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TRANSLATING FEDERALISM: UNITED STATES v LOPEZ

In 1835, two years after roaming through America, almost fifty years after the Constitution's founding, Alexis de Tocqueville wrote this about constitutionalism in America:

> I have hardly ever met one of the common people in America who did not surprisingly and easily perceive which obligations derived from a law of Congress and which were based on the laws of his state and who, having distinguished the matters falling within the general prerogatives of the Union from those suitable to the local legislature, could not indicate the point where the competence of the federal courts commences and that of the state courts ends.[1]

One cannot understand constitutionalism in America without considering just what this quotation from Tocqueville means. The American Constitution is in part a text; it "called into life"[2] a system of government constituted by this text. But the idea, for us, that the text called into life a system of government so well understood by "the common people" is unimaginable. It would be surprising enough to find a law professor who could "easily perceive which obligations derived from a law of Congress and which were based on the laws of his state," let alone the average citizen. The

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[1] Alexis de Tocqueville, *Democracy in America* 165 (Anchor, 1966).

[2] *Missouri v Holland*, 252 US 416, 433 (1920) (Holmes).

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world Tocqueville describes is alien to us, even if it is the world from which we come.

Why is this so? Why can't we see the lines of federalism as easily as they could? Tocqueville had a sense of the answer:

> when one examines the Constitution of the United States, . . . it is frightening to see how much diverse knowledge and discernment it assumes on the part of the governed. *The government of the Union rests almost entirely on legal fictions. The Union is an ideal nation which exists, so to say, only in men's minds and whose extent and limits can only be discerned by the understanding.* When the general theory is well understood, there remain difficulties of application; these are innumerable, for the sovereignty of the Union is so involved with that of the states that it is impossible at first glance to see their limits. Everything in such a government depends on artificially contrived conventions, and it is only suited to a people long accustomed to manage its affairs, and one in which even the lowest ranks of society have an appreciation of political science.[3]

The constitutionalism that Tocqueville describes in the first passage presupposes the knowledge described in the second. It has life only because of the "fictions" and "conventions" that underlie it. So long as these fictions and conventions are understood, the system can function reasonably well. Lines are rarely crossed since the lines are well known; practices are seen to conform since supported by understandings that make them cohere. The system is not fundamentally different, in this sense, from baseball: For no one would say that baseball is just the rules of the game; more than the rules, it is the understandings of those rules, and the practices that they envision, that constitute the knowledge necessary to play the game.

But what happens when this "diverse knowledge and discernment" disappear? When these "artificially contrived conventions" lapse, how does a constitutional regime respond? More particu-

[3] Id at 164–65 (emphasis added). The sense of "fictions" here is of course different from our modern sense. See, for example, *Hodel v Virginia Surface Mining & Reclamation Assc., Inc.*, 452 US 264, 307 (1981) (Rehnquist concurring) ("one of the greatest 'fictions' of our federal system is that the Congress exercises only those powers delegated to it"). Compare Charles F. Amidon, *The Nation and the Constitution*, in Sydney R. Wrightington, ed, 10 *The Green Bag* 595 (Boston Book, 1907) (quoting Cooley) ("No instrument can be the same in meaning today and forever and in all men's minds. As the people change so does their written constitution change also. They see it in new lights and with different eyes: events may have given unexpected illumination to some of its provisions, and what they read one way before they read a very different way now.").

larly, how does a *written* constitution survive when the "fictions" upon which it rested indeed become fiction?

This is the distinctive feature of constitutionalism in America. For it is not that conventions and understandings behind the constitutional text disappear; it is that they change. They change both in their substance, and in their location: They not only direct different readings of the constitutional text, but they are possessed, or understood, no longer by "the common people," instead by a constitutional elite—lawyers, law professors, and members of government. The distinctive problem of American constitutionalism is how to read this constitutional text, when these understandings are fundamentally different from what they were.

We can sketch two very different responses. The first is a technique of interpretive fidelity, by far the dominant rhetoric in constitutional interpretation, and the one most directly tied to a theory of constitutional democracy. According to this technique, the proper way to read the Constitution is first, to read it against the framing background—fully excavating the presuppositions about which Tocqueville speaks so as to find its meaning in that original context—and then second, to apply it today in a way that preserves that original meaning. Thus, if conventions in the original context were understood, but not said, and if they today are neither understood, nor said, then the response of fidelity is to articulate these previously understood conventions, and apply them today to assure that the constitutional structure original established is, so far as possible, preserved.[4] The effort, we could say, is to *translate* that original structure into the context of today,[5] one version of a technique we can call *originalism.*

The second technique is less focused on fidelity. Its method is more direct. It simply reads a text according to relatively simple rules of interpretation, finding that understanding of the text that

[4] This is a practice well understood within the German tradition. See David P. Currie, *The Constitution of the Federal Republic of Germany* 117–18 (Chicago, 1995) ("As a codification grows older, the judge's 'freedom to develop the law creatively' increases.").

[5] Fidelity describes that approach to constitutional law concerned with linking today's applications to something the framers did. Within the terms John Ely sketched, fidelity theory is interpretive. John H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, chs 1–2 (1980). But within this general class of interpretive theories, the class I am concerned with are theories of translation. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BU L Rev 204, 218 (1980). See generally Lawrence Lessig, *Fidelity in Translation*, 71 Tex L Rev 1165 (1993).

is most compelling in the current context. It doesn't worry whether that current reading is the original reading. It aims simply at finding a reading that coheres best with what is now understood to be the case. This technique, for convenience, we can call *textualism*.[6]

Constitutionalism in America cycles between these two techniques.[7] It follows one for a bit, and then the other—one with one part of the constitutional text while the other with another part; or one with one part, and then later, the other with the same part. It is a cycle that is apparently unending; a cycle that any theory of American constitutionalism must help to explain.

My aim in this essay is to track one such cycle between originalism and textualism, and to use this story to build an account that might just explain, and justify, this cycling more generally. The story is the story of American federalism, as viewed through the narrow prism of the judiciary. At different times with the same text, and at the same time with different texts, judicial treatment of the Constitution's federalism clauses has followed these different responses. At times, that is, the Court has let the Constitution's text speak for itself—enforcing or allowing the full range of powers that the text, in the current context, might seem to allow. But at other times, the Court has cabined federal or state powers, in the name of a founding balance thought inconsistent with a plain reading.

The opportunity for this account is presented by federalism's latest twist, *United States v Lopez*.[8] In *Lopez*, for the first time in almost sixty years,[9] the Court struck, as beyond Congress's "commerce power,"

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[6] All I mean to imply by invoking this "ism" is an interpretive practice focused primarily on text. See generally Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S Cal L Rev 683, 683 (1985), commenting on the "sophisticated versions of textualism" offered in Robert F. Nagel, *Interpretation and Importance in Constitutional Law: A Re-assessment of Judicial Restraint*, 25 Nomos 181 (1983), and Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 Tex L Rev 343 (1981) (Book Review). See also Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533 (1983); William Nichol Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan L Rev 321 (1988); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw U L Rev 226 (1988), distinguishing originalism and textualism.

[7] It should be clear from my usage here that I am thinking of these two techniques as ideal types, and not as complete descriptions of any particular practice or the full range of practices. For a wonderful account of this far wider range, see Philip Bobbitt, *Constitutional Interpretation* 1–43 (Blackwell, 1991). My aim here is to understand a pattern of movement, no so much the particulars of any point along that path.

[8] 115 S Ct 1624 (1995).

[9] The last time was *Carter v Carter Coal Co.*, 298 US 238, 297–310 (1936).

an act of Congress that aimed at regulating citizens (rather than states). In the shock after the decision, commentators attacked it[10] as either political, or activist, or fundamentally flawed. Flawed it may be, and activist it certainly is. But it is a mistake to see *Lopez* as mere politics. *Lopez* is an act of interpretive fidelity. It is an effort to reconstruct something from the framing balance to be preserved in the current interpretive context. It also marks a shift, from (what I will argue is) a textualist account to an originalist account. The question is whether this shift is justified, a question for which I hazard an answer here.

The argument that *Lopez* is a reading of fidelity begins with what all take as obvious: There is little doubt that the scope of the powers now exercised by Congress far exceeds that imagined by the framers. They struggled over whether the commerce power included the power to build roads; they wouldn't have struggled over its power to reach the possession of guns near schools.

But against this there is a second obviousness: That in the current interpretive context, the language of the Constitution's power clauses, read according to the formula given us by founding federal powers opinions,[11] plainly supports this expanse of federal power. This is the textualist account: That the Constitution gives Congress the power to regulate "commerce" "among the several states," and the power to pass laws "necessary and proper" to effect this regulation of commerce among the several states. Chief Justice Marshall's way of reading these words was quite expansive: So long as some activity could be said to "affect" the commerce of more than one state, that activity was within either the com-

[10] Not all commentators. Laurence Tribe said the decision might act as a useful corrective on Congress's exercise of its power. See Stuart Taylor, Jr., *Looking Right at the Justices*, Am Lawyer 37, 38 (Nov 1995) (reporting Tribe's view: "*Lopez* might well be a useful corrective to the tendency of Congress casually to assume that it can do anything it wants.").

[11] One could well question whether the founding powers opinions—*McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819) and *Gibbons v Ogden*, 22 US (9 Wheat) 1 (1824)—truly represent the framers' view of the federal government's power. James Boyd White, for example, sees *McCulloch* as a plain amendment to the constitutional design of the framers. See James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* 247–63 (Chicago, 1984). That the chartering of a national bank was more than a hiccup is suggested by Jefferson's reaction, see Willard Sterne Randall, *Thomas Jefferson: A Life* 506 (HarperPerennial, 1993) ("To take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power."). Marshall did not take kindly to the suggestion that he was extending the scope of the Constitution's power "by construction." For a description of his pseudonymous defense of *McCulloch*, see Raoul Berger, *Federalism: The Founder's Design* 90–91 (Oklahoma, 1987).

merce power, or the necessary and proper power. As commerce today seems plainly to reach practically every activity of social life, it would seem to follow that Congress has the power to reach, through regulation, practically every activity of social life. Put another way: If America were to adopt a constitution today that had this grant of authority within it, it would be perfectly reasonable to read this grant to give Congress the power to regulate the full range of economic (and hence social) life in America.

The textualist account conflicts with the originalist account. Yet for much of the past half-century, the Court has followed this textualism. It has allowed Congress a power that reaches to the extreme of what the words of the power clauses allow. And in so doing, it has ignored conventions and understandings, presupposed by the framers, and inconsistent with this broad reach of federal power.

Lopez reverses all that. It rejects this textualist reading of the power clauses, in the name of fidelity to a founding understanding about how far these powers of Congress were to reach. It finds implied in the constitutional structure limits on the federal government's power, limits that before may have been supported either by the understandings Tocqueville spoke of, or by the limits entailed by a diffuse national economy, but which today can be supported only by affirmative limits constructed by the Court. And so does the Court impose these limits, by artificial and incomplete readings of Congress's power clauses, rendered in the name of restoring a balance envisioned in the framing generation.

In this way is *Lopez* an act of fidelity, or what I would call an act of translation: Like the very best of the Warren Court, it limits an otherwise apparently unlimited grant of governmental power in the name of a framing conception of autonomy. *Lopez* limits federal power in the name of state autonomy; the Warren Court limited state and federal power in the name of individual autonomy. But both limit governmental power in the name of implied limits given us by the framers. Both, that is, translate this framing vision into the current interpretive context.

This is praise, not criticism, of the *Lopez* Court's work. For in my view, this effort at translation is essential if the American Constitution is to be something more than an ancient, dead text. This effort to breathe life into the structures originally established links *Lopez* with a long tradition of similar constructivism. Establishing this link will be my first aim in this essay—to offer a way to under-

stand this recent revival of federalism jurisprudence not as some political anomaly from the right, but as part of a tradition that draws together much in our constitutional past. Justices might not like the pairings this understanding suggests, but that is of no matter. Their practices are the same, and the justification for their practices will stand or fall together.

But why then the switch? What explains the revival of translation after a half-century of plain reading? This again is the question about cycling, for the practice of textualism rejected by *Lopez* was itself born in the rejection of an earlier practice of translation. This was the switch that ratified the New Deal. If a theory is to explain the latest swing of *Lopez*, then it must explain just what justified the practice that *Lopez* rejects.

This is my aim in the second section of the paper. My strategy is just this: Fidelity is the dominant modality of constitutional interpretation. But sometimes, as I will argue, the interpreter is constrained not to follow this first-best strategy. Sometimes, that is, the interpreter must follow a second-best strategy. This is the strategy of textualism, and it will obtain so long as this constraint on fidelity exists. When, and if, the constraint is weakened, then the Court should (and does) return to the first-best strategy of fidelity. Thus this cycle of techniques should, if the theory is correct, track the presence of this constraint.

Once we have sketched this structure, we will be in a position better to evaluate the success of *Lopez*, and the promise for reform that it might offer. Here I am less optimistic. While *Lopez* properly stands within an important tradition of interpretive fidelity, my argument in the end will be that the techniques it has selected to this end of fidelity are poorly chosen. I do not believe the change *Lopez* announces will be significant. As it stands, the case is little more than an invitation. But if *Lopez* were to take on this larger role, my view is that it is not well equipped. Ironically, the techniques are too conservative to achieve this conservative end. What fidelity requires is a kind of radicalism in interpretation—a radicalism that this Court is unlikely to embrace.

Changed Circumstances and Translation

I begin with a short introduction to the notion of fidelity that I argue is central to our interpretive tradition. This is not

meant as a general theory of the practice that I am calling translation; rather it is a particular application of that practice to a common problem in interpreting the scope of government power.

Its general form is this: Distinguish between power clauses in the Constitution, and rights clauses. A power clause (such as the Commerce Clause) grants to the federal government certain powers. A rights clause (such as the Free Speech Clause of the First Amendment) protects certain individual rights against federal (at least) interference. As originally understood, there is no reason to expect that the rights clauses and the power clauses would necessarily conflict—indeed, Madison originally thought the Bill of Rights unnecessary, since the power of Congress would not reach the domain of the Bill of Rights.[12] Nonetheless, these power and rights clauses are now seen to conflict. Now, because of changed circumstances, there is a change in the reach of the power clause, and in response, the Court finds reason in the rights clause to limit the scope of the power clause.[13] The list here is legion: the exclusionary rule, *Miranda*, contraception, *National League of Cities.*

What gives rise to the conflict is changed circumstances. The scope of the power clause is seen to turn upon facts in the world, and as these facts change, the scope of the power too is seen to change. Translation is the response. Changed circumstances describe what the world does to the legal system; translation describes what the legal system does in response—to neutralize the effects of these changes in the world.

A simple example should draw out the point. At the founding, the rule protecting domestic privacy was relatively simple. It was the rule of trespass. If the state entered my land and searched my belongings, then it trespassed, and to defend against this trespass, it needed good reasons. A trespass not authorized by a judicial warrant, or a trespass not supported by probable cause, rendered the officer liable for his violation of my rights.[14]

One consequence of this original rule was that searches that could be conducted without a trespass were not unlawful. Eaves-

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[12] Cass R. Sunstein, *The Partial Constitution* 9 (Harvard, 1993).

[13] A similar argument is made by Bruce Ackerman, *Liberating Abstraction*, 59 U Chi L Rev 317 (1992).

[14] I do not mean to imply that a warrant was required. See Telford Taylor, *Two Studies in Constitutional Interpretation* 24–29, 57 (Ohio, 1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 764–66 (1994).

dropping, for example: If the state stood outside my window, on a public street, and listened to my conversations within, then so long as it had not trespassed on my property, it had not violated my Fourth Amendment rights.[15]

No doubt this rule about eavesdropping might be thought in principle inconsistent with important privacy interests. But law functions at the level of the pragmatic, and the regime was a pragmatic response to the existing technologies of privacy and invasion. It may well have marked, for the time, the most practical way to protect these rights. And if, for the most part, this regime of property adequately protected privacy, then adequacy was enough.

But adequacy depends upon the context. In particular, it depends upon the technology of that context. When wiretapping, for example, became a technological possibility, and when much of human life moved from the parlors of one's home to the first stages of cyberspace, then this rule about trespass began to fail. Whereas before this change in technology a very high proportion of one's private conversations had been protected from government's view, now, after the change, an increasingly small proportion was so protected.

This change in technology is what I am calling the changed circumstance. And by applying the original rule of privacy, this change had a severe effect on the substantive protections. If one continued to apply the old rule in the new context—as, for example, Chief Justice Taft did in *Olmstead v United States*[16]—then an increasingly small percentage of private life would continue to be private. The old rule applied to this changed context yielded a different constitutional regime.

This led some to suggest,[17] and the Court eventually to adopt, a response of translation. Because the old rule in this new context yielded a regime whose meaning and effect was fundamentally different from the meaning and effect of the old rule in the original context, these Justices suggested a new rule, which in the new context would yield roughly the same balance between public and private. Their aim was to restore the privacy that the changed circumstances had erased. Their technique was to find a new reading of

[15] See *Berger v New York*, 388 US 41, 45 (1967).

[16] 277 US 438 (1928).

[17] Id at 438, 471 (1928) (Brandeis dissenting).

the Fourth Amendment that would compensate for these changes in technology.

This is the practice that I call translation.[18] It presents really two distinct questions. The first asks what rights would, in this context, be equivalent to the rights in the original context. Any number of predicates could be used to describe this "sameness," and it is not my point here to select one that works best. One could ask, for example, which preserves the meaning from the original context, or which preserves the effect of the original structure, or which is more consistent with the purpose of the original context, etc. Whichever is selected, the first question of translation is what an equivalent structure would be today.

The second question is the more difficult. Since often the translation will be a translation of a constitutional right, often the translation will have to limit governmental power. (Not always—for example, the best translation of the President's power increases his power[19]—but often.) For a court, within a democracy, this act of limitation can be quite difficult. For the Court must devise tools that will function with a minimum of institutional cost, to effect the changes to restore an original balance. What these tools can be is the focus of much that follows below. My point here is simply to raise this issue as distinct from the question of what structure is equivalent.

Thus a question of translation gets raised in response to a change in context—changed circumstances—and it gets answered by specifying the tools that will be used to neutralize the effect of these changes. In the example just given (*Olmstead*), it gets raised about an individual right. In the essay that follows, it gets raised about what could be considered states' rights. But whether individual rights or states' rights, the issue is the same: How best to neutralize increased governmental power in the name of preserving an original conception of individual or states' rights.

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[18] The translators in constitutional theory are many. For an excellent recent application, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L Rev 782, 855–87 (1995). The origin of the argument is well traced to Brest, 60 BU L Rev 204 (cited in note 5). For a discussion of statutory interpretation, see generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Harvard, 1994).

[19] For a discussion of translation and the powers of the executive branch, see Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 85–118 (1994). Compare Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U Chi L Rev 123, 125–26 (1993).

This is *Lopez*'s problem of translation. Changes no less significant than the changes of technology in *Olmstead* give rise to a vastly increased reach of federal power;[20] as the emergence of wiretapping effectively destroyed much of an individual's private space, this increased scope of federal power effectively destroys much of the original space for state legislative autonomy; this suggests to some the need to find, or imply, or construct, affirmative limitations on government's power, to restore a balance from the founding regime. In both cases, the nature of these limits is difficult to specify—and the nature of the limits in federalism will consume the balance of this essay—but in both cases, the function of the limits is the same. They are to reestablish something ratifiers of the Constitution chose, eroded by changes that no one chose, to assure that something of the original structure survives these unchosen changes.

The Balance of Federalism

"There are," as Larry Kramer writes, "two sides to Federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable."[21] The first side is about protecting states; it addresses limits on federal power, and gets litigated in the context of the positive commerce power, both over citizens directly, and over sovereigns. The second side is about protecting federal interests;[22] it addresses limits on state power, and gets litigated directly in the context of preemption, and less directly in the context of the negative commerce power. The first side has been the focus of most of the federalism disputes in the twentieth century; the second side was the focus of disputes in the nineteenth century.

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[20] Why technology increases the scope of Congress's power I discuss below. See the text below at notes 26–41.

[21] Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485, 1502 (1994). Justice Kennedy has made the same point. As Kathleen Sullivan puts it, "Justice Kennedy alone sees the Court's role in federalism disputes as a two-way ratchet, stopping the states from 'invad[ing] the sphere of federal sovereignty' but also holding the federal government 'within the boundaries of its own power when it intrudes upon matters reserved to the States.' " Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v Thornton*, 109 Harv L Rev 78, 103 (1995).

[22] I'm understanding this second half more broadly than Kramer's language suggests. The second half is about protecting federal interests generally, both by enabling federal legislation, and by disabling state legislation that is inconsistent with national interests.

My hope is to understand these two sides to federalism together—to see them as evolving in response to the same influences, and to look for a theory that can explain these separate evolutions. My argument is that both sides present the same interpretive problem (the second just a century before the first), and that both react to this problem with the same interpretive response. The interpretive problem is the problem of changed circumstances; the response is translation. Both are the focus of continued interpretive struggle, in large part because the nature of each turns on social and economic factors which are, over the two centuries since the Constitution was penned, in radical transformation. In both contexts, what the Court does in response to these changing contexts is to devise tools that, in the particular context, help recreate the initial balance of federalism. Not uniformly, and not with uniform fidelity, but in the main this is how we can understand the progression of tests that can be collected from the histories of both.

