morrison*. Congress could produce a civil damages remedy for gender-motivated crimes of violence by conditioning federal grants-in-aid to the states on the requirement that the states enact an effective remedy of this kind against the alleged perpetrators. While some nexus must exist between the condition and the purpose of the funds, Congress could attach the proviso to some type of existing grants for law enforcement programs. Clearly, this condition has a “direct relation” to law enforcement. Indeed, Congress might reasonably conclude that a private cause of action might create an additional deterrent to the commission of such criminal acts, which might reduce a state’s criminal justice expenditures, which might correspondingly lower the federal government’s budgetary outlays in assistance of the states.⁴⁸ Or Congress might simply create a new spending program to reduce gender-motivated violence, for example, by assisting state law enforcement to deal with the problem. Similarly, if Congress wished to ban handguns near schools, it could place conditions on education or law enforcement funds that required states to enact a similar law, as it currently does concerning other education funding. Congress might reasonably (indeed, persuasively) claim that creating a violence free learning environment would make the use of federal education funds more effective. Funneling such efforts into the spending power rather than the Commerce Clause *may* have the effect of forcing the federal government to bear more of the costs of enacting the laws (if new federal spending programs were needed), rather than acting through the relatively costless method of direct regulation, but it would still allow the federal government to achieve the ends seemingly prohibited by *Lopez* and *Morrison*.

One might respond that the Spending Clause remains such a large loophole only because the Court has yet to attempt to reduce it. Given the large number of *existing* federal spending programs (not to mention new ones) and their magnitudes, *Dole’s* loose approach to the conditions placed on spending programs allows Congress to legislate on almost any subject – precisely the outcome that the Court wishes to prevent in its Commerce Clause jurisprudence. Nonetheless, the Court may find it difficult to develop more limiting standards for the Spending Clause – such as by attempting to narrow the nexus it requires between federal spending programs and their related conditions. Suppose that the Court were to declare that conditions on federal grants-in-aid must be “directly related” to the purposes of the grants themselves, and that this test would be actively

⁴⁷ Lynn Baker, *Conditional Federal Spending After Lopez*, 95 *Colum. L. Rev.* 1911, 1914 (1995).

⁴⁸ See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding federal spending program on basis of Congress’s purpose to “safeguard its own treasury”).

enforced – e.g., that the Court would strike down our hypothetical VAWA statute because a private cause of action for gender-related violence is not adequately related to a more general federal spending program for law enforcement. It seems that Congress could still achieve its objectives by enacting a new spending program whose purpose was stated to be combating gender-motivated violence. To illustrate, suppose Congress created a spending program that supported the hiring of additional state prosecutors and police, whose main job was to deal with gender-motivated violence. Even if a condition that required states to create a private cause of action would not be held to fall sufficiently directly within the subject matter and objective of that spending program, Congress could simply allocate funds to pay for additional state judges needed to adjudicate an effective new civil damages action by victims against perpetrators. Thus, all Congress needs to do is enact spending programs with more specific goals. Ironically, this is a result that the states, which we imagine benefit from the broad discretion allowed to them by block grant approaches, themselves might not favor.

Even if the Court were to clamp down on the Spending Clause, Congress might turn to the possibilities of its taxing powers instead. Art. I, § 8, grants to Congress the power “to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.” Initially, the Court held that Congress could not use the taxing power to achieve results forbidden to it under the Commerce Clause. Thus, in *Bailey v. Drexel Furniture Co.*, the Court struck down a tax on the profits of enterprises that used child labor after it had earlier invalidated a congressional ban on the interstate movement of goods from factories that had employed child labor.⁴⁹ While the Court has never repudiated *Bailey*, it has applied it only once to invalidate a federal tax, and that before the New Deal Court’s “switch-in-time.”⁵⁰ Since the 1937 revolution, the Court has regularly refused to invalidate a federal tax as an effort to impose regulatory standards alleged to be outside the scope of enumerated federal powers.⁵¹ Due to the post-1937 expansion of the Commerce Clause, however, under which these challenged taxes might readily have been upheld, neither the Court nor Congress has had occasion to seriously re-consider *Bailey* and its imposed symmetry between the Commerce and Taxing Powers.

