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Keith Werham

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Keith Werhan*

Table of Contents

I. Introduction

As recent decisions make clear, the Supreme Court is reorienting the doctrines that enforce the limits of federalism on the regulatory power of Congress. The purpose of this undertaking is to tighten those limits in a way that is true to our constitutional design. This project has a long history, one that stretches to the foundational era of constitutional law.[1] It is a history that counsels considerable caution.

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* Geoffrey C. Bible & Murray H. Bring Professor of Constitutional Law, Tulane Law School.

1. *See generally* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (describing Court's recent adoption of stricter federalism principles). The intellectual history of American federalism, of course, probes far more deeply. *See also* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 31-214 (1993) (expounding evolution of democratic government theory in Western Civilization).

In its foundational decisions, the Marshall Court constructed a framework for evaluating congressional action that created interplay between formal[2] and functional[3] understandings of how federalism limits national power.[4] As the nation entered the modern, industrial age, and Congress initiated a regulatory

2. By "formal," I do not intend any pejorative implication. I simply mean any interpretive methodology grounded on decision making by rule. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 2 (1987) (differentiating between formal reasoning and substantive reasoning); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) ("At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decision making according to *rule*."). In constitutional interpretation, formal methods typically look for meaning in the text of the Constitution and the intent of its drafters. *See* Cass R. Sunstein, *Changing Conceptions of Administration*, 1987 BYU L. REV. 927, 944 (1987) (describing how opponents of independent agencies utilize formalist views). In its most pejorative meaning, formalism suggests an approach to legal reasoning that treats law as a closed, complete system of objectively determinable rules that yield correct outcomes through a noncontroversial process of deductive reasoning. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 24 (1996) ("The vice of formalism is found whenever people in law *falsely* deny that they are making political and moral judgments."); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6-11 (1983) (outlining "possible goals of legal systems"). This pejorative meaning is best taken as a warning that formalist claims become increasingly susceptible to charges of conceptualism and mechanical jurisprudence as they move away from their core appeal to decision making based on rules that themselves are defensible. *See* ATIYAH & SUMMERS, *supra*, at 28-30 (distinguishing formalistic reasoning from formal reasoning).

3. As Felix Cohen recognized many years ago, the term "functional" is capable of many meanings and connotations when applied to legal method. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821-22 (1935) (explaining numerous perceptions of "functionalist approach"). This much can be said with certainty: functional method characteristically is pragmatic and deeply skeptical of the formalist prescription that judges decide cases by reasoning deductively from rules previously laid down. *Id.*; *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-105 (1921) (commenting on evolution of functionalism in America); Alexander T. Alienikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 955-58 (1987) (describing development of "pragmatism" in legal reasoning).

In the sense in which I use the term here, "function" has much the same meaning as it did for Aristotle. To Aristotle, a thing's function (*ergon*) was its essence, that which defined it, as well as its end or goal (*telos*). C.D.C. REEVE, PRACTICES OF REASON: ARISTOTLE'S *NICOMACHEAN ETHICS* 123 (1995). Thus, by functional argument, I mean primarily the teleological reasoning that is characteristic of Aristotle's thought. Teleological reasoning seeks to explain something by focusing on what the thing is for, its end or goal or purpose, its *telos*. *See* Stephen Everson, *Introduction to Aristotle*, THE POLITICS, at xviii, xx (Stephen Everson ed., 1988) (explaining Aristotelian perception of "social and political association"). Thus, teleological reasoning is distinctively purposive, as is functional legal reasoning, as I understand the term. As described by Justice Cardozo, "We are thinking of the end which the law serves, and fitting its rules to the task of service." CARDOZO, *supra*, at 102. As an approach to resolving issues of constitutional structure, functionalism includes an instrumentalist assessment of the anticipated effects of the governmental action in question and minimizes the significance of legal categories. *See* Thomas Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 439 (1987) (explaining that functionalist approach to doctrinal analysis entails focusing on "actual operation and values" rather than focusing on "definition").

4. *See infra* Part I.A (discussing "The Federalist Balance in the Marshall Court").

response to the resultant problems and dislocations caused by that transition, a determined Court resorted to a thoroughgoing formalism in an effort to confine national power within narrow terrain.[5] Beginning in 1937, in the crucible of the Great Depression, the Court relented, replacing the earlier formalism with a thoroughly functional understanding of congressional power that was acquiescent to legislative prerogative.[6]

It is this post-1937 settlement that the contemporary Court is examining and changing. Discontented with the failure of the functional post-1937 doctrine to register meaningful federalism limits on congressional power, the Court has begun to reintroduce formalist elements into its approach. This process is in an early, experimental stage, and a stable judicial consensus has yet to take hold. It is not yet clear whether the revival of formalism in federalism jurisprudence will restore a balance that has been absent since the founding era, or simply will initiate another formalist cycle.[7]

Before the Court completes its experiment, I suggest the justices pause and consider a lesson from their recent decision making with respect to the other central structural principle of the Constitution – the separation of powers. The Court's reinvigoration of separation-of-powers limits on the actions of the national government preceded the current federalism revival.[8] There too, the justices have swung between formal and functional understandings of constitutional structure.[9] At present, the Court unpredictably moves between both approaches, typically invoking a formal approach to the separation of powers to invalidate actions by one of the branches,[10] while falling back on a functional understanding to uphold a challenged action.[11] The result has been a widely noted incoherence in separation-of-powers jurisprudence.[12]

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5. *See infra* Part II.A (discussing "The Formalist Turn").