My aim is to collect these tests, and then map their evolutions. But we should be clear up front about terms. If federalism has "two sides," then we must locate two pair of rights, and powers. The mapping of the first side—preserving state authority by limiting federal power—is the most direct, subject to an important objection.[23] Here, the relevant power is all the power of Congress; the relevant right is the right expressed in the Tenth Amendment, reserving the balance of power to the "states, and to the people, respectively."[24] The mapping of the second side—preserving federal interests—is more artificial, but salient nonetheless. Here the relevant power is the power of the states to regulate within their own domain, and the relevant right is the right of the federal government not to have its regulative authority interfered with by these state regulations. The interpretive problem for both sides of

[23] The objection is that the Amendment "states but a truism that all is retained which has not been surrendered." *United States v Darby*, 312 US 100, 124 (1941). For a complete account of these and related views, see Laurence H. Tribe, *American Constitutional Law* 378–85 (Foundation Press, 2d ed 1988). See also Edward Corwin, *Constitutional Revolution, Ltd.* 14–15 (1941) (describing Marshall's view). But in what follows, I assume the Amendment was to do more than state a truism.

[24] US Const, Amend 10. For other conceptions of the rights of the people, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1157–58 (1991).

the federalism problem then is just this—how to preserve the relevant right in light the expanding scope of the relevant power.[25]

THE PROBLEMS WITH INTEGRATION

The problem of federalism is to maintain two distinct balances over time. It is only an interpretive problem because one part of each balance is linked to a fact that, over the period in question, changes. The change that I claim is relevant here is the relative integration of social and economic forces; and the claim is that changes in this integration result in changes in the scope of both federal and state power.

This we can call the *integration thesis.* The intuition behind it is easy enough, though moving beyond an intuition is somewhat more difficult. The intuition is this: There is a sense in which economic and social forces are always linked—in some sense the price of rice in China does affect (and has always affected) the price of rice in New York. In this sense, local economic activity has never been just local. It has always been connected to economic activity more distant, within other jurisdictions.[26]

But from this certainly true premise, we should not conclude that the economy has always and everywhere been integrated to the same extent. Or in the same sense. There may always have been an international market for cotton, or gold; but it took the technologies of cold-car transport and pasteurization before there was a significant interstate market for milk. While in some sense the market for milk has always been integrated,[27] the extent to

[25] Here again there are objections. The strongest is that there is no need to conceive of this as a conflict of rights, since here, the holder of the right (the federal government) by virtue of the Supremacy Clause has all the power it needs to defend its rights without intervention by the courts. If the interests of the federal government are interfered with by the regulations of the states, the federal government can simply pass a law nullifying those interfering state regulations. But this objection is not so much an objection to the question of limits on state power as it is a particular solution to the problem of the proper limits on state power. It acknowledges, that is, that changed circumstances generate an interpretive problem; it simply offers the Supremacy Clause as the only remedy needed for that problem.

[26] I am making a claim here about what was or was not integrated. This is distinct from whether people at the time, given the contemporary economic theory, would have understood the same to be integrated.

[27] For example, even if you couldn't always ship the milk, it was always possible to move to set up a farm, so the price of milk in New York affected the price of milk in California in 1870 in just the sense that if it was too high in California and too low in New York, one might expect milk farmers to move from New York to California.

which it was integrated in 1789 is different from the extent it was integrated in 1989.

There is no simple way to describe this difference in the extent of integration, and no handy way to quantify it.[28] But I don't believe we need data to make the point that I want to make here: That integration in the sense I suggest has increased; that more operates in a national rather than local market; and that this change in the extent of the market properly has consequences for the scope of federal and state power.[29]

The consequences are these: As integration increases, the "effect" that local action will have beyond its own local border increases. It increases because as national markets increase, the influence of local effects is felt more broadly than before. Thus, in ways I will describe below, increasing integration both (*a*) increases the scope of federal power (since the effects of a local action are more consistently felt beyond state borders)[30] and (*b*) makes more

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[28] One possibility would be to measure the extent of the market affecting various commodities. The intuition would be that increased integration would track an expanding geographical market, such that if the geographic market for, say, milk expanded, we could say that the integration of a national market with respect to milk had increased. See Kenneth G. Elzinga and Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull 45, 47 (1973), citing Alfred Marshall, 5 *Principles of Economics* 324 (Macmillan, 1920), quoting Cournot ("Alfred Marshall emphasized that the delineation of a geographic market did not involve looking for a place or geographic location, but rather for the buyers and sellers who were 'in such free intercourse with one another that the prices of the same goods tend to equality easily and quickly.' ").

As geographic markets then increased, integration in the sense that I am offering here would increase. This increase in turn might be quantified through a technique suggested by George Stigler and Robert A. Sherwin. They, for example, provide a simple formula for measuring whether two commodities compete within the same market. See George J. Stigler and Robert A. Sherwin, *The Extent of the Market*, 28 J L & Econ 555, 585 (1985).

Using this technique, one might imagine, for example, constructing an index listing the commodities comprising 80 percent of the GNP, and then calculating the percentage of that index for which the geographical market was wider than a single state. The change in that percentage, then, would be a measure of changing integration in the national market.

One might think interstate movement would be a good proxy for commerce that might affect interstate commerce, but if the question is whether goods are in the same market, then "neither the physical shipment of goods nor its absence always gives a reliable proof that the two areas are or are not in the same market." Id at 581.

[29] Justice Fried points to changing conceptions of economics as a reason why more was seen to fit within the "Commerce Clause" definition. See Charles Fried, *Foreword: Revolutions?* 109 Harv L Rev 13, 37–40 (1995). A full account would rely both on changing conceptions in economics, changing facts about the world, and changing understandings of an appropriate judicial role. I discuss all three in *Understanding Changed Readings: Fidelity and Theory*, 47 Stan L Rev 395, 454–72 (1995).

[30] Compare Justice O'Connor's view in *Garcia:*

> In the decades since ratification of the Constitution, interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation

significant (for federal purposes) the power of the state governments (since regulations of the states more consistently influence federal matters). Both changes then give rise to the need for an interpretive response.[31]

Consider the federal side first: Since the start, or shortly after the start,[32] the scope of Congress's commerce power has been defined by negative implication from what Chief Justice Marshall said it was not. In *Gibbons v Ogden*, said Marshall, the power did not reach objects:

> [1] completely within a particular State, [2] which do not affect other States, and [3] with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.[33]

From this, the power was understood to reach (1) objects passing

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> and communications, has created a national economy in which virtually every activity occurring within the borders of a State plays a part. The expansion and integration of the national economy brought with it a coordinate expansion in the scope of national problems.

Garcia v San Antonio Metro. Transit Auth., 469 US 528, 583 (1985) (O'Connor dissenting). The Court has expressed the same view at times. See *New York v United States*, 112 S Ct 2408, 2418–19 (1992) (*New York II*); *Heart of Atlanta Motel, Inc. v United States*, 379 US 241, 251 (1964); *Stafford v Wallace*, 258 US 495, 520–21 (1922); see also Felix Frankfurter, *The Commerce Clause: Under Marshall, Taney and Waite* 8 (Quadrangle, 1937) ("[N]ot until after the Reconstruction period . . . did those powerful economic forces emerge which bring into play the affirmative possibilities of the authority over commerce granted to Congress . . . ."); John T. Ganoe, *The Roosevelt Court and the Commerce Clause*, 24 Or L Rev 71, 142 (1945); Louis Maier, *Federal Regulation of Manufacturing under the Interstate Commerce Power*, 24 Marq L Rev 175, 177–78 (1940).

[31] See also Joseph Roper, *The Constitution: Discovered or Discarded*, 16 Notre Dame Lawyer 97, 115 (1941) (describing "economic and social system, until about the year 1875 . . . [as] relatively simple"); Frankfurter, *The Commerce Clause* at 63 (cited in note 30) ("New economic forces were bringing new issues to the Court.").

[32] On whether Marshall's view was the founders' view, see note and text accompanying note 11.

[33] *Gibbons*, 22 US (9 Wheat) at 195 (bracketed numbers added). The same point is made later in the opinion:

> No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.

Id at 203–04. See also *Katzenbach v McClung*, 379 US 294, 302 (1964), quoting *Gibbons*, 22 US (9 Wheat) at 195 ("[t]he activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of government.'").

between two or more states ("in" interstate commerce), (2) objects "affecting" interstate commerce, and (3) objects neither in nor affecting interstate commerce, but the regulation of which was "necessary . . . for the purpose of executing" the commerce power or some other power. As Marshall made clear there, and later courts followed, the source of the power in parts (1) and (2) is the Commerce Clause itself. The source of the power in part (3) is the Necessary and Proper Clause.[34]

What is important about this definition is that it makes the scope of federal power turn upon facts in the world. For the scope of Congress's power turns either upon a simple, or not so simple, factual question. Congress's power depends either upon how much commerce is "in" interstate commerce (the simple question), or upon how much power "affects" interstate commerce (the not so simple question). However they are answered, both questions make the scope of Congress's power contingent upon some fact in the world—either upon the extent of interstate commerce, or upon the *integration* of the national economy. The greater the integration, the greater the congressional power.

At the founding, or more precisely, at the time of *Gibbons*, this test would have left a large sphere of concerns that states could regulate without federal interference. Some markets, but relatively few, functioned on a national scale. But internal commerce was slight,[35] and a power that turned upon its extent would be slight as well.

Over time, of course, all this changed. Therefore did the predicate for federal power grow as well. The same would be true of

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[34] See Forrest Revere Black, *The Commerce Clause and the New Deal*, 20 Cornell L Q 169, 179 (1935); *Garcia*, 469 US at 584–85 (O'Connor dissenting).

[35] See Bureau of Statistics, Treasury Department, *First Annual Report on the Internal Commerce of the United States* 8 (US GPO, 1877) (most "commerce" at founding was foreign commerce, with the result that little attention was paid to "comparatively small *internal commerce.*") (emphasis in original); id at 9 (describing growth in internal commerce). While no comprehensive account of the internal commerce is available, some comparative data points are interesting to collect. See Amidon, *The Nation and the Constitution* at 600 (cited in note 3) ("Actual statistics are wanting, but persons in a position to know, are of the opinion that the local business of the railroads does not exceed fifteen percent of their entire traffic" in 1907); R. V. Fletcher, *Some Aspects of the Commerce Clause*, 3 Miss L J 136, 141 (1930) (describing 80 percent of commerce as interstate); William Z. Ripley, *Railroads: Rates and Regulations* 442 (Longmans, Green, 1913) (75 percent "of the railway traffic . . . interstate" in 1886).

any test tied to the "extent" of interstate commerce.[36] For even if the test were limited just to commerce that traveled in interstate commerce, it is certain that the scope of Congress's power would be far greater than the framers imagined.[37] Given the structure of Marshall's test, this increase in federal power was a necessary consequence of economic integration.

In response to this increasing integration, the Court was at first willing to extend the reach of Congress's power quite generously. The changing economy meant both that the extent of federal regulation must increase, and that the commerce power would reach further than the objects touched originally. Chief Justice Waite, in *Pensacola*, provides a common account:

> The powers thus granted are not confined to the instrumentali-

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[36] See Edward Corwin, *Constitutional Revolution, Ltd.* 19 (1941) (describing the "inevitable tendency of Marshall's doctrines"). Of course, this nominalist understanding is not the only way to understand the reach of the commerce power. If we understood the reach of the clause more in line with its purpose, then there is a way to make sense of its scope without imagining it to reach all commerce whatsoever. If the clause was meant to assign to Congress regulation of matters that cannot effectively be regulated at the state level, then a better understanding of the "in" interstate commerce and "affects" interstate commerce categories would be to limit the power to objects operating within a national, or multistate economic market. An approach along these general lines is suggested by Donald Regan, *How to Think About the Federal Commerce Power (and Incidentally Rewrite United States v Lopez)* 94 Mich L Rev 554 (1995). The only problem with this approach, as I suggest below, is the difficulty in specifying a judicial test that could draw this conceptual line.

[37] So how much commerce is "in interstate commerce"? As a first step, this depends upon what one understands as "commerce." For the framers, the scope of items "in" interstate commerce was relatively small. Trade across state boundaries was primarily foreign commerce, as the facility with which items could move in interstate commerce was slight. But the scope of items actually in interstate commerce would not define the reach of what the framers imagined interstate commerce to be. Indeed, there is evidence that the notion "commerce," rather than having the strictly commercial sense that we give it today, reached much more broadly. As a legal term, the word had little significance prior to its inclusion in the Constitution; as a nonlegal term, it reached much more broadly than just business-related matters. As one commentator put it, its primary meaning at the time of the founding was the "interchange of ideas, sentiments, etc., as between man and man, formally also communication, channel or intercourse," while its secondary meaning was business related. See Bernard Gavit, *The Commerce Clause of the United States Constitution* 84 (Principia Press, 1932) ("This sense, of personal intercourse, was the most widely developed in the early use of the word *commerce*.").

Now, of course, nothing yet would suggest why the clause could be used for reasons other than the regulation of commerce—why, for example, it should be used as a jurisdictional basis, for example, for the regulation of immoral commerce (not in an economic sense) in women. The account of this extension comes later. But what this account does do is help distinguish between what really is an unlimited claim about the "affects" test and a more limited, and sensible, claim. Compare *Caminetti v United States*, 242 US 470, 491 (1917).

> ties of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances.[38]

Quite unreflectively, the Court simply applied the test of Marshall to these new circumstances of commerce, with the obvious implication that the scope of federal power would increase. As the Court said (in an otherwise infamous case):

> Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.[39]

The power of Congress extends further than before, the Court says, not because the power has changed, but because the predicate to the power's reach has changed. As one commentator put it near the turn of the century, "if the power of Congress has a wider incidence in 1918 than it could have had in 1789, this is merely because production is more dependent now than then on extra-state markets. No state liveth to itself alone to any such extent as was true a century ago. What is changing is not our system of government, but our economic organization."[40]

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[38] *Pensacola Tel. Co. v Western Union Tel. Co.*, 96 US 1, 9 (1877).

[39] *In re Debs*, 158 US 564, 590–91 (1895). See also Maurice M. Feuerlicht, *The Interstate Commerce Clause and NRA*, 9 Ind L J 434, 435–41 (1934).

[40] Thomas Reed Powell, *The Child Labor Law, the Tenth Amendment and the Commerce Clause*, 3 Southern L Q 175, 200 (1918). See also David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* 429 (Chicago, 1985), discussing view of *Pensacola Telegraph*, 96 US 1.

This increasing integration put great pressure then on the first side of federalism—that side concerned with preserving state authority against increasing encroachment by the federal government. For the more that was within the federal sphere, the less that would be left to the states. Increasing integration here meant that a great scope of what was before purely intrastate activity would affect interstate commerce, and therefore, a greater scope of what was before intrastate commerce would now be within the federal power.[41]

But more interesting, and less noted, is the effect of integration on the second half of federalism—that half concerned with preserving federal interests against interference from state regulation. For the more integrated the national economy, the more significant would be the effects of state regulation on federal interests as well. When the economy is less integrated, the significance of any action by an individual state on the national economy as a whole is small. For integration here is just a proxy for communication: When the economy is not significantly integrated, the effect of a state's action does not communicate efficiently to the economy as a whole. But as integration increases, the significance of state regulation increases. When the economy was not integrated, state regulation would have a relatively small effect on the national market; but when the economy was closely integrated, its effect would be much greater.

For both sides of federalism, increased economic integration put pressure on the balance struck by the framers. If this changed circumstance was not to undermine the original balance, accommodation would be needed. By the second half of the nineteenth century, this accommodation began, at first in the context of protecting national interests, and then in the context of preserving state interests. Through subtle shifts in the tests defining the reach of both the positive and negative commerce power, the Court at-

[41] The increase of federal regulation during the late nineteenth century here links as well to the growth of progressivism during the same period. Using "the territorial power, the treaty power, the postal power, the taxing power, and the commerce power," these reformers used the power of the federal government to achieve progressive ends. Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* 9 (North Carolina, 1995). Eventually, the form of this regulation shifted from abolition to regulation, id at 152, and as "shifting moral and spiritual values" of the early twentieth century became more laissez-faire, the push to progressivism shifted as well. Id at 269.

tempted to restore something of the framing balance. It is to those efforts at translation, then, that I want now to turn.

Translating Federalism

In both halves of the federalism balance, in response to increasing economic integration, the Court adopted tools for limiting a "power" (whether state or federal) in the name of a relevant "right." In this section, I want to outline the tools constructed in the name of preserving state authority; in the next I sketch the tools constructed in the name of protecting federal interests. And finally, I map the first set of tools onto the second.

Both sketches will be incomplete, and not just because sketches. For partway into both stories, there is a break in the vigor with which the Court enforces limits on Congress in the name of fidelity. It is that shift that will be the most important to explain.

TRANSLATING FEDERALISM: LIMITS ON FEDERAL POWER

By the turn of the century, the Court couldn't help but worry about the increase in federal power. For by unreflectively expanding Congress's power through continual extension of the Commerce Clause, the Court was in effect decreasing the power of the states. Formally, of course, no change was occurring: The Tenth Amendment reserved to the states "powers" not granted the federal government, and the power that was increasing was plainly a federal power. But substantively, something more was happening. As the Court noted late in this history of recognition,

> [E]very addition to the national legislative power to some extent detracts from or invades the power of the states. . . . [42]

The question was whether the Court would sit by passively as real world changes, incorporated into the Constitution through the application of old world tests,[43] rendered the Constitution fundamen-

[42] *Carter Coal*, 298 US at 294–95.

[43] For the point is not that Marshall would have done what the New Deal Court did, but rather that the words of the Marshall tests, applied outside of their original context, extended federal power much more broadly than before.

tally different from the Constitution of the framers. The question was the same as in *Olmstead:* a change in technology threatened to change the meaning of the constitutional balance, and the question was what change the Court could adopt in response.

What it did—though not at all as consistently as modern accounts suggest[44]—was to search for affirmative limits on federal power, in the name of preserving state autonomy. As the limits that were before grounded in the relative sparseness of the economic context, and in the understandings of limited federal power, faded, these limits were replaced by affirmatively asserted judicial constraints. Limits before supplied by the context were now constructed by the Court.

An example will make the point more clearly. Madison believed the Bill of Rights unnecessary, in part because he didn't believe the powers of Congress extended into the domains protected by the Bill of Rights. He didn't believe, for example, that Congress had the power to regulate the press, and therefore he didn't see any need to state a limitation on Congress's power to protect the press.

Let's assume Madison was right in 1791. In 1991, however, circumstances have changed. Applying Marshall's formula for determining the scope of Congress's power, the power of Congress might well now include the power to regulate the press (as, for example, an aspect of commerce). If so, then the First Amendment would now be read as an affirmative limitation on Congress's power, where as before (under Madison's view) it was not.

It is in this sense that we could imagine the limits of federalism becoming an affirmative limitation on Congress's power. Originally there was a balance between the federal and state powers—this is the "original balance." But as federal power increases, federalism now (from this perspective) becomes an affirmative constraint on the scope of federal power. The implied balance is now made an express barrier, through the practice of deriving limits on the scope of federal power.

This practice—of implying limits on the growth of federal power—is the practice of translating federalism. Again, it is an act

[44] See the excellent account of Barry Cushman, in *Rethinking the New Deal Court*, 80 Va L Rev 201 (1994).

of translation because it is construction aimed at fidelity to an original value rendered helpless by changed circumstances. It functions just as the translation hinted at in *Olmstead*, and it is justified with a similar argument. Just as Brandeis threatened (what we would call) Orwellian consequences if translation was not engaged,[45] arguments for translating federalism threaten an analogous *reductio:* a move that says, "if we allow this, then everything can be regulated."[46] Some limit must be found.

Or better, constructed. For again, the limits that translation offers are not found in the text of the Constitution; they are implied from its original structure, and constructed by the Court in the form of rules limiting federal power. The practice begins with the rhetorical material at hand. And at hand at the time this construction began were a set of precedents interpreting not the scope of the positive Commerce Clause, but rather the scope of the *negative* Commerce Clause. In these negative Commerce Clause cases, in an effort to preserve the power of states to regulate though their regulation "affected" interstate commerce, 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.[47]

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. The regime for testing whether state regulation reached too far would now be used to test whether federal regulation reached to far. And because the tests had been

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[45] *Olmstead*, 277 US at 472 (Brandeis dissenting).

[46] The examples of this *reductio* argument in the federalism context are endless, both in the Court, see, for example, *South Dakota v Dole*, 483 US 203, 215 (1987) (O'Connor dissenting); *Maryland v Wirtz*, 392 US 183, 204–05 (1968) (Douglas dissenting); *United States v Butler*, 297 US 1, 78 (1936); *Carter Coal*, 298 US at 302, discussing *Heisler v Thomas Colliery Co.*, 260 US 245, 259, 260 (1922); *Hammer v Dagenhart*, 247 US 251, 276 (1918); *Lottery Case*, 188 US 321, 372 (1903) (Fuller dissenting) ("An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case . . ."); *United States v E.C. Knight Co.*, 156 US 1, 16 (1895); *Kidd v Pearson*, 128 US 1, 21 (1888); and the academy, see, for example, Bruce Ackerman, 1 *We The People: Foundations* 103–04 (Belknap, 1991); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* 222–23 (Chicago, 1990); Lindsay Rogers, *The Postal Power of Congress: A Study in Constitutional Expansion* 180 (Johns Hopkins, 1916); Ira Jewell Williams, *Does the Commerce Clause Give Power to Dominate All Industry?* 83 U Pa L Rev 23, 36 (1934).

[47] The story is of course more complex. I detail it below at text accompanying notes 94–125.

used for some time, their appearance in this context would not appear to be an innovation, so much as a continuation of the old regime with new questions.