⁴⁹ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

⁵⁰ See *United States v. Constantine*, 296 U.S. 287 (1935).

⁵¹ See *Sonzinsky v. United States*, 300 U.S. 506 (1937), (\$200 tax on each transfer of concealable firearms; “inquiry into hidden motive is beyond competence of the courts”); *United States v. Sanchez*, 340 U.S. 42 (1950)(Congress expressed two objectives: raising revenue and making “extremely difficult the acquisition of marihuana”); *United States v. Kahriger*, 345 U.S. 22 (1953) (ten percent tax on all wagers coupled with registration of all wager takers, whose names must be given to state prosecutors, if requested.)

Even if the Court continues to place restrictions on the Commerce Clause, it is unclear whether it would attempt to impose corresponding limitations upon Congress's ability to enact taxes that went beyond commercial activity. Although much of the income tax code certainly can find justification as the regulation of commercial activity, other provisions that do not might be brought into question on the ground that their purpose and effect is not to raise revenue, but rather to achieve regulatory ends. Moreover, while gift and estates taxes involve the transfer of wealth, large portions do not seem to involve commercial or economic activity of the sort contemplated by *Lopez* and *Morrison*. If so, then the Court must find either that the congressional taxes in these areas are unconstitutional, which would involve serious disruption in long-settled federal practices, or that the pre-1937 precedents excessively narrowed the taxing power.

If the Court were to adopt a more relaxed approach to the taxing power, Congress would gain access to a broad reservoir of authority to replace its losses in the Commerce Clause arena. Although Congress could not use the Commerce Clause to reach non-commercial intrastate conduct, it could use taxes to encourage or suppress that same conduct. While Congress might not be able to ban handguns near school zones, it might use the taxing power to raise taxes on such guns to a level that would effectively discourage the activity. Congress might not be able to create a private cause of action to stop gender-motivated violence, but it might be able to impose taxes on individuals who commit such actions. Or, building on the existing tax code, Congress could deny anyone who possessed a handgun near a school zone or who committed gender-motivated violence any deductions or exemptions, or could impose a very high tax on any gifts or inheritances they receive. Outside of the criminal area, Congress's taxing power could prove even more formidable. Even if the Court were to restrict Congress's Commerce Clause power over the environment, for example, Congress could impose sufficient taxes on industry and even individuals to discourage undesired conduct.

Channels and Instrumentalities. Even if Congress chooses to forgo the spending or taxing power, *Lopez* and *Morrison*'s restrictions on the Commerce Clause contain sufficient qualifications that still might allow similar legislation to survive constitutional review. In both cases, the Court left untouched – indeed, it expressly reaffirmed – Congress's power to regulate anything that proceeds through the channels of interstate commerce or involves its instrumentalities, and gave no indication of how elastic this “jurisdictional element” or “jurisdictional nexus” is. If the Court allows these lines of doctrine to continue in full flower, Congress may well find that its ability to engage in social regulation will be little slowed.

Previous cases in the channels and instrumentalities vein suggest the potentially broad authority that remains in Congress's hands. It is clear that Congress can regulate, or even prohibit, any good as it crosses state lines. According to *Gibbons*, Congress also can exercise control over the intrastate

origin and terminus of an interstate trip. Some cases have allowed Congress to go so far as to criminalize activity using a good that, at some point, has crossed interstate boundaries. In *United States v. Sullivan*, the Court addressed the application of the federal Food, Drug, and Cosmetic Act to a local pharmacist engaged in purely intrastate commercial transactions.⁵² The pharmacist had purchased pills contained in large bottles, upon which federal warning labels had been placed, from a wholesaler who had received the labeled bottles from outside the state. The pharmacist then had split them into smaller bottles for resale to instate customers. He had violated the act by failing to place the federal warning label on the smaller bottles. In upholding the pharmacist's conviction, the Court found that Congress could regulate this purely local activity because the pills at one point had crossed state lines through the channels of interstate commerce. The Court built upon earlier cases that had approved federal health and safety laws prohibiting the movement of diseased livestock or impure or misbranded foods and drugs across state lines.⁵³