This was interpretive opportunism. For there is nothing in the logic of the two halves of the commerce power that compels that the tests that limit one side should, or even can, limit the other. The purpose or function of the two sides of the Commerce Clause question are really quite different. And given this difference, there is no reason to believe that limits designed for one purpose would serve the second purpose as well.

This point of logic was well understood; it was also successfully ignored. Instead the Court simply borrowed with abandon. The first of these borrowings was in *Knight*. There, for the first time, the Court limited the scope of Congress's affirmative commerce power, using the negative commerce distinction between "manufacturing" and "commerce."[48] Echoing the opinion in the negative Commerce Clause case of *Kidd*, the Court held,

> Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly.[49]

Given this origin, it is quite odd that *Knight* is seen to stand today for a principle of restraint, or authentic interpretation.[50] Its origin was plainly not that.[51] More importantly, it is not even clear that *Knight* is about the constitutional limitations on Congress's commerce power at all. For the case concerned the scope of the Sherman Act, not the Commerce Clause, and unlike the Constitution, the Sherman Act has no Necessary and Proper Clause. Thus, any limitation on the scope of "commerce" in the Sherman Act would not necessarily translate into a limit on Congress's power under the Constitution, for again, Congress's power under the

[48] *Knight*, 156 US at 12.

[49] Id.

[50] Compare Justice Thomas's concurring opinion in *Lopez*, 115 S Ct at 1648–49.

[51] See, for example, Augustine L. Humes, *The Power of Congress Over Combinations Affecting Interstate Commerce*, 17 Harv L Rev 83, 99 (1903) ("In regard to the regulation of such a monopoly of manufacture, it cannot be doubted that the power of Congress extends further than does that act.").

Constitution includes the power under the Necessary and Proper Clause.[52]

The suggestion that the significance of the opinion should be limited is even stronger when one considers that even as an interpretation of the Sherman Act, the case was soon effectively overruled.[53] And when one considers that the case was a criminal case, and that the limits the Court found may have had more to do with *mens rea* requirements of a criminal statute than the power of Congress under the Commerce Clause, the significance of the case from a constitutional standpoint becomes even more questionable.[54]

These points notwithstanding, *Knight* gave birth to a new industry in litigation—an industry challenging Congress's power by using the negative Commerce Clause categories to cabin the reach of the positive Commerce Clause. Once the link to the negative Commerce Clause was made, there was a treasure chest of ready-made justifications for cabining Congress's power—limitations that reflected the legal culture of the time: formal, absolute, and insensitive to matters of degree.[55]

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[52] Others, though surprisingly few, have noted that this opinion may best be understood as an interpretation of a statute rather than the Constitution. See id at 90 ("In this case, nothing more is decided than that a monopoly of manufacture was not within the statute and, therefore, was not void."); id at 91 ("In none of these cases was the court called upon to define, and it did not declare, the limits of the Power of Congress to legislate."); Currie, *The Constitution in the Supreme Court, 1888–1986* at 23 (cited in note 46).

[53] See Currie, *The Constitution in the Supreme Court, 1888–1986* at 23 (cited in note 46), citing *Addyston Pipe & Steel Co. v United States*, 175 US 211, 240 (1899).

[54] What was central to Chief Justice Fuller's opinion was that there was no necessary connection between the monopoly of manufacturing and the interference in interstate commerce. However likely, the interference was neither shown, nor was the intent to interfere shown. Since the essence of the Sherman Act violation was an intent to obstruct interstate commerce, what the opinion says is simply that this level of intent had not been demonstrated. It could neither be presumed, that is, and it certainly had not been shown. See *Knight*, 156 US at 17 ("Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.").

[55] For a collection of how these distinctions get applied, see F. D. G. Ribble, *State and National Power Over Commerce* 120–21, n 72 (Columbia, 1937) ("Examples of exclusion in cases of particular activities may prove useful. 'Bookkeeping, it is said, is not interstate commerce. True it is not.' *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194, 216 (1912). The making of contracts for the insertion of advertising matter in *The Saturday Evening Post*, *The Ladies' Home Journal*, and *The Country Gentleman* was declared not to be interstate commerce. *Blumenstock Bros. v. Curtis Publishing Co.*, 252 U.S. 436

But the limits of *Knight* were not applied generally to commerce cases through the early twentieth century. Indeed, *Knight* at first seemed an anomaly. For the quarter century after *Knight*, the Court continued, in the main, to take an organic view of the economy[56] ("[p]rimitive conditions have passed; business is now transacted on a national scale"[57]), and expanded Congress's power. As well as upholding bans on any interstate commerce, regardless of the motive of Congress,[58] and whether or not the communication was commercial,[59] the Court through this period took an essentially realist view about the effect of intrastate transaction on interstate commerce.

Swift & Co. v United States[60] was perhaps the signal case among these.[61] Said the Court, again interpreting the Sherman Act (and effectively overruling *Knight*,[62]) "commerce among the states is not a technical legal conception, but a practical one drawn from the course of business."[63] So too in *Southern Railway*,[64] where the

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(1920). Notable recent cases have presented concepts of certain activities as not being interstate commerce. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Cf. *Ramsey Co. v. Associated Bill Posters of the United States and Canada*, 260 U.S. 501 (1922); *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934). An exhibition of baseball, 'although made for money would not be called trade or commerce in the commonly accepted use of those words.' *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). See 19 Mich. L. Rev. 867 (1921). For other instances of activities declared not to be interstate commerce, see *Metropolitan Opera Co. v. Hammerstein*, 147 N.Y. Supp. 535 (1914); *American Baseball Club of Chicago v. Chase*, 149 N.Y. Supp. 6 (1914); *In re Oriental Society*, Bankrupt, 104 Fed. 975 (E.D. Pa. 1900); *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 269 Fed. 681 (Ct. of App. D.C. 1920) (affirmed in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*)." See also Edward Corwin, *Constitutional Revolution, Ltd.* 24 (1941) (describing limits on "commerce").

[56] William H. Nicholls, *Constitutional Aspects of Public Regulation of Business Price Policies*, 25 J Farm Econ 560, 564–65 (1943).

[57] Edward S. Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 Cornell L Q 477, 503 (1933), quoting *Farmers' Loan & T. Co. v Minnesota*, 280 US 204, 211 (1930).

[58] *Lottery Case*, 188 US at 356; *Hipolite Egg Co. v United States*, 220 US 45, 57–58 (1911).

[59] *Caminetti*, 242 US at 491–92 (White Slave Traffic Act).

[60] *Swift & Co. v United States*, 196 US 375 (1905).

[61] Black, 20 Cornell L Q at 179 (cited in note 34) (Chief Justice Taft characterized the *Swift* case as " 'a milestone in the interpretation of the commerce clause of the Constitution.' ").

[62] *Swift*, 196 US at 397.

[63] Black, 20 Cornell L Q at 179 (cited in note 34).

[64] *Southern Railway Company v United States*, 222 US 20, 26–27 (1911).

Court held that the power reached the regulation of intrastate railroad cars; and a year later in *Interstate Commerce Commission v Goodrich Transit*,[65] where it wrote that the power included the power to regulate accounting practices; and in the following Term, when it held the power reached wholly internal railroad rates;[66] and five years after that, when the power was held to reach the regulation of bills of lading;[67] and then most expansively, in 1922, that it included the power to regulate "[w]hatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce" whether wholly internal or not.[68] On the whole, this was not a framers-focused Court.

It was *Hammer v Dagenhart*[69] that gave *Knight* its second wind. Before *Hammer*, the Court's actual limitations on Congress's power were quite thin.[70] But with *Hammer*, the Court began its last real run at building implied constraints on the scope of Congress's power.

The case concerned Congress's efforts to limit the interstate transportation of products made with child labor. The opinion began with the *reductio* argument: If the Court didn't draw the line here, then there would be no line left to draw.[71] And thus the Court sought to draw a line, again using as tools the tools that were lying around.

Two are familiar: the first, the manufacturing/commerce distinction of *Knight:*

> Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles,

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[65] *Interstate Commerce Commission v Goodrich Transit Co.*, 224 US 194, 211 (1912).

[66] *Houston, E. & W. Texas Ry. Co. v United States*, 234 US 342, 353–54 (1914).

[67] *United States v Ferger*, 250 US 199, 204 (1919).

[68] *Stafford*, 258 US at 521.

[69] 247 US 251 (1918).

[70] Currie, *The Constitution in the Supreme Court, 1888–1986* at 27–29 (cited in note 46).

[71] As the Court wrote,

> To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

Hammer, 247 US at 276.

> intended for interstate commerce, is a matter of local regulation.[72]

And the second, the pretext analysis, suggested in *McCulloch*, but repackaged here for the occasion: The aim, said the Court, of this regulation of Congress was to invade the state regulatory domain, and it was this improper intent that made the statute invalid.[73] As the Court said:

> 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.[74]

Hammer is in many respects the most extreme of the Court's cases limiting the commerce power. For this is a limit on Congress's direct interstate commerce power, rather than a limit on Congress's indirect, intrastate commerce power.[75] If it marked any great shift in the Court's view, it was not evident even one term later.[76] Again, *Hammer*'s primary role in the crisis that would follow it by fifteen years was as a handy precedent, which, like *Knight* before it, was remembered perhaps because it stood out so, and useful, because it stood out so clearly.

The limited effect of *Hammer* notwithstanding, the 1918 Term did represent a turning point when one looks beyond the Commerce Clause.[77] Prior to that time, it was primarily within the area

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[72] Id at 272.

[73] See Henry Wolf Biklé, *The Commerce Power and Hammer v. Dagenhart*, 67 U Pa L Rev 21, 29 (1919); *Kentucky Whip and Collar Co. v Illinois Cent. R.R. Co.*, 299 US 334, 350 (1937) ("In the Hammer case, the Court concluded that the Act of Congress there under consideration had as its aim the placing of local production under federal control") (citations omitted).

[74] *Hammer*, 247 US at 272.

[75] The decision is contrary as well to the First Congress's decision to impose protective tariffs on foreign commerce—not only to raise revenues but to regulate and promote commerce. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U Chi L Rev 775, 781 (1994).

[76] As David Currie writes,

> Any hopes that *Hammer* portended an era of increased protection of state prerogatives, however, were chilled by later decisions. In the very next term, for example, in *United States v. Doremus*, the Court permitted Congress effectively to regulate narcotics sales under the cloak of the federal tax power.

Currie, *The Constitution in the Supreme Court, 1888–1986* at 98 (cited in note 46).

[77] William O. Douglas, *Recent Trends in Constitutional Law*, 30 Or L Rev 279, 283 (1951) (noting that the "ebb" that occurred during the 1920s was "clear and distinct.").

of taxation that the Court had been most active in limiting the scope of government's power;[78] but after 1920, the Court's energy began to wander more broadly. In the first six years of that decade, the Court declared "social and economic legislation unconstitutional under the due process clauses . . . in more cases than in the entire fifty-two previous years."[79] And this activism only increased after the (first) New Deal legislation reached the Supreme Court. First on delegation grounds,[80] and then on Commerce Clause grounds as well,[81] the Court struck a string of Congress's statutes, all in the name of a founding vision of federal power.

The techniques were common. Once again the distinction between manufacture and commerce arose,[82] as did its sister distinction, between the effects of direct and indirect interstate commerce regulation,[83] as well as the pretext limitations of *Hammer*.[84] In addition to these limits, there was a forgetting of the Necessary and Proper Clause, most prominently in the *Carter Coal* case: For throughout these opinions about the Commerce power, the Court fails to explain how Congress's necessary and proper power might interact with its commerce power. Even if manufacturing was not commerce, what was there to show that regulating manufacturing was not a necessary and proper way to regulate commerce?

Drawing these tools together, the Court struck at the nationalizing instinct in Congress's legislation. It struck in the name of a vision of federalism that had long been eroded by increasing federal power; it struck, then, in the name of one conception of fidel-

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[78] Vincent M. Barnett, Jr., *The Supreme Court, the Commerce Clause, and State Legislation*, 40 Mich L Rev 49, 53–57 (1941).

[79] Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv L Rev 943, 944 (1927), cited in Currie, *The Constitution in the Supreme Court, 1888–1986* at 133, n 1 (cited in note 46).

[80] *Panama Refining Co. v Ryan*, 293 US 388 (1935).

[81] See *Railroad Retirement Board v Alton R. Co.*, 295 US 330 (1935); *A. L. A. Schechter Poultry v United States*, 295 US 495 (1935); *Butler*, 297 US 1; *Carter Coal*, 298 US 238.

[82] *Carter Coal*, 298 US at 303.

[83] Id at 307. This test too, of course, was a test developed in the context of the negative Commerce Clause. See D. J. Farage, *That Which "Directly" Affects Interstate Commerce*, 42 Dickinson L Rev 1, 2–3 (1937). Local effects could become interstate if tied to the proper intent. See *Carter Coal*, 298 US at 304, distinguishing *Coronado Coal Co. v United Mineworkers*, 268 US 295 (1925).

[84] *Railroad Retirement Board*, 295 US at 368.

ity. Its attack was not simply blind formalism—for the Court was quite self-conscious at times, some member of the Court more than others, about the nature of these limitations. As Cardozo explained, some limit had to be drawn, and the question was just what.[85]

One could quibble with the strategy, one could question the ultimate motivation, but the best way to understand the effort is as an attempt to reclaim a lost reality of federalism. As Frankfurter put it, what was "submerged" in these distinctions was the view that "local affairs are subject to national control when that affect interstate commerce."[86] But they were submerged by the Court just because essentially all local affairs were now subject to national control. The Court was attempting to reconstruct an "initial fact of division,"[87] an effort not made any easier by the fact that these were two fields that were now "overlapping" in their reach.[88]

The battle to undo this limited vision of Congress's power, culminating in the switch in time in 1937, is well known. It is not a battle that need be relitigated here. Beginning with *NLRB v Jones & Laughlin*,[89] and ending with *U.S. v Darby*,[90] the Court deliberately withdrew the full range of limits on federal power to regulate that its earlier judgments had constructed. Limitations that just the year before had been declared limits in kind, not just degree, were now said to be "instances in which [a] metaphor has

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[85] As Cardozo explained in *Carter Coal:*

> The underlying thought is merely this, that "the law is not indifferent to considerations of degree." . . . It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the States. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie.

Carter Coal, 298 US at 327–28 (Cardozo dissenting) (citations omitted).

[86] Frankfurter, *The Commerce Clause* at 115–16 (cited in note 30).

[87] F. D. G. Ribble, *National and State Cooperation Under the Commerce Clause*, 37 Colum L Rev 43, 47 (1937).

[88] Ganoe, 24 Or L Rev at 74 (cited in note 30).

[89] 301 US 1 (1937).

[90] 312 US 100 (1941).

been used," "but particular, and not exclusive, illustrations of [Congress's] power."[91] These were all now matters of degree.[92]

The flip essentially ended judicially enforceable limits in the most important federalism domains; it represents a collapse of judicial restraints, not directly tracking any real change in the real world. And whether in one year, or five,[93] by the end of this effort at federalism, this fidelity had fallen dormant. For twenty years in Commerce Clause history, the Court had enforced limits on Congress's power. Now the question of how far Congress could go was no longer to be decided by the Court. The shift of the New Deal represents the end of affirmative judicial efforts to translate federalism—for the time being.

What explains the shift of the New Deal cannot be anything about the changed circumstances themselves, or at least not anything about changed circumstances alone. There was no radical shift in economic integration in 1937 through 1941, and the Court didn't pretend to the contrary. Nor can it be explained by anything internal to the idea of translation, for if the constitutional foundations remained constant, then the command of fidelity to translate federalism was the same. If anything changed, it was the ability of the Court to continue this effort of translation. What changed was something about the constraints on the Court's ability to translate. These constraints will be crucial to the analysis that follows, not so much to understand the extraordinary case of the New Deal shift, but to understand the ordinary case of ordinary shift in the tools used to translate.

Before we turn to examine these constraints, consider first the parallel steps of translation under the negative Commerce Clause, protecting the second half of federalism—federal interests.

TRANSLATING FEDERALISM: LIMITS ON STATE POWER

Before there were these (modest) efforts by the Court to translate federalism's first side (protecting state power), there were ef-

[91] *Jones & Laughlin*, 301 US at 36.

[92] As the Court said, the criterion was "necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution. . . ." *Santa Cruz Fruit Packing Co. v NLRB*, 303 US 453, 467 (1938).

[93] That no clear flip had been made, or yet acknowledged in 1937, is suggested by the opinion of Justice Butler in *Santa Cruz Fruit Packing*, 303 US at 469 (Butler dissenting); see generally Cushman, 80 Va L Rev 201, 204–38 (cited in note 44).

forts to translate federalism's second side (protecting federal interests), responding, again, to the changing integration of the national economy. As the economy became more integrated, the significance of state regulation became more marked. In response, the Court increased its police over state regulation, to try to assure that the effect of local actions didn't propagate too broadly. Integration had now amplified the effect of state regulation; the Court's job was selectively to dampen those effects.

The limits designed to translate federalism's second side are of two kinds. The first is what we now call the negative Commerce Clause, which operates, without the action of Congress, to constrain the states in the exercise of their own power to regulate.[94] The second is the preemption doctrine, which has evolved as a device for protecting federal legislation from interfering or disabling state legislation. Both doctrines have undergone radical shifts. My aim in this section is to map these shifts with the heuristic of translation.

I begin with the negative Commerce Clause. The life of the negative Commerce Clause can be told in three stages; in this section, my focus is on the first two. The first is relatively passive. Like the positive Commerce Clause, it begins with *Gibbons*, and the boundary that *Gibbons* drew (though in dicta) for proper state regulation. At issue was the validity of a New York law granting a monopoly to Ogden's steamboat company. The Court held the law invalid under the Supremacy Clause, because it conflicted, the Court said, with a federal licensing law.

On his way to this conclusion, Marshall sketched tools for determining whether the state law was a regulation beyond the state power, and while *Gibbons* does not fully articulate their structure, together with *McCulloch*, their outline is clear. At the core is a means/ends test. Laws will be understood as means to some end; the question the Court must address is to what end is a particular law a means. It determines this by determining what purpose the legislature had in enacting this law—whether it was with a purpose to, for example, regulate commerce, or with some other police power purpose. If its purpose was to regulate commerce, then the

[94] For an extraordinary account of the development of this doctrine, see Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich L Rev 1091, 1206–68 (1986).

law was unconstitutional. This first part of the first stage of the negative Commerce Clause evolution we can call the *purpose test.*[95]

One important implication of the purpose test was that the very same statute could be passed by the federal and a state government, and both be constitutional; or, as a corollary, the very same statute could be passed by two different states, but only one be constitutional (since the other was passed with an improper purpose). The fact that the means used to the police power ends were the same as the means used to a commerce regulation end was not determinative. What mattered was the end; to two different ends, the same means could be used.[96]

Willson is a good example of this purpose test applied.[97] At issue in *Willson* was the constitutionality of a set of dams, constructed by the state of Delaware, that blocked parts of the navigable waterways of the United States. If what determined constitutionality was the effect of a given law, then *Willson* should have been no different from *Gibbons.* In *Gibbons*, a law of the State of New York made it legally impossible for Gibbons to use the waterways linking New

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[95] See Louis M. Greeley, *What Is the Test of a Regulation of Foreign or Interstate Commerce?* 1 Harv L Rev 159, 163 (1887) (to determine "whether a given law is to be regarded as a regulation of foreign or interstate commerce, we must examine the object of the Legislature in passing the law.").

[96] As the Court said in *Miln*,

> In Gibbons v. Ogden, . . . the court say [*sic*], if a state, in passing laws on a subject acknowledged to be within its control and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt; it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers are identical.

New York v Miln, 36 US (11 Pet) 102, 137 (1837). The same point is made in *Gibbons* itself:

> All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.

Gibbons, 22 US (9 Wheat) at 204. Justice Johnson took the same view.

> Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers.

Id at 239 (Johnson concurring).

[97] *Willson v Black Bird Creek Marsh Company*, 27 US (2 Pet) 245 (1829).

York and New Jersey. In *Willson*, a dam of the state of Delaware had the very same effect (indeed, no doubt more effective). In both cases, the person challenging the regulation was licensed to ride the waters of the United States,[98] but in *Gibbons* this license was held to trump the state regulation, while in *Willson*, it was not.[99]

What distinguished the cases in Marshall's view was the aim of the Delaware regulation. As Marshall saw it, the dams increased "[t]he value of the property on its banks" by "excluding the water from the marsh," and thereby the "health of the inhabitants probably [would be] improved."[100] In short, the aim was to advance the power of police.

> Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states.[101]

The same is true in *Miln*, decided eight years later. Again, the question was simply what was the purpose of the state in passing the laws at issue. Citing *Gibbons*, the Court said,

> If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If we examine the means . . . , they bear a just, natural and appropriate relation to those ends.[102]

What determined the nature of a regulation, then, was its purpose. Something was not a regulation of commerce because of what it did; it was a regulation of commerce because of *why* it did it.

What is striking about the test is the interpretive facility it presumes on the part of the Court—the ability to divine from a statute, and scatterings of evidence about it, just what the aim of the legislature was in passing it. But precisely because the showing necessary to invalidate a statute was so severe, the test operated in effect simply to validate most state regulation. No state statute

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[98] See Currie, *The Constitution in the Supreme Court, 1789–1888* at 175 (cited in note 46).

[99] This is not to say that every dam would have been so protected. Part of what must have motivated the Court was the idea that this was such a small stream that was being dammed.

[100] *Willson*, 27 US (2 Pet) at 250.

[101] Id. See also Greeley, 1 Harv L Rev at 163–65 (cited in note 95).

[102] *Miln*, 36 US (11 Pet) at 133.

was struck under this test alone; indeed, as we will see later, no state statute was struck solely on negative Commerce Clause grounds until 1873.[103] What the test did was to direct inquiry by forcing the Court to ask whether there was a legitimate state police power reason for the statute, and if there was, then there was an effective presumption that this was the reason for the statute.

Thus while the purpose test demanded a relatively high interpretive burden before a statute could be struck—in the sense that the Court would have to make an extremely contestable judgment about legislative purpose before striking a state statute—this burden was never actually borne by the court through the life of the test. As I argue more below, this link is not accidental. It is also revealed in the second of the two tests of this first stage of the negative Commerce Clause evolution.[104]

Eventually, this first cut at dividing state from federal authority came apart. Though there are echoes of the purpose test late into the nineteenth century,[105] by the middle of the century, its dominance began to wane. The first clear flip came in *The License Cases*,[106] where Chief Justice Taney took the position that the Commerce Clause did not, by its own force, operate to limit state power at all; only if Congress legislated could federal law limit state action.[107]

Then four years later the rebellion of Taney led to a compro-

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[103] The case was *State Tax on Railway Gross Receipts*, 82 US (15 Wall) 284 (1873). See the discussion in Currie, *The Constitution in the Supreme Court, 1789–1888* at 338 (cited in note 46).

[104] Of course, by sketching the purpose test as I have, I do not mean to suggest that everyone viewed the matter in just this way. Story, in particular, thought a "regulation of Commerce" was determined by the nature of the regulation, not by the nature of its purpose. Hence in *Miln*, because the regulation was of the import of persons into the state, he thought this a regulation of commerce. That its purpose may have been to advance police power concerns was immaterial; what mattered were the means, not the ends. *Miln*, 36 US (11 Pet) at 156 (Story dissenting). Justice Thompson too may have shared this view, but he thought states had a concurrent power to regulate commerce until Congress took it up. Id at 148, 152–53 (Thompson concurring).

[105] See, for example, *Hennington v Georgia*, 163 US 299, 304 (1896). See also Greeley, 1 Harv L Rev at 184 (cited in note 95) ("In the opinion of the writer, according to the law as it stands to-day, the purpose or intention of the State Legislature in passing a law operating upon . . . interstate commerce is the only criterion of whether it is or is not a regulation of . . . interstate commerce.").

[106] *License Cases*, 46 US (5 How) 504 (1847). Taney's was one of six separate opinions.

[107] See Currie, *The Constitution in the Supreme Court, 1789–1888* at 226 (cited in note 46).

mise. In *Cooley v Board of Wardens of Port of Philadelphia*,[108] Justice Curtis sketched a second test for dividing federal from state authority. At issue was a set of state regulations of pilotage services. Curtis concluded that these were "regulations of commerce." Under Marshall's test, that should have been the end of the case. But Curtis's analysis was not so simple. Instead, the Court held that states have a concurrent power to regulate commerce, so long as they do not regulate subjects the "nature of [which] requires [] exclusive legislation" at the federal level.[109] Where subjects "in their nature" required federal regulation, then states were barred from regulating those subjects; but where subjects did not require federal regulation, then states could regulate commerce with respect to those subjects, at least so long as Congress does not. Looking at the first Congress's regulations of pilotage laws, Curtis then concluded that these were not subjects which in their nature required national legislation.[110]

The *Cooley* test was destined to become one of the most significant readings of the dormant Commerce Clause.[111] One reason it dominated the purpose test was its relative ease of administration. In a world where the appropriate objects of federal regulation are relatively uncontested, it would be easier simply to check the particular regulation against an understood list than to inquire into whether a particular statute was passed with an appropriate purpose.

Easier, but not yet easy. For its simplicity when striking a statute depended upon the relative uncontestedness of viewing a regulation as inherently national. Thus while relative to the purpose test, the *Cooley* test may have imposed a lesser rhetorical burden, it still required the Court to embrace something of a normative conception about the proper division of authority between states and the national government. To strike a state statute based upon this normative conception would still be relatively difficult. And consistent with this difficulty, again we find that the test alone served to strike

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[108] 53 US (12 How) 299 (1851).

[109] Id at 319.

[110] See Currie, *The Constitution in the Supreme Court, 1789–1888* at 230–33 (cited in note 46).

[111] Id at 230. See also Douglas, 30 Or L Rev at 285 (1951); Ribble, 37 Colum L Rev at 50–53 (cited in note 87).

no state statutes. It was a less difficult test to administer to the end of upholding state statutes.

These two tests then constitute the first stage of the dormant Commerce Clause development. They both yield no statute that was unconstitutional. They reign during a period of relative economic isolation; they serve to sustain state statutes that actually have little effect on interstate commerce. They define boundaries that states cannot cross, but for the most part, when the economy is as unintegrated as this, states do not cross these boundaries.

The second stage of the dormant Commerce Clause evolution is more activist. It occurs roughly during the period of time when the national economy is becoming highly integrated (1875–1912).[112] And it responds, as Frankfurter put it, to this integration.

> As economic relationships became more interdependent, and the interaction between state legislation of every kind and interstate commerce became closer, the central inquiry necessarily shifted from the purpose of state legislation to its effect upon national commerce.[113]

The response was to reformulate the tests for limiting state power in a way that will be quite revealing. For what marks the tools of this period is that they are, within their context, rhetorically less burdensome; they avoid *Cooley*'s necessity of a thick conception of the proper role for national legislation, and they are easier to administer than the divining necessary in the purpose test. Instead, they make constitutionality turn on more formal, and neutral, conceptions of regulations effect. As we will see, and as one would expect, the reduction in this rhetorical burden yields an increase in the number of statutes struck.

Again, there are two tests. The first, given us by Justice Field, was the more formal: It asked whether the state regulation directly or indirectly regulates commerce.[114] Under this test, regulation having a direct effect on interstate commerce was a matter of exclusive congressional power, but "where the effect on interstate commerce was merely indirect, state power to regulate was at least

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[112] Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767, 795 (1994).

[113] Frankfurter, *The Commerce Clause* at 30–31 (cited in note 30).

[114] Gardbaum, 79 Cornell L Rev at 795 (cited in note 112). See, for example, *Sherlock v Alling*, 93 US 99, 103 (1876).

concurrent with that of Congress."[115] If regulating interstate commerce was an unnecessary consequence of the state regulation, even if it was quite likely to occur, the state regulation was deemed an indirect regulation of commerce, and hence not a violation of the Commerce Clause. If, however, the regulation only succeeded to the extent that it regulated interstate commerce, or if that was its direct object, then the state regulation failed.

What this tool didn't demand was any strong consensus on the appropriate objects of inter- and intrastate regulation. What it did demand was a capacity for making judgments of a formal kind, between direct and indirect. While at some level we can all understand a line between direct and indirect effects, we should not take for granted this ability of a legal system effectively, or consistently, to draw such a line. Such would be very difficult for us. But the legal culture of the late nineteenth century was different. For what marks it as distinct was its ability to draw, and sustain, formal categories of law generally. This was the age of formalism in legal thought; a time when the legal system generally practiced a kind of legal reasoning that insisted where possible on categorical resolutions rather than balancing; that sought and sustained ways to make legal reasoning mechanical and simple.[116]

Now what makes possible this way of reasoning is a complex question. It is a way of legal reasoning still dominant in parts of continental Europe. It is also a way of reasoning against which progressives in America rallied at the turn of this century. But however it is constructed, and sustained, what is important is to see how it makes possible a kind of regime that to us would not seem possible or effective. A categorical test for carving up direct from indirect regulations is an effective test in a legal culture that well supports such tests; it is not an effective test where the legal culture doesn't.

When this formal method became contestable, a second, more realist method took its place. This was a test that looked directly at the economic effect of a particular kind of state regulation,

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[115] Id.

[116] See Hamm, *Shaping the Eighteenth Amendment* at 8 (cited in note 41); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 199–200 (Oxford, 1992); John Henry Schlegel, *American Legal Realism and Empirical Social Science* 31–32 (North Carolina, 1995) (describing "classical legal thought").

rather than fitting the regulation into some category of direct or indirect effects. The question became how significant this effect was. This position had been advanced for some time, by Justice Miller in particular.[117] And "[a]s economic relationships became more interdependent, and the interaction between state legislation of every kind and interstate commerce became closer,"[118] the need for this focus increased as well. Thus, in many cases where it was clear that under Marshall's purpose test the state regulation was adequate, under this emerging effects test, state laws "operating upon foreign or interstate commerce . . . [were] nevertheless . . . held to be a regulation of such commerce."[119]

What pressed the need for an effects test was both a kind of judicial economy, and the increase in, and therefore increased effect of, state regulation on interstate commerce. The increasing effect made it necessary to construct more tools to limit state regulation; but the increasing conflict about the proper role for state and federal regulation made it necessary to construct tools that could limit state regulation without a contested normative conception of propriety behind it. Thus, rather than attempting to discover the undiscoverable through an intent or purpose test, or rather than arguing about appropriate objects of federal and state regulation, what becomes the most salient feature of the conflict between federal and state regulation is the actual economic effect of such state regulation on interstate commerce. And once this effect is identified, the easiest way to resolve it is simply on the facts of the effect.

Both tests together mark the first real use of the Commerce Clause alone to strike state legislation. For it is really only in the chief justiceship of Waite that the Court began to use the Commerce Clause to strike down state legislation. Eighteen seventy-three saw the first such case,[120] beginning a period during which the Court would decide "over fifty cases in which it was alleged that state action offended the Commerce Clause."[121]

But rather than mere activism, what is important is to under-

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[117] Currie, *The Constitution in the Supreme Court, 1789–1888* at 406 (cited in note 46).

[118] Frankfurter, *The Commerce Clause* at 31 (cited in note 30).

[119] Greeley, 1 Harv L Rev at 177 (cited in note 90).

[120] Currie, *The Constitution in the Supreme Court, 1789–1888* at 403–04 (cited in note 46).

[121] Id at 404. See also Frankfurter, *The Commerce Clause* at 7 (cited in note 30).

stand the link between this activism, the framing balance, and a context where state economic regulation is more significant nationally. As integration increased, it made sense of the original balance for the Court to police more actively state regulation. And this increased policing yielded the increase in federal restriction on state regulation.

Now again, I do not means to suggest by this neat ordering of tests that these tools evolved serially, or separately, or regularly, or consistently. The were developed sporadically, often together. The 1888 case of *Smith v Alabama*[122] is a good example of these four approaches rolled into one. In upholding a state regulation of railroads, the *Smith* court first applied the *Cooley* test ("we find, [ ] [f]irst, that the statute . . . is not, considered in its own nature, a regulation of interstate commerce"), and then the *purpose* test ("that it is properly an act of legislation within the scope of the admitted power reserved to the states to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction"), and then the *direct/indirect* test ("and, thirdly, that, so far as it affects transactions of commerce among the states, it does so only indirectly, incidentally, and remotely,"), and then the *effects* test ("and [affects interstate transactions] not so as to burden or impede them.").[123]

But regardless of the relative tidiness of these shifts, what is significant is how the rhetorical ground must move—how it becomes necessary to rely upon a less and less normative conception of what federal regulation ought to be (which the move to effects measures) and how the rhetorical burdens of an earlier test facilitate these moves. From *purpose* to "*in its nature national*" to *direct/indirect* to *effects:* As the legal culture becomes more diverse, this affects the test that can be applied.

The most activist period for policing state policies occurs then during just that period where we could expect that the rhetorical burden, in context, of the dominant tests is at a minimum. Rather than rely upon relatively normative conceptions of proper federal and state power, the activism peaks when the tools used rely upon formal, or categorical, distinctions not themselves explicitly normative. And as we have seen, these tests too gained support in this

[122] *Smith v Alabama,* 124 US 465 (1888).

[123] Id at 482.

legal context because of a general facility, within this legal culture, to think and treat law as a formalist technique. These two features combine to facilitate activism just at the period when the need for activism is high. While my interest is not in showing a causal relationship, we can say that if the objective of the Court was to translate federalism, the tools selected in this second stage were among the least expensive available, and, in context, extremely effective.

The activism of this second stage eventually comes to an end, again, for reasons we explore later. But we can note that the timing of this activism is not accidental; it links with the general retreat adverted to above, after the New Deal. For after a period of relative quiescence after the New Deal, the negative Commerce Clause entered a third stage of its evolution. Rather than implicitly balance the values of state regulation against the burden on interstate commerce, in this stage the primary focus is on discrimination, with a secondary focus on whether any nondiscriminatory state regulation might nonetheless too severely burden interstate commerce.[124]

Now the virtue of a discrimination rule is its simplicity: It selects a core value protected by the negative Commerce Clause, and limits its reach to just that value. Consistent with this simplicity is a relatively active docket of cases striking state laws falling afoul of this minimal requirement. But the vice of the discrimination rule is its underinclusiveness. For there are plenty of examples of state regulations that would burden interstate commerce without being

[124] The history of this third stage is admittedly more complex than discrimination alone. Throughout this stage, there are two themes that on the surface of the opinions, one pulling in the direction of discrimination alone, and the second, in a direction that would more carefully balance national and state interests. *Southern Pacific Co. v Arizona*, 325 US 761 (1945), is an example. There Justices Douglas and Black both implied that discrimination was a necessary condition to a finding of unconstitutionality; but Chief Justice Stone "took the occasion to entrench for the majority his original position that the validity of nondiscriminatory state regulations affecting commerce turned on 'accommodation of the competing demands of the state and national interests involved.'" Currie, *The Constitution in the Supreme Court, 1888–1986* at 327 (cited in note 46). The clearest counterexample to this nondiscrimination interpretation is *Pike v Bruce Church, Inc.*, 397 US 137 (1970), which, though focused primarily on discrimination, makes it seem as if even where there is no discrimination, a federal court must weigh the benefit of the state regulation against the burden on interstate commerce. But I follow Regan, 84 Mich L Rev 1091 (cited in note 94), here in arguing that the essence of the test, *Pike* notwithstanding, is discrimination. For a recent account far more explicit on this, see *National Paint & Coatings Association v City of Chicago*, 45 F3d 1124 (7th Cir 1995) (Easterbrook).

discriminatory.[125] By focusing on discrimination alone, the test fails to capture this category of burden.

What it does, however, is provide a minimal limitation that courts can carry into effect. For reasons I suggest more extensively below, this minimum may also be the maximum. For anything more than discrimination would require the courts to weigh values that they could not do without the appearance of acting politically. Thus here too there is a retreat from the more active limitation on state power because the burden of that more active test was too great.

TRANSLATING FEDERALISM: PREEMPTION

The timing of this retreat in the negative Commerce Clause links with a second retreat yet to be described. This is the retreat of the preemption doctrine. But before we can describe the retreat, we must establish its advance.

Though modern constitutional law tends to obscure the distinction,[126] as Stephen Gardbaum has argued, both conceptually, and historically, the doctrine of preemption is distinct from the doctrine of supremacy. Supremacy says that when two otherwise valid laws conflict, federal law will prevail; preemption determines the scope of that conflict. One could well have a doctrine of supremacy without a doctrine of preemption—indeed, as Gardbaum argued, this has been the case for most of the Constitution's history. Without preemption, the question is simply whether two laws conflict. What preemption adds to this is a tool for determining how far any such conflict will be said to extend. At its broadest, a preemption doctrine might say that the existence of a federal law within a certain field of regulation would operate to negate any state legislation within that field; at its narrowest, a preemption doctrine might say that a federal law conflicts with a state law only if it is impossible for someone to obey the commands of both.[127]

Throughout its history, the preemption doctrine moves between these two extremes. And this movement maps well onto the story

[125] Posner describes the simplest example in his discussion of a state tax. See Richard A. Posner, *Economic Analysis of Law* 638–43 (Little, Brown, 4th ed 1992).

[126] See, for example, Gardbaum, 79 Cornell L Rev at 787 (cited in note 112).

[127] Id at 770–73.

of translation that we have seen so far. For it is just at the point where the vigor to effect limits on federal and state power is at its highest that we see the preemption doctrine operate most broadly; and just at the point that we see the efforts at translation erode generally that we see the preemption doctrine too interpreted more narrowly.

Though hints of a doctrine like preemption pepper the U.S. Reports of the nineteenth century, it is not until 1912 that the doctrine is really born. Before that time, federal law trumped state law when the two laws conflicted.[128] But in 1912, in the case of *Southern Railway Co. v Reid*,[129] the Court began a short experiment with what was really quite a radical doctrine. Under this newly born preemption doctrine, once the Court noted that Congress had passed "some" regulation within "some" field of law, concurrent state legislation within that same field was annulled. What we would today call "field" preemption followed automatically from the fact of any federal regulation at all; no reference to congressional intent was necessary to invoke this doctrine; no indication of a balance of state and federal interests either. All that was required was the presence of a federal law to wipe away state laws within that field.[130]

The effect of this doctrine on the balance between federal and state authority was quite dramatic. As federal authority was exercised within concurrent domains of authority, preemption cleared the underbrush of related state regulation. And as more federal authority was exercised, the doctrine wiped away an ever greater scope of state power. This automatic field preemption thus oper-

[128] Id at 783.

[129] 222 US 424 (1912).

[130] See, for example, cases cited in discussion at 264–76 in Alexander M. Bickel and Benno C. Schmidt, Jr., 9 *History of the Supreme Court of the United States: The Judicial and Responsible Government*, 1910–21 264–76 (Macmillan, 1984). See also Gardbaum, 79 Cornell L Rev at 797 (cited in note 112) ("The difference between preemption and supremacy is precisely the difference between the sufficiency of 'some' federal regulation and the necessity of 'conflicting' regulation for the non-application of state law."); id at 801 ("The effect of congressional action is to end the concurrent power of the states and thereby to create exclusive power at the federal level from that time on."). The German Constitution expressly provides for "field preemption," such that if the Bund taxes something, the Länder may not. See Federal Republic of Germany Const, Art 72(1) ("In matters within the concurrent legislative power, the Länder shall have the power to legislate so long as and to the extent that the Federation does not exercise its right to legislate."). See also Currie, *Constitution of the Federal Republic of Germany* at 49, 53–54 (cited in note 46).

ated strongly to empower the nationalization of domains of law, at just the time that the federal government was actively increasing its regulatory role.[131]

But this tool of federal power carried with it a relatively high rhetorical burden. For to make the rule effective, it fell to the Court to determine what a particular "field" of regulation was, and it was upon that determination that state legislation was displaced. This judgment, however, is of course not obvious. The overlap and differences between state and federal legislation left many questions about how far a field could be said to run. These questions placed the Court then in a position reminiscent of the *Cooley* test, where the Court was in the business of deciding the nature and scope of a wide range of regulatory domains.

This burden was lifted after the switch in time that marked the triumph of the New Deal. Just at the time the Court recognized the authority of Congress to reach far more than before, it also transformed the significance of the statutes that Congress had passed by radically cutting back on this automatic preemption.

[131] A crude empiricism supports the suggesting that this change was significant. In the history of the Supreme Court's invalidation of state laws, the second major cycle of activism coincides precisely with this shift in the preemption doctrine. A raw count of Supreme Court opinions striking state and federal laws by decade is not inconsistent with this pattern of change. The table below was derived from the Senate's The Constitution of the United States of America: Analysis and Interpretation, S Doc No 99–16, 99th Cong, 1st Sess 1883, 1913 (1982), and its supplement.

Decade	State	Federal
1800	1	1
1810	7	0
1820	7	0
1830	3	0
1840	9	0
1850	7	1
1860	25	4
1870	29	8
1880	42	5
1890	32	6
1900	30	11
1910	107	6
1920	135	16
1930	85	16
1940	45	3
1950	51	6
1960	140	14
1970	180	17
1980	144	16

After the New Deal, the focus in preemption cases was not on whether a law was within a particular field in some way regulated by Congress; instead, what mattered was the judgment that Congress *intended* to preempt a particular state law. The presumption was against preemption; and the burden was to demonstrate the intent of Congress to preempt.[132] Thus, when preemption functioned to wipe away state regulation, the Court could shift responsibility for this preemption to Congress and away from itself.

How one measures the net effect of these two changes at once is a difficult question. The switch of the New Deal certainly increased the scope for permissible federal regulation; but the retreat of this field preemption doctrine also reduced the extent to which federal regulation would, by necessity, displace state regulation. Thus, rather than a zero-sum game between federal and state authority, what both shifts mark is an increase in governmental power, at both the federal and state level. All that we can note for certain is that the shift of the New Deal reduced the extent to which courts would limit the exercise of governmental power, whether federal or state.

This then is the second retreat in the second half of the federalism domain. For here again, the Court shifts the tools it was using to defend the interests of the national government, giving greater deference to state regulation. And as with the negative Commerce Clause cases, the substance of this shift is to focus upon a congressional judgment, rather than upon any formula for striking state laws embraced by the Court.[133] The judgment, then, was said to be Congress's, not the Court's.

THE LIMITS COMPARED

My argument so far has been quite simple: We can in part understand the effort of the Court to be the attempt to preserve, or restore, something of the framing balance between federal and state authority; that this balance has two sides; and that the collection of devices—what Frankfurter called "legal levers of con-

[132] See, for example, *Rice v Santa Fe Elevator Corp.*, 331 US 218, 230–31 (1947).