This aspect of the Commerce Clause is not just limited to laws regulating commercial or economic activities. Well before the New Deal revolution, the Court had given its approval to use of the Commerce Clause to regulate the movement of not just goods, but persons who engaged in prohibited conduct, through the channels of interstate commerce. Initially, in the *Lottery Case*, the Court upheld a federal law that barred the transportation of lottery tickets across state lines, even when it did so for the purpose of protecting public morals, rather than for any commercial purpose.⁵⁴ The Court soon made clear that Congress's control over people or items moving through the channels of interstate commerce allowed it to regulate broadly. In a series of cases involving the Mann Act, the Court upheld federal laws that prohibited the transportation across state lines of women not just for prostitution, but also for immoral purposes.⁵⁵ After the New Deal switch in time, the Court reaffirmed Congress's plenary control over transportation of persons and goods across state borders by relying on this jurisdictional element in cases such as *Scarborough v. United States*,⁵⁶ which upheld federal criminal penalization of firearm possession by felons, and *Cleveland v. United States*,⁵⁷ which upheld federal prohibition of polygamy.

⁵² 332 U.S. 689 (1948).

⁵³ See, e.g., *Reid v. Colorado*, 187 U.S. 137 (1902); *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (upholding federal food and drug law requiring that prescribed labels for goods shipped in interstate commerce must remain on the goods until sold).

⁵⁴ 188 U.S. 321 (1903).

⁵⁵ See, e.g., *Hoke v. United States*, 227 U.S. 308 (1913); *Caminetti v. United States*, 242 U.S. 470 (1917).

⁵⁶ 431 U.S. 563 (1977).

⁵⁷ 329 U.S. 14 (1946).

These cases indicate that Congress still may use its power over the channels of interstate commerce to establish nationwide uniform standards for non-commercial conduct. Some federal statutes today make criminal an activity because a perpetrator crossed state boundaries with the intent to commit the crime. *Morrison* does not explain whether Congress could criminalize an activity so long as the perpetrator or his or her weapon, or even the victim, had crossed state boundaries – and thus made use of a channel of interstate commerce – at some time (or even any time in the past), or a law that prohibits from the use of interstate commerce any person who commits gender-motivated violence. This broad, as yet unqualified, potential authority may require that anyone crossing state borders meet federal standards respecting their activities and characteristics. Moreover, the Court's decisions have not required that any nexus exist between the time that persons cross state borders and the time they engage in the prohibited activity. Thus, to take *Morrison*, Congress could plainly prohibit anyone from crossing state borders with the intention of committing gender-motivated violence; this would provide a “jurisdictional element” missing in both *Lopez* and *Morrison*. Even further, might Congress be able to prohibit anyone who has committed such violence from crossing state boundaries in the future? Or might it provide that anyone who has ever moved from one state to another is barred from engaging in gender-motivated violence? Further, Congress has been held authorized to place conditions on the use of goods that travel through interstate commerce, even if the use is wholly interstate, as in *Sullivan* and the felony firearm possession law. Again, the Court has yet to impose any nexus requirement between the time a product crosses state lines and the moment it is used in violation of federal law. To take *Lopez*, Congress seemingly could pass a law prohibiting the possession of any firearm that has ever traveled in interstate commerce within a school zone – which would almost certainly include almost any firearm in the country.