[133] See, for example, Currie, *The Constitution in the Supreme Court, 1888–1986* at 35 (cited in note 46), discussing *In re Rahrer*, 140 US 545 (1891).

trol"[134]—has evolved as the pressure on various aspects of this original balance has changed.

In the survey so far, we have seen three such levers—the first, the formal limits on the commerce power imposed in the name of preserving a sphere of state regulatory authority; the second, the similarly formal limits of the negative Commerce Clause, acting at first to sustain, and then to constrain, state regulation in areas that interfered with federal interests; and, finally, the third, the doctrine of preemption, used as a supplement to the negative Commerce Clause as a way to further protect federal interests from interfering state regulation. All three of these doctrines grow in their power through the nineteenth and early twentieth centuries; all three peak in their power just at the New Deal.

I have swept as broadly as I have here for two reasons: The first is to collect a sufficiently large sample of tools used to effect limits on governmental power, in the name of federalism, so as to make comparison meaningful; but the second is to make a bit more contestable what seems an organizing idea in our modern understanding of the transformation around the New Deal. For what the complexity here should suggest is that the effect of the New Deal on the federalism balance is more complex than the ordinary account suggests. No doubt the (partial[135]) collapse of the first lever of control, allowing Congress to regulate in areas not open to it before, yielded an increase in federal regulatory authority. But balancing this significant transformation are the relative retreats in both the negative Commerce Clause power and preemption doctrine. Congress could regulate more, but the effects of its regulations on competing state regulatory regimes were not as strong; nor would the Court automatically recognize federal dominance without the exercise of express congressional power. Therefore too could states regulate more. That there was a shift at the New Deal cannot be doubted; but its net effect on state authority is far more contestable.

Nonetheless, one aspect of the shift in these three areas cannot be denied: The shift here is a shift away from limitations on government *generally* rather than a shift away from limitation on federal power in particular. In a fairly dramatic manner, the Court's

[134] Frankfurter, *The Commerce Clause* at 26 (cited in note 30).

[135] The collapse is not total, and the timing is not perfect. See above note 124.

ability to enforce affirmative limits on state and federal power withered. Federal power may have increased, but it was not a federal power that the Court would be responsible for; it was instead power that had its pedigree in the action of Congress; and likewise, the effectiveness of competing state regimes would increase, again, not because of anything the Court did, but because now Congress would have the power, in the main, to trump competing state regimes. In all three areas, what we observe is a retreat from judicial control. And the question I want to raise now is just what explains this general retreat.

The Constraints on Translation

"The history of the commerce clause," Frankfurter wrote, "is the history of imposing artificial patterns upon the play of economic life."[136] The history of this "imposing," however, is not at all consistent. While against both state and federal governments the Court was increasingly active during the first third of this century, just after the first third, these interventions were in retreat. What explains the early activism may be something about increasing economic integration, and a need, grounded in fidelity, to restore a framing balance between federal and state authority. But no such convenient fact explains the retreat. What then does? To what are these changes responding?

If translation is a response to changes in the interpretive context—changes in the integration of the social and economic context of the Constitution—then my argument is that we understand limits on translation too as responses to changes in the interpretive context. But this time the changes are not in the social or economic context of interpretation. This time the change is in the legal culture of the context of interpretation. It is these changes that will matter by affecting the ability of a court to construct tools of translation. In some contexts, constructing such tools will be easier than constructing such tools in other contexts. This difference we can call a difference in *capacity*, and my aim in this section is to explain how such difference can be understood.

Whatever else defines a successful judicial system, one dimen-

[136] Frankfurter, *The Commerce Clause* at 21 (cited in note 30).

sion of its success is its ability to deliver consistent rulings in cases that appear to be the same. I want to pick out two features of a judicial system that might affect this ability.

One feature is the *determinateness* of the rules that the system produces.[137] The more determinate the rules (assuming good faith on the part of the judges) the more consistent the application. Determinacy is in part a function of the rules themselves—how well they are structured, whether internally consistent, whether vague, etc.—but it is also in part, and for our purposes, more importantly, a function of the rule appliers themselves, or more generally, the legal culture within which the rules are applied.[138] The very same rule, applied by two different rule appliers, or applied in two different legal cultures, can be differently determinate. For example, the rule against perpetuities is more determinately applied by a graduating class of Chicago law students than by a graduating class of Yale law students, or more certainly, by a class of Berkeley English grad students. This is not to say anything about the relative intelligence, or commitment, of these different classes of rule appliers. It is instead to say something about the consistency and rigor of the training of each. Likewise with legal cultures: For the class of lawyers generally, the rule against perpetuities is more determinate in late nineteenth-century America than late twentieth-century America, if only because the diversity and specialty of law in the twentieth century is so much greater than law in the nineteenth.

The difference is not only in consistency or rigor of training, however. The difference is also in the heterogeneity of the rule appliers. A law faculty composed of thirty-five white males will more consistently and determinately agree on "excellent candidates" for teaching positions than a law faculty of mixed gender and ethnicity. Likewise, a committee of citizens in Los Angeles will less consistently and determinately agree on what is "good for the community" than a committee of citizens in Minot, North

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[137] This is the focus, or function, of formalism as Fred Schauer develops it in *Formalism*, 97 Yale L J 509, 538–48 (1988), and his question there is whether a legal system can use formalism as a technique to achieve a certain kind of determinateness. See, for example, id at 540–41. Cass Sunstein makes a related point in Cass R. Sunstein, *Problems with Rules*, 83 Cal L Rev 101, 132–33 (1995).

[138] For a related argument, see Frederick Schauer, *Playing by the Rules* 112–35 (Oxford, 1991), and William Twining and David Miers, *How to Do Things with Rules* 184–98 (Weidenfeld and Nicolson, 3d ed 1991).

Dakota. In both cases, the judgment in part turns on things taken for granted by those judging. Differences in background will mean differences in these things taken for granted, and hence differences in the outcomes of judgment. The point is to understand the relationship between the rules and the rule appliers, so as to understand the degree of determinateness, and consistency, that can be expected.[139]

The second feature of the legal system's ability to deliver consistency in judgment is the structure of the system for applying rules. For when considered together with the first feature, this second feature will exacerbate the problems in determinateness underlined by the first.

We can distinguish two systems of judicial review, one centralized, the other decentralized.[140] Constitutional courts in the European legal tradition are centralized—only one court gets to strike a law as unconstitutional. Constitutional courts in the American legal system are decentralized—any "court" in the American system gets to decide constitutional questions.[141] The difference here is crucial when considered along with the point about determinacy just made. For the cost of indeterminacy is magnified by decentralized judicial review: The more decentralized the system for applying rules, the more costly is any amount of indeterminacy. Costly, in just the sense that multiplying the rule appliers within a relatively indeterminate legal culture will increase the incidence of inconsistency. And while for some issues, inconsistency will not much matter—for example, the inconsistency between two Fourth Amendment judgments of "reasonableness"—for some matters, inconsistency will be quite significant. In particular, when determining whether a law of Congress is constitutional, inconsistency among federal courts can be quite significant.

We can draw these two points together then like this: The judicial capacity, in the limited sense I am considering here, of a given legal system can be understood along two dimensions. The one looks at the nature of the legal culture within which the judiciary

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[139] Posner makes a similar point in Richard A. Posner, *Overcoming Law* 101–02 (Harvard, 1995).

[140] See Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 132–48 (Oxford, 1989).

[141] Well, possibly not. See *Freytag v Commissioner*, 501 US 868, 888–92 (1991).

functions, and examines how determinate rules within that context can be. This is an account of the heterogeneity of the rule appliers, and we might say, the thickness of the legal culture within which they apply their rules. The second dimension looks at the structure of the judiciary, asking whether review is centralized or decentralized. The focus from this perspective will reveal the extent to which indeterminacy will matter in a given legal culture.

What both dimensions of determinacy suggest is that as a legal culture changes, its capacity for applying rules changes as well. As the legal culture changes, the rule appliers might be less able determinately to apply a given set of rules; and with a decentralized system of judicial review, this change in determinacy gets magnified by the multiplicity of rule appliers.

What follows then is an odd paradox of judicial power. To the extent that a legal system becomes less capable of applying a rule determinately, dispersing judicial review may actually reduce the power of judicial review. For in response to the relative lack of facility possessed by lower courts consistently to apply a given rule, the higher court will make the rule more determinate. One technique for making the rule more determinate will be to make it more simple, or crude; another would be to increase the deference to nonjudicial actors. But in either case, the reduction in the ability of the lower courts determinately to follow the higher court's rule will result in a less subtle control exercised by the higher court. Because each difficult rule produces a wide range of errors, the court would be pushed to find a rule that systematically produced fewer errors. In such a legal culture, then, centralized judicial review may actually increase the power of judicial review, since if centralized, the cost of indeterminacy decreases, and hence the ability of the legal system to construct subtle rules increases. Centralizing judicial review in a system of uncertain lower court fidelity may increase the power of judicial review; and likewise, diffusing judicial review in the same sense reduces the power of judicial review.

But why does indeterminacy matter? What is its cost? And in what sense does inconsistency decrease the capacity of a court?

What makes inconsistency important in understanding the vigor with which the Court pursues strategies of translation is not anything about the efficiency with which these rules can be implemented. Inconsistency does reduce efficiency, but that is not its

most significant cost. Instead, the cost of inconsistency ties to an important institutional feature of judicial review in America. This is the sense that inconsistent application indicates that the judges might by guided by something other than law—that their decision, that is, might be political.

The point is just this: To the extent that results of a particular rule appear consistent, it is easier for the legal culture to view this rule as properly judicial, and its results as properly judicial, in just the sense determined by this rule. To the extent, however, that the results appear inconsistent, this pedigree gets questioned; it becomes easier for observers to view these results as determined, or influenced, by factors external to the rule—in particular, factors considered political. The appearance of inconsistency here breeds the flavor of politics.

What is critical is appearance; the question is what the Court credibly can say. I am making no claim about whether the results are actually political—they may or may not be. All that is important to the account that I am offering is how the results appear.

For this appearance points to what I want to assert is a constraint on judicial review in America, a constraint I want to call the *Frankfurter constraint.* The essence of the Frankfurter constraint is this: That a rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application. And as a corollary to this rule, to the extent that a rule appears political, we can observe that the Court will trade away from that rule. A sense of institutional cost will guide the Court to select rules that minimize the political cost of the rules it selects, which means that as the legal culture renders a rule political, this sense of institutional cost will guide the Court to trade away from that rule.[142]

[142] Frankfurter discussed just this constraint in his explication of the history of the Commerce Clause, emphasizing the desire to minimize perceived "judicial policy-making" as a constant guiding force. See, for example, Frankfurter, *The Commerce Clause* at 54 (cited in note 30). At times he located the source of this constraint in the nature of the Court's fact-finding ability, see, for example, id at 72 (cited in note 30); *Lopez*, 115 S Ct at 1658 (Breyer dissenting) ("Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce."), but the more salient dimension of the concern is that the choices made by the Court would, in context, appear political. See Frankfurter, *The Commerce Clause* at 70–71 (cited in note 30). See also *Wickard v Filburn*, 317 US 111, 129 (1942) ("the conflicts of economic interest between the regulated and those who are advantaged by it are wisely left under our system to resolution by the Congress . . ."). Robert Bork's work in antitrust

What the Frankfurter constraint entails is a constant pressure on the Court to avoid rules that, in context, in their application, appear political. And because rules will appear political when applied inconsistently, and because rules can become inconsistent because the legal culture renders them less determinate, what this means is that over time the Frankfurter constraint will render some rules unusable that before were quite effective. Or again, a rule that at one time does not fall afoul of the Frankfurter constraint can at another time become inconsistent with it. And the same the other way round.[143]

The capacity of a court to effect translations turns then in part upon its ability, within a particular legal culture, to construct rules of translation that will survive the Frankfurter constraint. Rules that at one time survive it may, as the legal culture changes, no longer survive the constraint. *Why* the legal culture changes is beyond the scope of this essay. No doubt part of the reason it changes is because of actions of the Court itself. But only part. It

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especially continues this concern, perhaps obsession, with the political costs of the rules the Court embraces. See, for example, Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 87–88 (Free Press, 1978).

[143] The argument that constitutional law tracks "prevailing morality and predominant public opinion" is of course quite familiar. See, for example, William Howard Taft, *The Anti-Trust Act and the Supreme Court* 47–48 (Harper and Brothers, 1914). Frankfurter went so far as to say, "[m]ore than any other branch of law, the judicial application of the Constitution is a function of the dominant forces of our society," Frankfurter, *The Commerce Clause* at 3 (cited in note 30), though what he means here, I believe, is less that political forces control as much as dominant ideas and attitudes affect how judges see constitutional questions. Professor Corwin puts the point better: "An act that is 'clearly' unconstitutional to a judge who is convinced that Mr. Herbert Spencer's Social Statistics was a second book of Revelations may appear to be 'clearly' constitutional to one who thinks that Mr. John L. Lewis introduced true democracy into the United States for the first time." Edward Corwin, *Constitutional Revolution, Ltd.* 33 (1941). What is distinctive about this relatively uncontested set of views is not that they triumph in some sort of battle of ideas in the mind of the judges. Rather, as Frankfurter describes it, what makes it possible for them to have the effect they have is that when a decision "harmonize[s] with public feeling," understanding the support of these underlying ideas becomes less pressing. Frankfurter, *The Commerce Clause* at 22–23 (cited in note 30). The phenomenon is not limited to constitutional law. Bork identifies the same in antitrust law, see Bork, *The Antitrust Paradox* at 425 (cited in note 142), and Gilmore in Contract law, see Grant Gilmore, *The Death of Contract* 95 (Ohio, 1974).

What I am adding is the case where there is no relatively uncontested set of views which, because of their uncontestedness, a Court can rely upon almost invisibly. My claim is just that when the views upon which a judgment would rest are rendered fundamentally contested, the response of the Court is to avoid taking sides in this conflict. The response is much like a summary judgment motion: where facts are not reasonably contested, the Court may rely upon them to resolve the question before it; when they are contested, the Court avoids a decision relying upon a resolution of the contested facts one way or the other.

is neither the case that the Court fully constructs the legal culture it functions within, nor the case that it has no effect on that legal culture. All my argument relies upon is that to some extent, the Court must take the legal culture as it finds it, and to that extent, how it finds the legal culture will constrain its ability to translate.

THE LIMITS OF TRANSLATION: THE NEW DEAL

The historical account I have provided so far stops with the New Deal. For some time late in the 1930s, or early 1940s, the constraints that I have described as the product of tools for translating federalism change. In each of the three contexts within which translation may be said to have been advancing federalism interests, the activism of the Court in enforcing these limits wanes. The question is how this change can be understood. My objective here is to use the Frankfurter constraint to explain some of this change.[144]

All three tools for translating federalism before the switch of the New Deal depended upon a relatively thick legal culture that sustained the lines drawn. In the positive Commerce Clause context, the rule depended upon being able credibly to distinguish "direct" from "indirect" regulation of commerce, "manufacturing" from "commerce," "intended" from "unintended" effects. In the negative Commerce Clause context too, the tools depended upon the same distinctions, plus the ability to measure the economic effects as a reason to strike a state statute. And in the preemption context, the rules depended upon being able credibly to say that a certain federal regulation was within a given "field" of regulation, thereby striking state legislation within that field.

All three tools thus depended upon the ability to make formal distinctions that divide proper from improper regulation, formal distinctions that themselves depended upon, as Tocqueville put it, "fictions" extant within the legal culture. All three tools could succeed in sustaining these distinctions, making them "credible" within each legal culture, only so long as the legal culture could

[144] My aim here is only to understand, not to justify, the changes of the New Deal. I have elsewhere tried to use a similar analysis to show how we can see these New Deal changes as justified by simply focusing on this dimension of what can be said, consistent with the Frankfurter constraint. See Lessig, *Understanding Changed Readings*, 47 Stan L Rev 453–72 (cited in note 29).

continue to support them. And a legal system can support them only so long as they can be drawn without producing a large number of apparently inconsistent results. So long, that is, as the culture allowed them to be made without them appearing "political."

But this, midway through the Depression, is just what the legal culture would no longer support.[145] While a story far too involved for this essay, the argument can be summarized like this: That the retreat of the "Old Court" tracks the collapse of what made it rhetorically possible for the Court to sustain these formalisms in the name of translating federalism. The formalisms themselves had been rendered political. They now seemed more the result of extra-judicial judgments than entailed by the legal material. The limits they imposed were now seen not as efforts at translation; they were seen as efforts at preserving a conservative status quo. Imposing these formalisms would violate the Frankfurter constraint.[146]

Why the old categories were rendered political is a complicated story.[147] In part it was because part of what these old limits rested upon had itself been drawn into doubt—had been rendered contestable. Not only the ideas of a passive government in the face of crisis, and the ideas of laissez-faire, but also some of the very premises of federalism itself. What the Depression had done was render these ideas fundamentally contestable, with the result that decisions resting on one side or the other of this contest were rendered political. To draw these artificial lines to limit governmental power became artificial; the effort, political.

Ordinarily, when a founding constitutional commitment is challenged, it is the duty of the Court to stand up to the challenge, and defend the founding commitment until changed by amend-

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[145] Id.

[146] See id. See also Frank R. Strong, *John Marshall—Hero or Villain*, 6 Ohio St L J 42, 46 (1939); Nicholls, 25 J Farm Econ at 581–82 (cited in note 56) (summarizing attitudes about governmental regulation).

[147] Just as the opposite—categories at first deemed political, but then rendered nonpolitical—is a complicated story. An example of this might be the change in First Amendment doctrine. No doubt part of the impetus for this change comes from the efforts of the Court itself. But nonetheless, the Amendment takes on a status in the American legal culture by the late 1960s that gets its great strength in part from the solidity of the presuppositions that underlie it. Compare Jack M. Balkin, *Frontiers of Legal Thought II. The New First Amendment: Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L J 375.

ment. This minimum of courage is essential to a system of judicial review. But what the New Deal represents, I suggest, is an important exception to this principle. When the very act of defending this founding commitment has been rendered political, then the obligations of the Frankfurter constraint may trump the obligations of fidelity. When the act of defending principles of fidelity appears more likely to be an act of politics than principle, the Frankfurter constraint may counsel concession on principle, to preserve the institution of judicial review first.

This is what I believe best excuses the Court's retreat in the face of the New Deal.[148] A faithful translation of the framers' conception of federalism would have required that the Court continue to do something to assure that something from the original balance was preserved. The Court did not do that. But what would excuse the Court in this context (and, by implication, not necessarily in others) was the Frankfurter constraint: Where the effort at translation itself has been rendered political, the Court is excused from effecting that translation.

A better example is more recent. Consider the Court's refusal in *Planned Parenthood v Casey*[149] to overturn *Roe v Wade*.[150] *Roe* had extended the right to abortion in a context where the issue was not fundamentally contested in constitutional law, and in a context where extending rights under the Due Process Clause was not such an odd practice. By the mid-1980s, however, the issue of a constitutional right to abortion had become fundamentally contested. Whether rightly or wrongly, clearly at least five Justices on the Court believed that *Roe* was not a faithful reading of the Due Process Clause of the Fourteenth Amendment—that as an original matter, *Roe* was wrong. But not all of these five agreed that the decision should be overturned. For what apparently swung some of the anti-*Roe* Justices was just the fact that the issue—getting the Court to overturn *Roe*—had become so fundamentally politi-

[148] To say that this "excuses" the Court's retreat is not to say that this is the "reason" the Court made the retreat. The reason no doubt was a certain loss of will on the part of Hughes and Roberts, the only Justices who changed their vote during this period. But the question of justification looks beyond the subjective reason why judges vote as they vote. The question is whether there is an account of their votes that accords well with a conception of the judicial role, and fidelity.

[149] 505 US 833 (1992).

[150] 410 US 113 (1973).

cal. Two presidents had made it their political objective to appoint justices to the Court who would overturn *Roe*, thus turning the reversal of *Roe* into a political act. The success of this political act made it impossible for the Court believably to assert that it was reversing *Roe* for reasons of fidelity. It would have appeared the result of politics, not constitutional law. This was true even for justices who believed their primary motive was constitutional law. The context had rendered their actions political, even though their motives may well have been nonpolitical.

The switch at the New Deal was one level more complex than *Casey*. One might think the analog to *Casey* would be for the New Deal Court to have written an opinion about the significance of precedent, and, as in *Casey*, stuck firm. But the differences here are significant. First, the democratic pedigree of the challenge in *Casey* was not as solid as the pedigree in the "switch in time." This is the insight in Ackerman's very different account about the political change of the New Deal.[151] For with the "switch in time," and unlike *Casey*, there was a clearly democratic wish to give up the effort at translation; and when translation itself appeared political, the better answer was to yield to the democratic branches.

Second, in both cases what gave credibility to the resolution of the conflict was that the swing Justices appeared to be acting against interest. None of the Justices who penned the Joint Opinion could say that it was correct as an original matter, yet they nonetheless would affirm it in the name of avoiding an appearance of politics.

I do not mean to minimize the institutional cost suffered by the Court after the New Deal. After *Casey*, it is at least plausible to believe that the Court was a stronger institution; that is not true after the New Deal. But faced with the alternatives, the action taken by the Justices may well have been the action minimizing the political costs of the judicial action. Where limits in the name of federalism could no longer be imposed with relatively slight rhetorical cost, the limits fell away. When the Court could no longer sustain them without appearing political, it fell to the political bodies to impose them as an act of self-restraint.

What *Casey* and the New Deal switch suggest is something more

[151] See Ackerman, 1 *We the People* at 105–30 (cited in note 46).

about the contours of the Frankfurter constraint. However strong is the commitment to constitutional fidelity, at times the act of pursuing fidelity can appear an act of politics. And when it does, then it, no less than any other act that appears political, becomes costly for the Court to execute. When fidelity appears political, the Frankfurter constraint may trump.

LIMITING THE FEDERAL GOVERNMENT: IMMUNITY AND SOVEREIGNTY

What is common throughout these examples at the New Deal is the limit of the Frankfurter constraint. When the social meaning of the judicial act of translation has been rendered political, there is an institutional pressure to avoid taking that act.

But the principle is not limited to the New Deal. Instead, I suggest, the force of the Frankfurter constraint continues today. Two more examples will make the account complete. In each example, the pattern is the same: Each involves an effort to set limits on federal power to preserve regulatory space for the states; in each these limits self-destruct when they are rendered, in context, political. In each case, the response is to avoid this now political act.

The first is the example of intergovernmental tax immunity, though I will consider the example only from the perspective of state immunity from federal taxation. State immunity from federal taxation began as a reaction to the federal immunity from state taxation first announced in *McCulloch*. It was an expression of equality between two sovereigns, neither compelled by the framing conception of state sovereignty, nor by the logic that seemed to drive *McCulloch*.[152] Nonetheless, for a short time the doctrine flourished without apparent limit. But the combination of an increase in federal taxation and state activity combined to force again the question of the doctrine's justification.

All seemed to agree that every activity of the states was not immune from federal tax; all also seemed to agree that not every

[152] At least if the logic of *McCulloch* is grounded in the collective action problem that faces the federal government when the states act to tax it. That same problem would not exist the other way around. If, however, the logic of *McCulloch* is simply the notion that "the power to tax is the power to destroy," then it would seem that the same logic could support both immunities. I consider this latter justification, however, to be a less compelling account of the case than the former.

activity of the state was subject to federal tax. The question then was where to draw the line.

The first efforts looked to the traditional activities of state government. Where the activity of the state was a "traditional" function of the state, there was immunity; when not, there was no immunity. But as with any test that turns on tradition, this distinction was not stable. For as the state entered more and more activities, and as the technology of state activities changed, it became harder to decide which activities were traditional, and which not.[153]

The struggle came to a head in *New York v United States.*[154] New York ran a mineral water business; it claimed that this was a collective good that required state regulation optimally to exploit the wells. The court split on how to think of the matter. Four opinions sketched three distinct approaches to the question, two, in essence, the same approach.

The judgment in the case was announced by Justice Frankfurter, in an opinion joined only by Justice Black. Frankfurter recounted this history of the tax immunity doctrine, and worried the difficulty that the Court had had in finding any useful line to draw. In the end, Frankfurter concluded, there was no useful line for courts to draw. As he wrote,

> The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based. Any implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim of implied immunity by States from federal taxation raises questions not wholly unlike provisions of the Constitution, such as that of Art. IV, Sec. 4, guaranteeing States a republican form of government, see Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, which this Court has deemed not within its duty to adjudicate.[155]

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[153] This problem did not arise before the present century, partly because state trading did not actively emerge until relatively recently, and partly because of the narrow scope of federal taxation. *New York v United States*, 326 US 572, 579 (1946) (*New York I*).

[154] Id.

[155] Id at 581–82.

Rather than draw an impossibly costly line, Frankfurter opted for the simpler, if underinclusive line: discrimination. So long as the federal tax is not discriminatory against states, the federal tax would be deemed constitutional.

At the other extreme, though I suggest for the same reason, was the opinion of Justice Douglas. Douglas too agreed that there was no principled line for the Court to draw between places where immunity was proper, and places where it was not. But what followed from this, Douglas said, was that there should be immunity everywhere. Rather than all federal taxes to quash state innovation, Douglas said, states should be given free space within which to experiment.[156]

Both opinions (admittedly for only three Justices) turn on the same inability to discern. And in an opinion for four of the Court, Chief Justice Stone agreed the judgments were difficult, but declined to abjure all such judgments. There would be some federal taxes not on their face discriminatory which the Court would not uphold. However, how one drew that line would be difficult in the future to say.[157]

But, again, what unites all three opinions is an understanding that this act of drawing affirmative limits on the scope of federal taxing power, in the name of preserving traditional, or essential, state functions, could not help but make the Court, in context, look political. Even if one believed that in the abstract such lines could be manageable, the process of drawing them would render them political. Limits of this sort failed, in the view of these Justices, for just the reason that limits confronting the New Deal failed.

The second example was, before *Lopez*, the last great struggle in the Court to protect federalism interests. This is the battle that began with *National League of Cities*,[158] and ended, in a sense, with *Garcia*,[159] concerning the extent to which the federal government can regulate states.

The pattern of this cycle should be quite familiar. Indeed it is precisely the pattern just observed in the tax immunity cases. What

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[156] Id at 590–98 (Douglas dissenting).

[157] Id at 586–90 (Stone concurring).

[158] *National League of Cities v Usery*, 426 US 833 (1976).

[159] 469 US 528.

gives rise to the conflict—the problem, in the terms used above—is the increasing scope of federal regulations and state regulatory activity, leading, as in the tax immunity cases, to the unavoidable conflict between the two. The solution, as the Court sees it, is again a move of translation; some limits to federal power must be implied to preserve to the states a domain of autonomy to allow them to regulate themselves. The question then is what tools will be implied—what kind of tools will be used to effect the limits that the Court believes the original balance requires.

The test announced in *National League*—limiting the federal government's power to regulate "states qua states"—was implemented with a set of tools. The tools were strikingly similar to those first selected in the tax immunity cases. Where the federal government regulated within traditional domains of state functions, *National League* invalidated such laws; where it regulated in an area not traditionally within the domain of state functions, the regulation was permissible.[160]

As one might have predicted, these tools were not destined to be especially useful. As lower courts began to implement the mandate of *National League*, the very same problems that had plagued the analogous test in the tax immunity cases plagued the courts here. How one determined which functions were "traditional," given the radical change in technologies over 200 years, was not clear. And because not clear, conflicting interpretations of various federal laws emerged. As these conflicts worked their way to the Court, it became more and more plain that this regime for translating federalism was not going to succeed. For it was generating an extraordinary amount of insecurity without any clear sense about how this uncertainty could be reduced.[161]

The uncertainty was ended, for the time being it appears, in *Garcia*. In an opinion written by Justice Blackmun, the Justice who had given *National League of Cities* its fifth vote, the Court gave

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[160] *National League*, 426 US at 852.

[161] As the Court later recognized,

> Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

Garcia, 469 US at 530.

up the *National League* tools for translating federalism. The reasons, again, will be familiar. As in the tax immunity cases, what plagued the Court here was that there could be no firm line that would divide proper from improper federal regulation; the line instead was constantly shifting.[162] And if the line was constantly shifting, then the Court couldn't help but appear political in its shifting resolution of these federalism cases. As the list of cases on both sides of the test began to look more and more arbitrary, the arbitrariness of this test became an insurmountable burden for the Court. It gave up the search that *National League* began, because the institutional costs of the search had become too much.[163]

What the examples should suggest is the particular unavailability, in this legal culture, of a particular kind of tool for limiting the scope of federal or state power. This is any tool that attempts to draw categorical limitations that turn on the "nature" of the subject being regulated. Repeatedly, tools like this have failed.[164] They have failed because this is not a legal culture that can well

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[162] In the words of Justice Black:

> There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been nongovernmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

Garcia, 469 US at 546, quoting *Helvering v Gerhardt*, 304 US 405, 427 (1938) (Black concurring).

[163] As the Court held,

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.

Garcia, 469 US at 546–47.

[164] Again, the failures have been in the tax immunity context, see *Garcia*, 469 US 528, 541–42 (1985), and the "states qua states" context, see, for example, id at 538–39 ("Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, . . . licensing automobile drivers, . . . operating a municipal airport, . . . performing solid waste disposal, . . . and operating a highway authority, . . . are functions protected under National League of Cities. At the same time, courts have held that issuance of industrial development bonds, . . . regulation of intrastate natural gas sales, . . . regulation of traffic on public roads, . . . regulation of air transportation, . . . operation of a telephone system, . . . leasing and sale of natural gas, . . . operation of a mental health facility, . . . and provision of in-house domestic services for the aged and handicapped . . . are not entitled to immunity.") (citations omitted).

sustain these efforts at casuistry: not because there is anything in particular bad about casuistry, but because there is just nothing particularly good about our facility with these.

What this does not mean, however, is that there are no tools for limiting federal or state power—that there are no tools, that is, for translating federalism. Indeed, I believe there are such tools, and that we have seen the Court, whether knowingly or not, often follow a strategy that does embrace this kind of tool. These tools we can call second-best limits on governmental power. They are prophylactic, in just the way much of the Warren Court's rules for criminal procedure were prophylactic. They are tools that have the effect of advancing the interests of federalism, though they don't directly seem to do this. But what is important about them is that they are tools that can, meaningfully, be applied by a Court in the current legal context.

Translation's Second-Best Tools

The trick to translating limits on governmental power is to find limits that a court—or better, our Court—can impose, and sustain, over the run of cases that any such limit will produce. Translation is subject to these institutional constraints. The constraint that I have identified here is the Frankfurter constraint—that a tool that in its operation makes the Court appear political is a weaker tool for just that reason. The trick is to find tools that do not violate this constraint.

My aim in this section is to sketch three examples of rules for translating federalism that do not violate the Frankfurter constraint—or at least do not do so now, since again whether a tool violates the constraint is a function of the interpretive context. The primary author of these tools has been federalism's most avid translator, Justice O'Connor. Just about without exception,[165] O'Connor has offered rules for translating federalism that would do so consistent with the Frankfurter constraint. These rules succeed in imposing limits on federal interference with state activities

[165] But exceptions there have been. Justice O'Connor's proposed test in *Garcia*, 469 US at 580, 585–86 (Necessary and Proper Clause) as well as *South Carolina v Baker*, 485 US 505, 533–34 (1988) (O'Connor dissenting) (Republican Guarantee Clause) both would have violated the Frankfurter constraint.

without directly pursuing federalism values. Their motive is the protection of federalism values, and their effect will be the protection of federalism values. But their means is something different.

CLEAR STATEMENT

The first of these techniques was used as a supplement to *Garcia* in *Gregory v Ashcroft.*[166] At issue was the application of the Age Discrimination Act to state judges who, under the state constitution, were required to retire at age seventy. Under the rule that *Garcia* replaced, the rule of *National League of Cities*, the Court might have had to determine whether regulating the age at which states may force their judges to retire was a regulation of "states as states." *Garcia* disposed of that rule,[167] and replaced it with a rule that relied upon the political process.

The Court in *Gregory* sought to improve this political process through the use of a clear statement rule. Said the Court, affirming the rule of *Garcia*, "Congress may legislate in areas traditionally regulated by the States," but the Court will not assume that Congress exercises this power "lightly."[168] Therefore, before assuming that Congress has exercised this power, "it is incumbent upon the federal courts to be certain of Congress's intent. . . ."[169] To be certain, then, the Court requires that Congress speak with particular clarity when it attempts so to regulate. Citing a clear statement case from the Eleventh Amendment context, the Court said,

> If Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so unmistakably clear in the language of the statute.[170]

This is the rule of clear statement. With this device, the Court measures Congress's statute against an implied standard of cer-

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[166] 501 US 452 (1991).

[167] Subject, at least, to the limitations later imposed by *New York II.* See text accompanying notes 183–87.

[168] *Gregory*, 501 US at 460. This language notwithstanding, the focus is not field preemption, but rather clear statement.

[169] Id (internal citations omitted).

[170] Id, citing *Atascadero State Hospital v Scanlon*, 473 US 234, 242 (1985).

tainty, to measure whether the Court believes that Congress really intended to reach as far as it apparently did. Where a statute is ambiguous, or where a particularly strong state interest or individual right is being overridden by governmental action, then the Court will require of Congress that it make its intent more clear. The Court will not presume, from simple ambiguity, that Congress intended to invade a domain of state regulatory interest.

Now the contexts within which the Court has applied the clear statement rule are many. They range from individual rights cases,[171] to Eleventh Amendment cases,[172] to cases where the fear is Congress's invasion of traditional state functions.[173] In each case, the notion is simply that any intent to change the constitutionally preferred status quo must be demonstrated by clear language in the statute.[174] But it should be plain that in setting out such a rule, the Court is setting out a constitutionally preferred status quo. And by increasing the costs for deviating from that status quo, it is reducing the number of deviations.

The advantage of the clear statement rule is twofold. First, it functions primarily as a channeling device. It requires simply that Congress be certain of an intent to alter a presumed constitutional balance. Second, it can achieve this function without requiring of the Court some impossible interpretive task. Determining whether a statute is sufficiently clear is an activity within the ordinary ken of the Court. We can expect, then, that the Court's adjudication of these cases will yield a fairly consistent line of authority.

What application of the clear statement rule does require, however, is a plain articulation of the values underlying the selective application of this special rule of clarity on Congress's statutes.[175] This articulation itself may expose the Court to some political cost. But so long as the values articulated do not appear arbitrary, or do not change radically over the life of the Court, they are unlikely

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[171] See, for example, *Kent v Dulles*, 357 US 116, 129 (1958).

[172] See, for example, *Atascadero*, 473 US at 242.

[173] *Gregory*, 501 US at 464.

[174] Id at 460.

[175] It is of course true that the rule applies only to Congress's statutes, but it is unclear what Justice Souter means by saying they are "merely rules of statutory interpretation." *Lopez*, 115 S Ct at 1655 (Souter dissenting). What informs these rules are constitutional values, and to the extent that these values undercut, or redefine the scope of Congress's statute, they are, to that extent, constitutional rules.

to cause any great political cost to the Court. If the values can instead reflect what at a minimum all can agree upon about the federalist origins of the constitutional design, the fact that the rule expresses these values would not render it political. Again, what renders a rule political is contestability, not values.

Finally, one should be candid about the role for the Court that such a rule presumes. If the Court's job were simply to find Congress's meaning, then it would have no right to impose on Congress anything like a clear statement rule. But the Court is not simply the handmaiden of Congress. Its duty is also to the Constitution. The question is how best it can satisfy that duty. In my view, there is nothing wrong with the Court asserting its own rules for reading Congress's statutes, so long as those rules are designed better to effect the values of the Constitution. Such is the nature of a clear statement rule.

SPENDING

The clear statement rule has relatively general application. The next two rules are more targeted. The first is a rule suggested by Justice O'Connor for policing the federal spending power. As a practical matter, there are no real federalism limits on the federal power to spend. While other federalist regimes have worried well about the danger that federal spending has on the autonomy of state authority, and have therefore imposed substantial limitations on federal power to spend,[176] our Court has done very little to limit federal spending in the name of state autonomy.

South Dakota v Dole[177] states the Court's most recent test.[178] In it, Chief Justice Rehnquist outlined a four-part test for limiting federal power to spend, and hinted at a fifth. The four limits on spending are as follows:

> The first of these limitations is derived from the language of the Constitution itself; the exercise of the spending power must be in pursuit of "the general welfare." [. . .] In considering

[176] Germany, for example, has very strict federalism limitations on federal spending authority. See Currie, *The Constitution of the Federal Republic of Germany* at 210 (cited in note 4).

[177] 483 US 203.

[178] For an excellent recent account of the evolution and theory of the spending power doctrine, see David E. Engdahl, *The Spending Power*, 44 Duke L J 1 (1994).

> whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. [. . .] Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously. . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." [. . .] Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." [. . .] Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.[179]

The condition hinted at was that the conditions imposed not be so extreme as to become coercive.[180]

Of these four conditions, only the second has any effect on structuring spending power. For it is just a clear statement rule, that functions here just as any clear statement rule. The fourth condition adds nothing to what the Constitution already requires—for of course, Congress may not pass a law disregarding "an independent bar" to a grant of federal funds. The first and the third conditions are in principle limits, but in practice can be no limit at all. The reason is the same as the reason that the fifth condition—that the conditions cannot be too extreme—cannot in practice be any limit at all. All three fail as limits because to apply them would be to violate the Frankfurter constraint. That would apply most clearly to the first rule, for there is no feasible way the Court could strike a statute as without the "general welfare" without the Court returning to the days of *Lochner*.[181] The Court acknowledges as much in announcing the rule. So too could the Court not apply the third or fifth condition. Whether a limitation on federal spending is "related" is just the same question the Court asks in the Necessary and Proper Clause context. There, as here, judgments about "relation" could not be made in a sufficiently predictable way to avoid seeming political.

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[179] *South Dakota*, 483 US at 207–08 (citations omitted).

[180] Id at 211.

[181] The point is not just that these are matters of degree. All of law is a matter of degree. The point is that these are matters of degree in a context where drawing a line through these matters of degree will appear political. Drawing a line will not always appear political. But where it does, the Frankfurter constraint requires restraint.

What these considerations strongly suggest is that the political costs, or the rhetorical burden, of applying this rule to limit federal spending conditions would be extremely high, and consequently, as predicted, the number of times the rule has been applied to limit federal spending programs low—never. What the rule of Chief Justice Rehnquist barely hides is the judgment that there is nothing the Court *can* do to limit conditions on federal spending, even if there is something the Court *should* do.

Justice O'Connor, however, offered a rule that would certainly limit federal spending, motivated by a desire to preserve state autonomy, but pursuing this objective indirectly. She proposed a test that forbade any conditions on spending grants that were beyond regulations on how the money would be spent.[182] A condition that said no money granted may be spent on X, Y, and Z would be constitutional; a condition that said this money is accepted on the condition that the state do X, Y, Z would not.

The advantage of this rule is solely its administrability. The line between "conditions on how the money is spent" and other conditions is relatively clear. But what is striking about the test is its artificiality. For there is nothing in the text of the spending clause that would suggest these limits on federal spending; nor is there anything in its history. What is striking also is the crudeness of the rule. For the rule would force the federal government to do indirectly what it was not allowed to do directly.

But "artificiality" and "crudeness" are criticisms of a rule only if a better rule is available, and because of the Frankfurter constraint, I am not sure that one is. That is, again it seems that this indirect way of enforcing federalism interests is more effective than the direct way outlined by Chief Justice Rehnquist. Chief Justice Rehnquist's test is more obviously related to the federalist interest in limiting spending, yet it works to effect no substantial limit at all; while Justice O'Connor's test seems only accidentally related to the federalist interest, but would succeed in practice in substantially advancing federalism interests. Again, the difference here reflects an institutional constraint of the Court, but one which the Court cannot well ignore.

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[182] *South Dakota*, 483 US at 215–17 (O'Connor dissenting).

COMMANDEERING

My third example is as specific a rule as the spending rule, but perhaps less significant, if only because the kind of "invasion" at issue is less prevalent.[183] This is the rule against "commandeering" given to us in *New York v United States.*[184]

At issue in *New York v United States* was a federal program designed to deal with the problem of nuclear waste. Among its many provisions was one set of requirements that constituted the "commandeering" that the Court held unconstitutional. In these regulations, Congress required that states either enact certain regulations, or take title to that state's nuclear waste. That the federal government couldn't force the states to take title seemed to flow from the principles of the first *New York v United States:* To force states to take title to this property of negative value would be in essence to tax the states; the first *New York* clearly indicated that a discriminatory tax against the states would be unconstitutional.[185]

What about simply requiring them to enact certain regulations? Well it is clear that the federal government would have the power to require private organizations to enact similar regulations, for the regulations here clearly affected interstate commerce. But what made these requirements problematic was that they were applied to the states. "[B]y directly compelling [states] to enact and enforce a federal regulatory program,"[186] the federal government was "commandeering" the states in the exercise of their sovereign power. This, the Court held, was unconstitutional.

Now again there is much to wonder about here. For why, one might ask, is there any real problem with much of what the federal government might require through commandeering?[187] Certainly there are plenty of cases where the commandeering the federal government achieves is really quite insignificant to any federalism interest. Why then a rule that cuts so crudely?

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[183] Compare below at note 187.

[184] 112 S Ct 2408 (*New York II*).

[185] See *NYI*, 326 US at 575–76.

[186] Id at 2428.

[187] In some areas there has been a problem. The best example is in air pollution regulation, see David P. Currie, *Air Pollution: Federal Law and Analysis* §§ 2.40, 2.46 (Callaghan, 1991). See also Norman Dorsen, *The National No-Fault Motor Vehicle Insurance Act: A Problem in Federalism*, 49 NYU L Rev 45, 61–62 (1974).

But obviously the reason again links to the limitations on the Court's power to distinguish. For here again, Justice O'Connor, as she did with the spending rule, offers a rule that is both under- and overinclusive, which does not directly seem to advance federalism interests, but which can, because of its simplicity, be applied by the Courts to advance federalism values. Once again, she has offered a second-best rule because of the constraints making impossible any first-best rule.

THE LESSONS FROM THESE LIMITS

What federalism needs, as Justice O'Connor describes, is for the "Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power."[188] But for the slight flip in passivity, this, I think, captures well the problem a federalist-focused court faces. For it is not that the commerce power has grown because of the "craft" of the Court; it has grown because of the integration of a national economy, the craft of the Court notwithstanding. And it is not that the Court can simply "enforce" affirmative limits on federal regulation—such limits simply don't exist out there to be found; they must, instead, themselves be "crafted." What federalism requires is for the Court to craft, to construct, to make-up, limits on regulative authority, both state and federal, so as to check the growth in the commerce power, to the extent that growth has set the original balance askew. The task again is the same as that undertaken by the Court in the context of individual rights, where in the name of a founding vision of liberty, the (Warren) Court imposed affirmative limits on governmental power to reconstruct a space of individual liberty.