Due to the nationalization of the economy and society, resulting in the fact that almost every person and every good in the nation crosses a state boundary at some point, the Court's willingness so far to respect Congress's plenary control over the channels of interstate commerce threatens the very result that *Lopez* and *Morrison* fear: a general federal police power. Two examples may suffice. The Court has suggested that family law remains a preserve of state regulation. First, suppose that Congress passed a law requiring that anyone traveling in interstate commerce, either in the past or the future, who wishes to obtain a divorce, must obtain a divorce that meets federal standards. Second, in the Defense of Marriage Act, Congress allowed states to refuse to recognize same-sex marriages granted by other states. Suppose Congress went further and (a) refused to allow anyone to cross state boundaries who was married under a same-sex marriage law, or (b) refused to allow someone to enter a same-sex marriage who had previously traveled from one state to another. Such laws would succeed in imposing a virtually nationwide rule of conduct without relying upon the “substantial effects” prong of the Commerce Clause. If Congress could

accomplish this by using the “channels of interstate commerce prong” of the Commerce Clause, there are not many subjects it could not reach. If the Court is to continue down the path it has sketched so far, it will need to tighten the jurisdictional element by making clear how tight the nexus must be between the crossing of state boundaries and the commission of an act subject to federal regulation.

Lopez and *Morrison*’s reaffirmation of the second aspect of the Commerce Clause’s substantive reach – the “instrumentalities” of interstate commerce – buttresses the potentially broad scope of the “channels” prong. Under the instrumentalities prong, Congress may regulate the nationwide transportation and communications networks through which commerce flows.⁵⁸ Indeed, Congress can go even further and criminalize activity that uses the instrumentalities of interstate commerce. Thus, Congress has enacted mail and wire fraud statutes that make a federal offense fraud committed using the telephone or the mails, and could also do so for activities that use other networks, such as the railroads, interstate highways, and the internet.

While as yet not fully used by Congress, the instrumentalities aspect of the Commerce Clause could sweep a great deal of intrastate, non-economic activity within the ambit of national authority. Mail and wire fraud require only one use of the mails or the phones to trigger federal jurisdiction. Congress could add other common-law crimes in addition to fraud to the mail and wire statutes: conspiracy to commit murder, robbery, assault, and so on. Seemingly, all it would take is one phone call in the course of planning to rob or attack a victim to make something a federal crime. Further, Congress could make it a federal crime to use the interstate highways, or any road connected to a federal road, in the commission of any crime. Congress could make a federal crime out of using the internet or a computer network attached to the internet to commit any crime. As with Congress’s power to regulate the channels of interstate commerce, the nationalization of the economy and society gives the legislature’s power over the instrumentalities of interstate commerce a sufficiently broad scope to encompass much private, non-economic conduct.

Substantial Effects – Commercial Activity. A further point of weakness in the Court’s effort to limit the Commerce Clause is its restriction of federal power to commercial activity. As the dissents in both *Morrison* and *Lopez* claimed, substantial evidence indicated an impact upon the economy by firearms in schools and violence against women. In *Morrison*, unlike *Lopez*, Congress had conducted extensive fact-finding to support its conclusion that violence against women had a substantial effect on interstate commerce. Despite the congressional findings, the majority refused to follow a causal chain of events beginning with a violent crime and leading to an effect on interstate commerce because the initial action was not

⁵⁸ *Preseault v. ICC*, 494 U.S. 1 (1990).

commercial (or economic) in nature. Such noncommercial activity would not benefit from the aggregation principle articulated in *Wickard v. Filburn* and other cases: “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity,” “our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”⁵⁹

It is important to recognize that this definition of the commerce power still leaves unchanged several elements of the Court’s jurisprudence that has given Congress broad regulatory authority. First, the Court has not questioned Congress’s power to regulate wholly intrastate activity. Indeed, *Morrison* clearly implies that Congress can regulate any economic activity, regardless of whether it is interstate or intrastate in nature. Second, the Court has left untouched the aggregation principle whereby even infinitesimal commercial conduct – such as growing a few hundred bushels of wheat or operating a single tailor’s shop – may fall within congressional authority, so long as that activity in the aggregate may be found to have a substantial effect on interstate commerce. Third, the Court has had no occasion to re-examine its holdings that commerce includes not just trade, but also manufacturing and production, travel, and related commercial activities. Commerce also includes not just physical goods and persons, but also services and intangible instruments, such as securities and contracts.