But in crafting these tools, the Court is constrained by its own institutional design. It is constrained first, I have argued, by what I have called the Frankfurter constraint: That in engaging in this practice of constructing, the Court cannot adopt a rule that, in context, appears to be political. This constraint, I have argued, explains well much of the change in the tools that the Court has indeed crafted. For what the change in these tools in part at least reflects is a sensitivity to the rhetorical burden of any particular

[188] *Garcia*, 469 US at 587 (O'Connor dissenting).

rule. As that rhetorical burden has increased, the Court has substituted other less burdensome tools.

At least when such substitutes are available. For a second lesson from the account so far is that sometimes such tools are not available. Sometimes the context has changed such that any effort at limiting the power of the government, in the name of fidelity or anything else, will be perceived as political. This at least was my account of the changes at the New Deal. In that context at least, regardless of the truth of the matter, the Court could not credibly constrain Congress without undermining its own institutional authority.

But times like the New Deal—and cases like *Casey*—are the exception. And to say that there are general classes of tools that are no longer available for translating federalism is not to say that no tools exist. My aim in this last part has been to argue that, indeed, such tools do exist; that they succeed to the extent that they can be enforced by a court without great rhetorical cost; and that there are at least three examples of these tools to consider.

What unites these second-best rules is that they have the effect of advancing the interests of federalism without requiring the Court to define those values in a way that is inevitably contestable. They are, therefore, ways of preserving fidelity while minimizing the institutional cost to the Court.

There should be more. But what limits this conservative effort at fidelity is a misplaced conservatism in the tools chosen by the Court. None of these second-best tools can be said to be derived from the text of the Constitution; each is plainly constructed and imposed upon a constitutional text in the name of a deeper fidelity with the Constitutional structure. Yet it is just this constructivism that this conservative Court seems wont to do. Rather than creatively adapting second-best tools to the end of fidelity, the Court more often than not adopts a tool that, while closer to the constitutional text, turns out to be self-defeating in application. Rather than strategic, the Court is plodding.

This presents, I suggest, an odd paradox. What the lessons of federalism's successes, and failures, teach is that fidelity requires a certain radicalness. That to be faithful to the constitutional structure, the Court must be willing to be unfaithful to the constitutional text. Yet this nominal infidelity this Court can't commit, thus committing it, I suggest, to an infidelity more fundamental.

It seems unable, that is, to adopt workable tools where those tools seem far removed from the constitutional text, and thus seems trapped in adopting textually supported rules that will, over time, prove unworkable.

As Applied to Lopez

The point is well made in *Lopez*. Alfonso Lopez was a student at Edison High School in San Antonio, Texas. On March 10, 1992, he showed up at school with a gun. He was arrested, and charged under Texas law. The next day, under a statute that made it a federal crime to possess a gun within 1,000 feet of a school, he was prosecuted by federal authorities as well. State charges were then dismissed.[189]

In the district and appeals courts, Lopez argued that the statute was beyond Congress's power. Surprisingly, the Court of Appeals for the Fifth Circuit agreed.[190] The court held the statute unconstitutional, as beyond Congress's power under the Commerce Clause.

And so too did the Supreme Court. In an opinion written by Chief Justice Rehnquist, the Court reiterated what had been a mere article of faith for some time—that Congress's power was not unlimited—but for the first time in more than half a century, the Court evinced that faith by striking down the statute.

Rehnquist's opinion was short and to the point. Commerce Clause jurisprudence has distinguished three kinds of regulations of Commerce:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . , *i.e.*, those activities that substantially affect interstate commerce.[191]

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[189] *Leading Cases*, 109 Harv L Rev 111, 111–12 (1995).

[190] *United States v Lopez*, 2 F3d 1342, 1367–68 (5th Cir 1993).

[191] *Lopez*, 115 S Ct at 1629–30 (citations omitted).

Because there was no showing, or requirement of a showing, that this gun had traveled in interstate commerce, Congress could reach it only if it could be shown that the "activity" "regulated" had a "substantial relation to interstate commerce" or "substantially affect[ed]" interstate commerce. As the Court wrote,

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[192]

What captured the Chief Justice's opinion was an argument that is quite familiar. This is the *reductio:* Ours is a government of enumerated powers. Enumeration presumes that something is unenumerated. Therefore, any argument that entails that there is nothing the government can't regulate is an argument inconsistent with enumeration. Neither the dissent nor the government in *Lopez* could articulate any principle that would limit Congress's power under the Commerce Clause. The presupposition of enumeration was therefore violated. As the Court worried,

> Under the theories that the Government presents in support of §922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.[193]

So much should be common ground. Granted, in an economy such as our own, every activity "affects" interstate commerce, in the sense that "[m]otion at the outer rim is communicated perceptibly . . . to recording instruments at the center."[194] In an economy such

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[192] Id at 1630–31.

[193] Id at 1632. See also id at 1628 (identifying the reason for the earlier restraints as the fear of this *reductio*); id at 1642 (Thomas concurring) (raising the fear that the power would include the power to regulate "marriage, littering, or cruelty to animals").

[194] *Schechter Poultry*, 295 US at 554 (Cardozo concurring).

as this, there is no limit to be found in the nature of the "effect." Granted also that if Congress exercised this power to its fullest, it would obliterate any space left for exclusive state legislation. Therefore, it follows, if a space is to be preserved, the power must be limited. With this much of the opinion, I do not believe anyone can fairly disagree.

The question is simply who should draw the limits: Congress or the Court. No doubt foxes don't guard hen houses well, and likewise, Congress may not be the ideal guardian of states' rights. But the question is not who is *ideal;* the question is who is *best.* The Court would be best if it could construct tools that would limit Congress's power without running afoul of the Frankfurter constraint. But whether the Court can construct such tools is the question to be answered. The answer is not a given.[195]

In my view, the tools that Chief Justice Rehnquist has provided in *Lopez* will run afoul of the Frankfurter constraint.[196] They will violate the Frankfurter constraint for the same reason that tools in *National League of Cities* run afoul of the Frankfurter constraint. This is not because any set of tools would similarly fail—indeed, at the end of this essay I will suggest limits that would not. But it is because the limits that *Lopez* sets are not stable, and that unless restructured, will invite a new Justice Blackmun, embarrassed by the mess that *Lopez* has created, to write the next *Garcia.* We are Sisyphus; the cycle has begun again.

This is indeed unfortunate. For by once again giving us a tool that attempts to track what federalism was *really* meant to protect, the Court has given us a tool that will really protect nothing.

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[195] There is of course a long tradition that views judgments about such matters of "discretion" as resting with Congress, checked by the people alone. Frankfurter, of course, is a leader in this school, Frankfurter, *The Commerce Clause* at 41 (cited in note 30), but the genealogy of this view reaches back to *McCulloch,* and gets echoed in cases throughout our history. See, for example, *McCray v United States,* 195 US 27, 55–56 (1904).

[196] To endorse, as I have here, a place for the "Frankfurter constraint" in any theory about interpretive fidelity is not to endorse the extent to which the principle was carried by Frankfurter himself. Frankfurter's application of the rule often seemed to turn on whether there was an absolutely determinate result possible, rather than on whether indeterminacy would be viewed as political. Thus, in the apportionment cases, he objected to federal court involvement because mathematical certainty would not be possible. See *Baker v Carr,* 369 US 186, 266 (1962) (Frankfurter dissenting). But whether certainty is possible or not is not the question; the question is whether any uncertainty would be viewed as political. Whether it has is an open question; but whether it has is not simply a function of the uncertainty.

There is a realism in the Court's method. But we must be realistic about this realism if this effort at fidelity is to succeed: Realist limits can never effect effective judicial limits on governmental power, or at least the naive realism revealed here cannot. If limits are to be found, they must be made. And if they are to be made, they will be made only with the tools of a sophisticated formalism. What the neo-formalist realizes is that formalism is not an ontology; formalism is a tool.[197] And the lesson of realism should be that it is the only tool with which legal policy can be effected by a court against the will of a legislature.

In what follows, then, I want to sketch just why the tools that Rehnquist has given us will fail, and then very briefly I will outline the kinds of tools that might not.

THE INVISIBLE NECESSARY AND PROPER CLAUSE

The question the Court asks in *Lopez* is whether the statute is constitutional "under [Congress's] commerce power"[198]—whether the "*commerce authority*"[199] reaches this far. The Court concludes that it does not. But it never continues with what is ordinarily the next question in any power inquiry—whether the exercise of this power is nonetheless "necessary and proper" to the exercise of some congressional power, here the commerce power. For even if Congress's "commerce authority" does not reach this activity, it has long been understood that Congress's legislative authority may reach beyond the particular enumerated powers—to, that is, unenumerated powers—so long as that Necessary and Proper authority is used "to effectuate other policies within the express powers."[200]

The source of this authority, of course, is *McCulloch v Maryland*,[201] a case decided six years before *Gibbons*, upholding the constitutionality of Congress's Second Bank of the United States.

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[197] This again is Schauer's point. See Schauer, *Formalism*, 99 Yale LJ 509 (cited in note 137).

[198] *Lopez*, 115 S Ct at 1629.

[199] Id.

[200] Gardbaum, 79 Cornell L Rev at 781 (cited in note 112).

[201] *McCulloch*, 17 US (4 Wheat) 316.

Congress had no expressly enumerated power to incorporate a bank; nonetheless, held the Court, it did have the authority by virtue of the Necessary and Proper Clause. Founding a bank was just a means; and the Necessary and Proper Clause granted Congress the "discretion" to select the "means by which the powers" the Constitution confers on it "are to be carried into execution."[202] As Marshall wrote, practically copying Hamilton's earlier argument to President Washington,[203]

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[204]

Now of course the Court in *McCulloch* didn't tell us which end it thought the bank a necessary means to; Marshall suggested a number of possible ends, but never resolved really which the Court thought this statute served. Nonetheless, what is important is that *McCulloch* itself established, and later cases consistently agreed,[205] that Congress's power is not at an end once the end of an enumerated power is reached; always left for consideration is whether the activity being regulated can nonetheless be regulated under the Necessary and Proper power. Following this inquiry was the practice of the Court for much of the century and a half after *McCulloch*

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[202] Id at 421.

[203] As Hamilton described Congress's power, what is constitutional or not,

> is the *end* to which the measure relates as a *mean*. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of national authority.

Randall, *Thomas Jefferson* at 506–07 (emphasis in original) (cited in note 11).

[204] *McCulloch*, 17 US (4 Wheat) at 421.

[205] *Gibbons* too supports this view. As I indicated above, the negative implication of the third part of Congress's power is best understood as referring to the Necessary and Proper power. Again, as Marshall indicated there, federal power would extend to objects wholly internal if they "concern" more than one state. But this is just the Necessary and Proper analysis of *McCulloch*. And thus again, the question of Congress's power is whether the power derives from the commerce power directly (that which reaches more than one state) or from the Necessary and Proper Clause (where regulation is "necessary" for the purpose "of executing some other power"). See note and text accompanying note 33.

was decided, in both commerce cases[206] and other powers cases as well.[207]

The practice comes to an end, for a brief period of time, during the first efforts of the Court to limit Congress's commerce power. For there too the Court simply ignored the Necessary and Proper Clause. The beginning was *Knight*, where again the Court determined the scope of the Sherman Act by considering the meaning of "commerce" alone, and concluded that "manufacturing" was not "commerce" so did not fall within the scope of the Act.

In the context of the Sherman Act, this narrow view may well have been proper—for again, the Sherman Act has no "necessary and proper" language. But outside the Sherman Act, it makes no sense. Even if the "Commerce Clause" does not reach "manufac-

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[206] See, for example, *United States v Coombs*, 37 US (12 Pet) 72, 77 (1838) (actions which "interfere[ ] with, obstruct[ ], or prevent" commerce though not themselves on water, and hence not within Congress's admiralty power, "may be punished by Congress under its general authority to make all laws necessary and proper"); *United States v Dewitt*, 76 US 41, 44 (1869) (Congress's power does not reach "internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution" another power of Congress); *Railroad Commn. of Wisconsin v Chicago, Burlington & Quincy R.R. Co.*, 257 US 563, 588 (1922) (regulation of intrastate railroad rates permissible when "incidental to the regulation of interstate commerce and necessary to its efficiency"); *Jones & Laughlin*, 301 US at 36–37 (power to regulate commerce "is the power to enact 'all appropriate legislation' for 'its protection and advancement' ") (citations omitted); *Darby*, 312 US at 121 (Congress may use "means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities"); *Wickard*, 317 US at 121; *Katzenbach*, 379 US at 302, quoting *United States v Wrightwood Dairy Co.*, 315 US 110, 119 (1942) (Congress's power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end"); *Heart of Atlanta*, 379 US at 275 (Black concurring) ("Congress . . . has power under the Commerce Clause and the Necessary and Proper Clause to bar racial discrimination in the Heart of Atlanta Motel and Ollie's Barbecue."). See also Currie, *The Constitution in the Supreme Court, 1789–1888* at 430 n 6 (cited in note 46) ("Congress had authority under the necessary and proper clause to protect interstate or foreign commerce by persons not themselves engaged in commerce."); Note, *Power of Congress to Regulate Intrastate Rates*, 14 Colum L Rev 583, 585 (1914) (questioning whether the Court means the power to reach internal commerce to flow from "the 'necessary and proper' clause, superadded to the Commerce Clause"); Charles E. Carpenter and Robert Charles Mardian, *When Is Commerce Interstate?* 22 S Cal L Rev 406, 406 (1949) ("However, it must not be forgotten that, even if this line of demarcation [between inter- and intrastate commerce] is clearly established . . . the control of Congress may still prevail because of the relation which the intrastate matter regulated bears to interstate commerce.").

[207] A favorite example is the power to construct a monument to the Battle of Gettysburg, upheld unanimously by the Court in *United States v Gettysburg Elec. Ry.*, 160 US 668, 681 (1896), held to be necessary and proper to, "inter alia, the power to raise armies, essentially because it would instill feelings of patriotism that would make better soldiers." Currie, *The Constitution in the Supreme Court, 1888–1986* at 24 n 117 (cited in note 46). See also id at 100.

turing" since "manufacturing" is not "commerce," there is still the question whether regulating manufacturing is necessary and proper to the regulating of commerce. This question, crucial to a complete analysis of Congress's power, never gets asked in these early cases limiting Congress's power under the Commerce Clause. Instead, as in *Lopez*, the Court limited its view to "commerce authority" alone: As the Court said in *Carter Coal*, "the validity of [Congress's] act depends upon whether it is a regulation of interstate commerce" and therefore that "the nature and extent of the power conferred upon Congress by the Commerce Clause becomes the determinative question."[208]

There are passages in some of the opinions in *Lopez* that makes it seem as if the Court simply forgot the Clause.[209] But I do not believe the Clause was forgotten either here, nor in the first cycle of these Commerce cases. The Clause is ignored, not forgotten; it is ignored because to consider it would be to make impossible any limit on Congress's power. For if the Court analyzed this exercise of power under the Necessary and Proper Clause, then there would have been no way to limit Congress's power without running afoul of the Frankfurter constraint.[210]

We can see this by briefly considering three narrower ways that the Necessary and Proper Clause could be interpreted. Each, I will argue, would either fail to limit Congress's power, or run afoul of the Frankfurter constraint. The first would be to require a tighter fit between ends and means when regulating in the Commerce sphere. This, in effect, is what *Lopez* does, though not under the Necessary and Proper Clause. It requires that the claim that something "affect" interstate commerce be made more plain than Congress did; and that the effect will not be so easily implied, at least

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[208] *Carter Coal*, 298 US at 297.

[209] Justice Thomas, while referring once to the Necessary and Proper power, then apparently ignores it, resting his analysis on the meaning of the word "commerce" at the founding, and upon the meaning given the Commerce Clause by *Gibbons*. See, for example, *Lopez*, 115 S Ct at 1647 (Thomas concurring). Says Justice Thomas, "The Commerce Clause does not state that Congress may "regulate matters that substantially affect commerce . . . ." Id at 1644. True, but again, the Constitution *does* say that Congress may regulate means which are "necessary and proper" to regulating commerce, which matters "that substantially affect commerce" plainly are.

[210] Even in a fairly formal legal culture such as France, the determination of what is a "necessity" is viewed as political. See Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* 154 (Oxford, 1992).

where the activity involved is deemed "non-commercial." But the problem with this is just the problem Marshall saw in *McCulloch:* That the Court is not in the position to weigh these interests, to test the degree of necessity needed, and that its efforts here could not help but become inconsistent. What repeated litigation about the tightness of the means/end relationship would produce is just the inconsistency that the Frankfurter constraint enjoins.

A second technique is suggested by Gary Lawson and Patricia Granger. This would focus not so much on the "necessity" of a particular regulation, or again, the tightness of the fit between means and ends. Instead, this approach would focus on the "propriety" of any means selected.[211] So understood, a regulation would not be permitted under the Necessary and Proper Clause if it was a regulation with an improper purpose.

While this approach is doctrinally well executed, as others have suggested, it is not clear what it adds to the existing regime. For the approach is essentially formal; one needs to have a conception of "propriety" that would then govern whether a regulation was proper or not. That technique could look either to the end to be regulated, or the means used to regulate. If it is the former, then the test collapses into the purpose test; if it is the latter, then the question is how the Court determines what means are "proper." Should it look just to the what the framers would have thought "proper,"[212] or may "proper," like "cruel," "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[213] If it is the former, then it faces all the problems that the historical tests of the tax immunity cases and the *National League of Cities* cases faced above; if it is the latter, then in articulating this evolution, the Court would be describing contestable values that would expose it to the charge of violating the Frankfurter constraint.

The final technique is Marshall's in *McCulloch* itself. It asks

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[211] Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L J 267, 333 (1993).

[212] Id ("An originalist, for example, would ask whether a fully informed public in 1789 would have regarded a particular distribution of governmental power as an 'improper' departure from sound separation of powers principles. Whatever the content of that doctrine may be, however, it is textually incorporated into the Constitution through the Sweeping Clause.").

[213] *Trop v Dulles*, 356 US 86, 101 (1958) (interpreting the Eighth Amendment).

whether the exercise of Congress's Necessary and Proper power is really just a pretext for invading forbidden domains.[214] While some have applied this pretext test to Congress's power generally,[215] in my view, the best reading of Marshall's opinion in *McCulloch* is to see it as a test to limit the necessary and proper power in particular, and not Congress's power generally. 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.[216] 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.[217]

But again, making the Court the police of propriety makes the Court the target of Frankfurter's complaint. The problem is the same as in the other two techniques. In each there is the gap that will sweep in the tensions with the Frankfurter constraint. To judge these matters of degree would be to judge matters seen as inherently policy driven. This is not to say that there is something conceptually impossible about requiring the Court to engage in such an inquiry. Indeed, the Court has done this before.[218] But what undermines this as a technique is the same thing that undermined other "purpose" techniques before: The difficulty of establishing an improper purpose means that the technique is just an effective way to ratify, rather than check, the power of Congress. The rhetorical burden of claiming pretext, given the multiplicity of reasons any legislation is passed, and given the basic questions about what intent means here anyway, means this technique too would likely fail effectively to constrain.

The only choice left open to the Court then was to dissemble;

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[214] *McCulloch*, 17 US (4 Wheat) at 423.

[215] *Lottery Case*, 188 US at 372 (Fuller dissenting).

[216] See, for example, *McCray*, 195 US at 54–55.

[217] See, for example, *Carter Coal*, 298 US at 317–19 (Hughes concurring).

[218] See, for example, *Dewitt*, 76 US at 44 (1869) ("This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.").

to ignore the clause as a way of limiting the reach of the commerce power. If this is a tool, no doubt it is an administrable one. But as a tool for limiting Congress's commerce power, it would also be incomplete. Thus *Lopez*'s second tool, which I discuss in the section below.

COMMERCIAL EFFECTS

The omission of the Necessary and Proper Clause is a necessary move to isolate the commerce question from a more general authority supporting Congress's power. But it alone does not do the work of the opinion. The battle in the future will be over the second tool in the *Lopez* set: the limitation of Congress's "affects interstate commerce" power in contexts where the activities regulated are not commercial.

One should say at the start that the scope and nature of this limitation are not at all clear from the opinion. The Court did not say absolutely that only commercial activities can be reached by the "affects" branch of Congress's "commerce authority" (the third part of Congress's "commerce authority"—that part reaching objects that "substantially affect" interstate commerce). It only indicated that it would be harder to so reach it. But how much harder? What more would be necessary before the Court will allow Congress to reach an activity, not itself commercial, but which affects interstate commerce? The safest reading might be that where the activity is not commercial, then the "aggregation principle" (that allows otherwise insignificant activities to be aggregated into an activity affecting interstate commerce) will not apply.[219] So understood, *Lopez* could be read as a limitation on *Wickard*, limiting *Wickard* to cases where the regulated activity is commercial.[220]

In my view, however, this hole in the opinion is of little real significance. Indeed, we could imagine it being filled with something like a clear statement rule, simply requiring Congress to make clear the links it imagines its statute to draw upon. Far more

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[219] Compare Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv L Rev 1335, 1364 n 125 (1934) (describing the necessity of the aggregation doctrine).

[220] See *Wickard v Filburn*, 317 US 111 (1942). This would be consistent with the facts in *Wickard*, though if one adopted Justice Thomas's view of commerce (excluding agriculture), it would not. See *Lopez*, 115 S Ct at 1643 ("As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture." (Thomas concurring)).

significant than this tiny hole is how this commercial/noncommercial distinction will be drawn.

We can best see the problem by focusing on two sorts of characterization problems that will no doubt plague *Lopez* litigation. The first is to characterize the activity that is being regulated. *Lopez* presents the problem adequately enough. If one says that the activity is "possessing a gun near school," then that is certainly not a "commercial" activity—at least that is so when one "injects" the word with a modern meaning. For us, at least, commerce is about making money, even though it is not so clear it had the same meaning for the framers.[221]

But if one defines the activity that narrowly, then it is unclear how, for example, the Civil Rights Act of 1964 gets upheld. For there, one could have defined the activity as "discriminating" and then asked whether discriminating is "commercial or not." Certainly the discriminating has an effect on economic activities, even if the discriminating itself is not commercial. So too, the possession of a gun near schools has an effect on commercial activities—the need to hire more guards, the effect on teachers' pay, etc.—even if the possession itself is not commercial.

The characterization problem is rendered even more plain in a case decided under *Lopez* involving the federal arson statute.[222] The facts in the case clearly established that the criminal act at issue—burning a house—was done for the purpose of defrauding an insurance company, as no doubt most arsons are. Yet Chief Judge Wallace of the Ninth Circuit held that this statute could not reach this case. Even though the statute had a jurisdictional requirement—requiring the government prove that the "residence was 'used in' or 'used in an activity affecting' interstate commerce"—the Ninth Circuit found the connection proven was not significant enough to invoke federal jurisdiction.

In one sense the case makes sense, especially under the market

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[221] Consider, for example, Shakespeare's usage in Hamlet, Act 3, Scene 1, Ophelia, "Could beauty, my lord, have better commerce than with honesty?" I do not intend, however, to start down the Crosskey road, attempting an account of the meaning of "commerce" at the founding to compete with the quite different meaning Justice Thomas has provided. See Currie, *The Constitution in the Supreme Court, 1789–1888* at 170 n 86 (cited in note 46) (describing Crosskey's views). That two so fundamentally different views of the meaning of the term could be supportable, however, suggests something of the trouble of this particular form of "originalism."

[222] *United States v Pappadopoulos*, 64 F3d 522 (9th Cir 1995).

test for interstate commerce power sketched above.[223] The government had argued that the use of natural gas showed that the house "affected" interstate commerce, since the natural gas was part of interstate commerce. The court held this was not enough, since the link was not "substantial." But from the other side, this was arson for the purpose of insurance fraud. Insurance markets are clearly interstate. Thus if the activity is arson for the purposes of insurance fraud, federal jurisdiction would seem to follow.

The point is this: Not that a line couldn't be drawn, but that the activity of drawing it, across the full range of cases, will be extremely difficult. As lower courts ask the *Lopez* question in a range of cases, the characterization problem will mean that there may well be a large number of conflicts for the Court to resolve. And without any clear principle to resolve them, their resolution will most likely seem to fall afoul the Frankfurter constraint.

But a second characterization problem is more significant. Even if one could easily define the activity being regulated, what is it that determines whether the activity is "commercial" or not?

The opinion offers us nothing in the nature of the activity to look for. Indeed, the Court quite directly concedes that "depending on the level of generality, any activity can be looked upon as commercial."[224] So then what will determine whether the Court chooses to look upon an activity as commercial or not? What is the principle that will separate "commercial" from "commercial," given that "any activity can be looked upon as commercial."

It is here that we begin to see what underlies the opinion, and here that we should feel a certain déjà vu. For throughout the opinion, again, what drives the Court is the notion that if this can be regulated, then anything can, where the "anything" that is most feared is a very particular set of objects: "family law (including marriage, divorce, and child custody)," "a school's curriculum," "every aspect of local schools." What unites this list is what grounded the concurring opinion of Justice Kennedy—that these were activities of "traditional state concern."[225] What is drawing this line between "commercial" and "non-commercial but capable of being viewed as commercial" is simply the old line drawn and

[223] See above at note 28.

[224] *Lopez*, 115 S Ct at 1633.

[225] Id at 1638, citing *New York II*, 112 S Ct at 2417–22.

undermined in *National League of Cities*, namely, the line focusing on objects of traditional state concern.

This is an understandable line to draw; it is an understandable distinction to grasp. When first conceived, it has a certain plausibility that one could be forgiven for imagining, at least initially, could support a constitutional distinction.

But it is too late in this game to forgive the Court for this move. For over and over, in a wide range of federalism contexts, just this line has proved itself Maginot.[226] There is no thing out there called "tradition" that lower courts can look to to sort out just what objects of regulation should be federal and which local. And because there is nothing out there to guide the courts, courts will be guided to different conclusions. As these differences percolate, and thrust themselves on the Court to resolve, the results cannot help but seem, as they were before *Garcia*, inconsistent. There is no doubt that the possession of a small amount of marijuana will be "seen to be" commercial, and national, and plainly within the scope of the commerce power, while the possession of a gun is not. But at some point conflicts like this will not be sustainable; the rhetorical burden will be too great. And once again, the Court will be forced into a retreat.

USABLE TOOLS

What the Court's opinion does then is in two parts: It first shifts the focus of the power inquiry away from the unlimitable Necessary and Proper Clause, to the more manageable "commerce" inquiry; it then uses this more narrow question about commerce to construct a test that limits that regulation of commerce. While the first part of the test is manageable enough, the second returns us to a hopeless inquiry about the nature of "commercial," an inquiry I want to suggest, that will cross the line of the Frankfurter constraint.[227]

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[226] Justice Fried makes the same point at Fried, 109 Harv L Rev at 44–45 (cited in note 29).

[227] And to the extent that it does not violate the Frankfurter constraint, we might wonder about whether it will have any significant effect. The signals are that it won't. Compare the decision issued just days after *Lopez*, *United States v Robertson*, 115 S Ct 1732 (1995) (per curiam), where the Court held that so long as even a minimal amount of commerce occurred across state lines, that was sufficient to bring it within the interstate commerce power. Only intrastate activities said to have an effect on interstate commerce have been subjected to this limiting interpretation. A similar conclusion can be drawn from *Allied-Bruce Terminix Cos. v Dobson*, 115 S Ct 834 (1995), where the Court allowed federal com-

My aim in this last part is to suggest tools that might have helped. I offer them here more to suggest the kind of radicalness that conservatism, or fidelity, requires. For the problem with the rule of *Lopez* is that it is far too timid, and by being timid it cannot protect itself against being undermined over time. What is needed is something less direct, but more manageable.

Here are four examples, each more artificial than the tools used by the Court, but each, I suggest, also more stable than the tools selected by the Court. I do not intend to defend the examples at any length; I offer them only as suggestive—but suggestive of the kind of enterprise that the Court must engage if its enterprise of translation is to succeed.

Clear statement of economic effect. The simplest rule parallels *Gregory*.[228] It simply requires 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. The Court thus requires proof that Congress considered whether the issues legislated about are truly national. To be effective, the requirement needs to do very little more than signal that in the process of enacting the statute a proper showing had been made; ex post rationalizations would not suffice.

Now this tool will be criticized as an invasion on the legislative sphere. This it is. But any clear statement requirement is just such an invasion, though a far smaller invasion than an absolute limit. If the Court can say that certain areas cannot be regulated by Congress, I don't understand why it can't say that those areas can be regulated, but only if Congress shows that it has considered just why.

The value of a clear statement rule is its simplicity, and that its indirect effect, on both sides of that balance, would be to increase consideration of federalism interests. It is a tool, therefore, that can increase this consideration within the Frankfurter constraint.

In the context of the Commerce Clause, however, one might wonder about the effectiveness of this rule. *Lopez* itself raises this question: After the court of appeals had struck the statute in *Lopez*,

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merce power to reach a local termite-protection plan bought by an Alabama homeowner from a multistate termite-control company. See the discussion of these cases, and a more general account of *Lopez*'s limited effect, in Deborah Jones Merritt, *Commerce!*, 94 Mich L Rev 674, 728–38 (1995). Compare Fried, 109 Harv L Rev at 41–45 (cited in note 29).

[228] 501 US 452 (1991).

but before the Supreme Court had a chance to rule on it, Congress passed "findings" for insertion into the statute.[229] Because it will always be easy simply to state the existence of some connection, one might wonder whether the statute would have any regulative effect at all.

The argument that a slight burden is no burden is not, in my view, a fair argument. More importantly, we can observe that in the related context of Eleventh Amendment jurisprudence, the slight burden has had some effect.[230] Whether it is enough of an effect goes to the question whether other tools should be used as well. Some of those might be as follows.

Self-imposed limits. An often forgotten part of *Miranda* was the Court's offer of compromise: The Court's offer that the states could evade the requirements imposed by the Court if they simply enacted a better system to protect the constitutional right at issue.[231] Oddly, no state has taken up the challenge.[232] But that is no reason why the Court couldn't make the same offer to Congress in the Commerce Clause context. In the context of commerce regulation, the Court could say to Congress that it will strike statutes regulating primarily intrastate activities, so long as Congress does not adopt some other regime for measuring the significance of an interstate effect. If Congress does establish such a regime—for example, an agency like the CBO, established for the purpose of tracking interstate effects—and if Congress limited its regulation to activities that affected only a specified level of interstate effects, then the Court could defer to the judgments of both the agency and Congress.

This was the strategy of the NLRB for limiting its jurisdiction under the NLRA. The NLRB announced guidelines for its jurisdiction that were tied to its view about industries that actually had a "substantial" effect on interstate commerce. While it believed

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[229] *Lopez*, 115 S Ct 1632 n 4.

[230] See the discussion of William Eskridge in *Dynamic Statutory Interpretation* at 285–94 (cited in note 18).

[231] *Miranda v Arizona*, 384 US 436, 490 (1966) ("Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence. . . .").

[232] The federal government has, but its lead has been ignored. See Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC 3501 (1988), discussed in Craig Goldblatt, *Harmless Error as Constitutional Common Law: Congress's Power to Reverse Arizona v Fulminante*, 60 U Chi L Rev 985, 990 n 27 (1993).

these guidelines below a constitutional minimum, the agency restrained itself from exceeding the limits of the guidelines,[233] in part simply to signal that it was taking the limitations seriously.

In a similar way, the Court could shift to Congress the duty of defining "substantial" in a principled way, and defer to its judgment when it had established the mechanism for so measuring it. Such a mechanism might include primary jurisdiction in a commerce court that measures the significance of a regulation and its effect on commerce. But whatever the test, the aim would be to give Congress an inducement to limit its jurisdiction along principled lines. And it would create this incentive through the use of a rule that simply examined whether a mechanism to induce consideration had been adopted. This sort of monitoring the Court is quite capable of doing; and with this sort of monitoring, the Court could effect greater consideration of federalism interests.

Allowing opt-out. The third technique is perhaps more extreme, yet it too would induce greater respect for federalism interests without requiring the impossible of the Court. We can approach the idea indirectly by asking, What exactly was the state interest trampled by the federal government in *Lopez*? Was any state actually impaired in the exercise of its autonomy by this rule? Was there really a state that wanted to permit gun possession within 1,000 feet of a school, but which was disallowed by Congress's statute?[234]

To ask the question is to raise what is perhaps the oddest part of the *Lopez* debate. For it is not at all clear what state interest is being interfered with by *this* federalization of state criminal law. Indeed, such federalization gives plenty of benefits to the states.[235]

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[233] See Bernard D. Meltzer and Stanley D. Henderson, *Labor Law: Cases, Materials and Problems* 699–700 (Little, Brown, 3d ed 1985) ("In 1950, the Board, in order to conserve its resources and to reduce the confusion of litigants and its own staff, began to publish 'jurisdictional yardsticks,' which prescribed various monetary minima for the exercise of jurisdiction. These yardsticks were revised in 1954 and again in 1958, with a view to expanding the Board's effective jurisdiction and, concomitantly, reducing the no-man's-land in which state authority was inoperative even though the Board declined to act."); NLRB, *Twenty-Third Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1958* 8–9 (US GPO, 1959) (setting jurisdictional standards); NLRB, *Twenty-Fifth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1960* 19–20 (US GPO, 1961).

[234] Forty-two states, including Texas, have criminal penalties for the possession of firearms in and around schools. See *Leading Cases*, 109 Harv L Rev at 112 n 6 (cited in note 189).

[235] As examples of federal statutes that don't hurt state interests, see *Brooks v United States*, 267 US 432 (1925) (banning interstate transportation of stolen motor vehicles).

Federal prisons now hold many criminals that would otherwise burden state prisons. Federal prosecution removes many criminals from backlogged state proceedings. And federal enforcement supplements state enforcement. If the FBI's fingerprint lab is not an invasion on state autonomy, just why is the statute in *Lopez?* What is it taking from state control that states would really want to have?

What these questions might suggest is that there is a distinction between federal statutes that are true conflicts with state interests, and federal statutes that are not. Or alternatively, it might suggest that the invasions of some federal statutes are harmless, while others are not. One might then imagine a regime that tried to distinguish the harmless from the rest, and that allowed the federal invasion where the effect on states interests was harmless.

Sorting such interests directly would be a clear violation of the Frankfurter constraint. For to identify which conflicts were really conflicts would require the Court to identify which exercises of state autonomy were true, or necessary, or desired, as distinguished from which were not. But to do this would require the Court to embrace a normative conception of the proper domains of regulation, far too contestable for the Court to make any doctrine stand upon.

Thus the question then becomes whether an indirect sorting is possible. Why not this: The Court could say that it will presumptively uphold any federal statute that allows for a state opt-out provision. If a state passes a statute opting out from a federal law, then that law would not be enforced within that state. But if a state did not opt out, this would be good evidence (not great but good) that the statute did not invade a substantial interest of the state.

Thus, we could imagine some statutes where states would truly like to experiment—for example, drug laws. Some states may very much want to experiment with limited legalization as a way to lesson the secondary effects of the drug trade. And in those cases, we could imagine states passing opt-out statutes to allow such experimentation. But I doubt that any state would pass the "permit children to carry guns within 1,000 feet of schools" law, or a pro-arson law. For here again, no state interest is undermined by this federal law.

Now of course, "no state interest" is not quite right. There is an autonomy interest that is lost whenever the federal government

crosses into state legislative domains. Moreover, we might think the framers' design was to force states to legislate in a broad domain, to keep local government vital.[236] On this view, the mere consent to federal regulation should not be enough. What the opt-out regime allows is the acquiescence of states in legislative judgments by the federal government, rather than forcing the states to act on their own. And one might well say, this shifts the original balance, and that rather than allow this shift, the Court should act to force the states to be free.

It should, I would agree, if there were a way that it could. But what federalism must face is something conservatives in other contexts are quite quick to assert: that there is only so much that a court can do. What a court must do is adopt usable tools to a fidelity end. These tools will be different from the framers' tools, no doubt. But so what. To say that the tools cannot be different is to say that the fidelity game is off. That would certainly be better than this cycle of remembering, and forgetting.

Jurisdiction stripping. One final tool might mark out the boundary of the extreme, but it follows from the considerations that we first encountered when discussing the source of the Frankfurter constraint. This is the idea of stripping jurisdiction over Commerce Clause claims from lower federal courts, and vesting it in one court, a commerce court, to pursue a more subtle and complex strategy for limiting Congress.[237]

Two thoughts might suggest this somewhat counterintuitive technique, both following from what should be an obvious point about Supreme Court control over congressional jurisdiction—namely, that such control needs to be exercised selectively, and rarely. The first is a direct application of the capacity point made above.[238] The problem with any complex or artificial rule for limiting congressional jurisdiction is that it cannot be reliably applied by the federal courts. Federal courts applying the rule will inevitably be drawn into conflict; and because the boundaries drawn by the Supreme Court are inevitably artificial—in the sense that to

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[236] This was Tocqueville's view. See Tocqueville, *Democracy in America* at 158–70 (cited in note 1).

[237] In principle, it would be better to vest the jurisdiction in the Supreme Court, but the limits on original jurisdiction would preclude this. See *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

[238] See notes and text accompanying notes 136–43.

follow them requires a common understanding that this legal culture cannot rely upon existing—the Court, as in *Garcia*, will be forced to confront the awkward conflicts the lower courts yield. Moreover, because these cases raise questions about the application of federal law, they are not cases where conflict can be ignored. Conflicts raised here must be resolved by the Supreme Court.

The second thought is a bit more strategic. It might be that given this inevitable conflict, the best strategy to limit Congress's exercise of jurisdiction is a strategy that simply induces Congress to consider the scope of its jurisdiction when legislating. The best way for the Court to do this might be through the "bolt out of the blue"[239] technique—a somewhat random and not fully clear act by the Court striking down a statute of Congress that seems to go "too far." Such a test, while protective of federalism interests, obviously doesn't generalize, and hence can't be followed by lower courts. But the very fact that it might be applied would induce Congress into a more reflective mode of legislating. Then subsequently, the Court could uphold the statute when convinced that interests were properly accounted.

The problem with following this second strategy, given the present diffusion of jurisdiction, is lower courts. While one court might adequately limit a "gone too far" rule, it would be difficult for lower courts consistently to apply just such a rule. In the present structure, any rule such as the "gone too far" rule that the Supreme Court would announce is likely to be used by a lower court, and hence inconsistently used by the lower courts, with the consequence again that the Court may be forced to consider cases it would be better for it to avoid.

Both thoughts lead to the suggestion that Congress merely strip from the lower courts the power to address the constitutionality of a federal statute under the commerce power, leaving that determination to one court alone, or alternatively, to one court (a commerce court) with very limited Supreme Court review. By so limiting jurisdiction, then, that court could articulate and apply rules with less fear that the rules would get out of hand. It could therefore develop a richer and more effective set of rules for con-

[239] This is David Currie's view of much of the early limitations imposed by the Fuller and White Courts. See Currie, *The Constitution in the Supreme Court, 1888–1986* at 101 (cited in note 46).

straining federal legislative jurisdiction. Hence by so limiting jurisdiction, the richness and power of judicial review in a post-realist legal culture could be increased.

The justification for such a limitation should be plain enough. What drives it is simply the practical cost of having federal statutes struck in a piecemeal way. What the Court would be doing would be balancing the interests of individuals to have local courts determine this constitutional question, against the state interests that an effective rule to protect state autonomy be enforced. If the choice is between a regime (the pre-*Lopez* regime perhaps) that gave every court the power to strike an act of Congress, but under a test that made every statute constitutional, and a rule that effectively limited the power to strike laws of Congress to the Supreme Court, but under a test that was more restrictive and more protective of state autonomy interests, the latter result would dominate the former regime.

What these four rules have in common is that each has a predictable effect (advancing interests of state autonomy); each can be implemented at minimal judicial cost (since they don't require judgments that fall afoul the Frankfurter constraint); and each therefore helps translate federalism. What they also have in common is that they have as much relation to the text of the Constitution as the *Miranda* rule has to the text of the Constitution. They are plainly made up, in the sense of not deriving from the text of the Constitution.

But if federalism in particular, and translation in general, is to succeed, we must get over this obsession about what is "made up." We have no choice, if fidelity is our aim, but to make up limits that better translate founding commitments. For the plain language of our Constitution today abstracted from the context of the founding yields a Constitution quite inconsistent with the vision of the framers. A plain reading of the Constitution's text yields federal power far beyond what they imagined, and government power generally far beyond what they imagined. Textualism gives us a far more statist Constitution than the framers gave us. And if our commitment to fidelity is genuine and general, then what we need is a technique, in both the individual and states' rights contexts, that can properly restrict a framing balance.

The balance can't be restruck directly. The system can't depend upon the Court to make judgments that cannot help but appear,

in context, political. Thus what these four rules do, and what many of the rules of the Warren Court do as well, is give us indirect ways to pursue a target that the courts can't pursue directly. These tools are made up; but the end to which they are directed is quite genuine.

Conclusion

There was a time when the limits of federalism were provided by the context within which federalism disputes were fought, just as there was a time when the crude technology of searching provided effective limits on the scope of government's power to invade individual privacy. Both contexts provided part of the support to an important substantive value enshrined in the constitutional text.

Both contexts changed. The question in each then became whether the Court would take steps to supplement what the context used to provide; whether it will take steps to provide through affirmative limits on governmental power what before was provided by implicit limits. In both cases, the question is whether when contexts render gaps in the original constitutional design, the Court will act to remedy these gaps.

My argument in this essay has been, first, that this has been precisely the practice of the Court in the context of federalism: That its aim has been to provide through implied limits on federal and state power something of a correction to assure a balance between both. This practice I have called translation, and I have traced something of its history.

But I have also suggested that this practice is constrained by a fundamental requirement that has been constant in the history of judicial review—the need for the Court, in differing ways, to avoid actions that appear, in context, political. What the Court must do is find limits on governmental power in the name of fidelity, subject to this constraint on its constructive role.

While *Lopez* is properly within this tradition, I have argued that it has not fully realized this limit. For just as Chief Justice Rehnquist did before in *National League*, *Lopez* launches a practice of limitation that will be unstable. The lines *Lopez* draws will not cut up the world of federal law in a predictable or usable manner. And

as the inconsistencies increase, the feasibility of continuing this rule will be undermined.

A better set of limitations would have been more creative. As I have argued, the Court will never succeed in its efforts at construction unless it acknowledges the dynamic of construction. Only when it acknowledges the creative in the effort of translation will it begin to think more strategically, and successfully, about how federalism values are to be advanced. I have suggested four different rules here that may be more successful at advancing federalism's interest, subject to the constraint of the Frankfurter constraint. There are no doubt others. The only doubt is whether the Court's commitment to fidelity is strong enough to allow it to see them.