Nonetheless, the *Lopez* and *Morrison* Courts’ effort to limit the substantial effects prong of the Commerce Clause power to only commercial (or economic) activity represents a new limitation never before clearly articulated. Even assuming that this distinction may be properly rooted in Article I and that it is capable of consistent, principled enforcement by the federal courts, there would still remain substantial room for congressional maneuver due to the Court’s suggestion that “commercial” activity does not just mean business or enterprise, but all “economic” activity.⁶⁰ While the Court does not define “economic activity,” it is possible to view many social interactions as falling within its bounds. Hence, *Wickard*’s extreme example of a farmer who produces wheat for personal consumption remains good law. Although the farmer’s consumption may not have been “commerce,” as generally understood, his growing of wheat could readily qualify as an economic activity. Similarly, many crimes might be considered to involve unwilling transfers of wealth, which may fairly be characterized as “economic” activities.⁶¹ Given the success that the law and economics movement has encountered in revealing the underlying economic motivations that might underlay many actions, Congress may have little difficulty in persuasively characterizing many activities as economic in nature. As Professors Grant Nelson and Robert Pushaw admit in their recent effort to develop a more restricted

⁵⁹ *Morrison*, 120 S. Ct. at 1751.

⁶⁰ See *id.*

⁶¹ See Richard Posner, *Economic Analysis of Law*.

Commerce Clause test, “defining ‘commerce’ to include all economic impacts would enable Congress to regulate everything, and thereby drain the Commerce Clause of any meaningful content.”⁶²

As the Rehnquist Court’s treatment of *Wickard* suggests, however, the Court has already equated “commerce” with “economic” to such a degree that it is doubtful whether the commercial/non-commercial line will truly provide any substantial limit on Congress’s powers. Consequently, the equation of commerce with economic activity may mean that the Court’s new Commerce Clause jurisprudence may pose little real obstacle to *most* federal policies. The *Wickard* Court itself, for example, rejected arguments that the farmer’s personal production of wheat escaped congressional regulation because it was non-commercial in nature. Instead, the Court looked to the economic impact of the wheat consumption in the context of an integrated national market. The Court has already upheld a federal ban on loan sharking, regardless of whether the activity occurs intrastate or interstate.⁶³ If this is still good law, then Congress may be able to regulate any intrastate criminal activity that it can fairly characterize as economic in nature. And most can be, possession of guns near schools and violence against women notwithstanding.

Thus, while Congress might not be able to enact criminal penalties for *all* violence, it may still be able to ban any violence that has an economic motive or purpose. Not only would crimes that are fundamentally financial in nature, such as fraud or theft, fall wholly within federal power, but large subsets of other offenses also could come within national jurisdiction. Congress probably cannot, for example, enact a law that prohibits all physical assaults, but it could prohibit all muggings – which are, by definition, physical assaults undertaken to get the victim’s money. It probably could not prohibit all breaking-and-entering, but under the Court’s own commercial/non-commercial distinction, Congress could enact a nationwide law that prohibited all robbery. Congress may not be able to prohibit all possession of a certain product, but it could ban any transaction or exchange that involved that product. To push the commercial distinction even further, neither *Lopez* nor *Morrison* prevent Congress from regulating any activity that involved the exchange of a single dollar of U.S. currency or even barter. Congress may well be able to make a federal offense of any crime that involved the use of the federal currency.

Indeed, allowing Congress to regulate any crime that has an economic element might even allow Congress to achieve much the same results that it had sought in *Lopez* and *Morrison*. Congress might not be able to directly ban the possession of a handgun near a school, but perhaps it could make illegal any transaction in which a handgun is exchanged and then brought to school – which would be only a subset of all transactions involving handgun

⁶² Nelson & Pushaw, *supra* note ___, at fn 514.

⁶³ *Perez v. United States*, 402 U.S. 146 (1971).

purchases or exchanges. Congress might not be able to regulate all domestic violence, but perhaps it could create causes of action to suppress gender-motivated violence that involves a commercial transaction – such as purchasing a weapon, renting a car or hotel room, or even buying the gasoline to drive to commit the crime. Suppose, further, that Congress re-enacted the VAWA provision in *Morrison*, but with the additional element that the violence be motivated also by a desire of the attacker to maintain or improve his economic position.

Previous Court decisions also allow Congress to regulate activity because of its commercial location, rather than its economic nature. In *Heart of Atlanta Motel*, for example, the Court upheld the Civil Rights Act's prohibition on discrimination for a motel that served interstate travelers, and in *Katzenbach v. McClung*, it allowed the application of the antidiscrimination provisions to a restaurant that sold food, a substantial amount of which had moved in interstate commerce. The Court did not require that the discrimination itself have occurred for economic reasons, but instead found that the Commerce Clause provided sufficient support for federal regulation because the prohibited conduct occurred on locations that were commercial in nature. If those cases remain good law, then Congress conceivably might bar any domestic violence or unlicensed handgun possession that occurred on any property involved in a commercial enterprise, such as businesses, inns, hotels, airports, bus stations, restaurants, and stores. Thus, in addition to racial and gender discrimination rules, Congress can impose environmental regulations on almost any business, as almost all business is a part of interstate commerce.

Morrison's commercial/non-commercial distinction contains further ambiguities that may prove difficult for the Court to enforce as an objective test. As Justice Breyer noted in his dissent, the Court's approach allows Congress to regulate pollution by factories, but not by homes burning the same fuel, or a different fuel (such as coal or firewood), even if they both produce the same amount of emissions. One possible objective criterion could be that Congress can only regulate activities that are conducted for profit and related market-based activities.⁶⁴ This approach, however, not only suggests that earlier precedents such as *Wickard* must be overturned – defendant there had only grown wheat for personal consumption – but also countenances a fairly broad reading of federal power in another dimension. It means that Congress can regulate any activity that involves business, regardless of the subject matter and its historical regulation by the states, no matter the smallness of its size (would even a child's lemonade stand fall within potential federal jurisdiction?), so long as it satisfies the aggregation test.

⁶⁴ See, e.g., Grant S. Nelson & Robert J. Pushaw, Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues, 85 Iowa L. Rev. 1 (1999).

CONCLUSION

We have sought to demonstrate that the Court's restrictions on the commerce power, while certainly a departure from previous directions in the federalism area, alone present no drastic or revolutionary limitations on the federal government's ability to achieve its policies. Some might fear that recent decisions, such as *Lopez* and *Morrison*, will prevent Congress from using the Commerce Clause to reach noncommercial, intrastate activity. Other powers, however, such as the Spending and Taxing Clauses, provide Congress with alternative opportunities to reach beyond the new restrictions on the Commerce Clause. Even the Court's current pronouncements on the Commerce Clause provide Congress with ample power to reach a great deal of conduct. Due to the national integration of the economy and society, the channels and instrumentalities prongs of the Commerce Clause provide substantial authority to establish uniform federal rules over a vast amount of noncommercial conduct. Even if Congress wishes to intrude even further into intrastate activity, the Court's effort to impose the barrier at economic activity may prove sufficiently permeable to allow federal jurisdiction over most things that Congress would want to regulate.

This leaves us asking how seriously the Court will further pursue its federalism revival. As *Lopez* and *Morrison*, in addition to most of the major federalism cases in other areas, were decided by the same 5-4 divisions, a change in the personnel of the Court brought about by this fall's elections could produce a reversal of these cases or their settling in. But that aside, if the Court intends to impose serious restraints on Congress, its recent efforts in the Commerce Clause area can only be the early steps. It may be that no effort along the commercial/non-commercial line will work. It may be that the Court will have to provide substantive content to its federalism revival by articulating what areas are to remain solely within state jurisdiction. But that is the subject of another paper.