6. *See infra* Part II.B (detailing "The Functionalist Response").

7. Professor Erwin Chemerinsky noted the recent formalist turn in the Court's federalism jurisprudence and compared that development with the justices' approach to the separation of powers. *See generally* Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997). Professor Chemerinsky's treatment is characteristically thoughtful, but the scope and nature of our analyses differ considerably.

8. The Supreme Court began its reinvigoration of separation-of-powers principles in the early 1980s. For my analysis of that development, see generally Keith Werhan, *Toward an Eclectic Approach to Separation of Powers:* Morrison v. Olson *Examined*, 16 HAST. CONST. L.Q. 393 (1989).

9. *See id.* at 396-410 (outlining formalist and functionalist approaches used in Court's pre-*Olsen* decisions concerning separation of powers).

10. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 439-49 (1998) (ruling Line Item Veto Act inconsistent with Framers' Article I delegation of legislative power to Congress).

11. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 380-411 (1989) (upholding Sentencing Reform Act in face of separation-of-powers challenge).

12. *See generally* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (noting incoherence in Supreme Court's separation-of-powers jurispru-

The justices have an opportunity to learn from their separation-of-powers experience as they rethink their approach to the federalism limits on congressional power. It is important that the Court break the tendency to cycle between a strict formalism and a permissive functionalism when resolving issues of constitutional structure. The essential task facing the justices is to settle on a methodology that blends both approaches. The Court has not yet accomplished that goal in its separation-of-powers jurisprudence. It has faced a similar difficulty in its attempts to delineate federalism-based limits on congressional regulatory authority. While the Marshall Court, I shall argue, established a balanced approach that was consistent with the federalist understanding of federalism, later Courts lost, and have never regained, that balance.

Although translating the constitutional organizing principle of federalism into an appropriately balanced doctrine has proven to be something of a conundrum, a potential solution, surprisingly, is in sight. In the Supreme Court's recent, and potentially transformative, decision in *United States v. Lopez*,[13] which it recently solidified in *United States v. Morrison*,[14] a bare majority of the justices suggested an intriguing redefinition of the congressional commerce power.[15] The *Lopez/Morrison* innovation promises to integrate formal and functional approaches to federalism limits and to align contemporary doctrine with the original federalist understanding and the foundational jurisprudence of the Marshall Court.[16] The justices, however, have given mixed signals of their direction. Following on the heels of *Lopez*, the same narrow majority of justices in *Printz v. United States*[17] adopted a strongly formalistic approach to limiting congressional regulatory power.[18] The *Printz*

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dence); E. Donald Elliot, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989) (same); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988) (same); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225 (1991) (same). Martin Redish and Elizabeth Cisar, in noting the "split personality" of the justices, offered perhaps the most vivid encapsulation of this incoherence. *See generally* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were To Govern": The Need For Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991) (noting high degree of inconsistency in Supreme Court's application of either functionalism or formalism in separation-of-powers cases).

13. 514 U.S. 549 (1995).

14. 120 S. Ct. 1740 (2000).

15. *See* United States v. Morrison, 120 S. Ct. 1740, 1751 (2000) (invalidating Violence Against Women Act, in part because "gender-motivated crimes of violence" do not constitute economic activity subject to federal regulation under Commerce Clause); United States v. Lopez, 514 U.S. 549, 561-64 (1995) (invalidating Gun-Free Schools Act because no economic activity that would substantially affect interstate commerce fell within scope of Act).

16. *See infra* Part III.A (discussing "Lopez/Morrison").

17. 521 U.S. 898 (1997).

18. *See* Printz v. United States, 521 U.S. 898, 904-33 (1997) (invalidating interim pro-

retrenchment reinforces the considerable doubts over whether the Court will be able to maintain a balanced federalism jurisprudence. Yet, in the recent case *Reno v. Condon*,[19] a unanimous Court limited *Printz*, and in doing so, may have signaled the justices' determination to regain their balance.[20]

This Article explores the contemporary crossroads of federalism jurisprudence. In Part I, I describe the "federalist balance" that formed the foundational conception of federalism limits on congressional regulatory power. In Part II, I briefly review the "federalism pendulum," which embodies the swing between formal and functional doctrine as the Court resisted, then embraced, congressional power to control the modern economy. In Part III, I look at the contemporary search for balance, focusing on the Court's decisions in *Lopez* and *Printz*, as well as the Court's recent applications of those decisions in *Morrison* and *Reno*, for the clues they offer concerning the character of the current federalism revival.

I. The Federalist Balance

The framers sought to devise a government that was energetic, but limited, effective, yet safe.[21] To the founding generation, or at least to those of the federalist persuasion who moved the people of the United States to adopt the Constitution of 1787, the tension produced by these dueling aspirations did not make conflict inevitable. Instead, the founders saw their commitments to an energetic national government and to individual liberty as mutually reinforcing and producing balanced governance.[22]

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vision of Brady Handgun Violence Prevention Act because it would require state officials to execute federal law).

19. 120 S. Ct. 666 (2000).

20. *See* Reno v. Condon, 120 S. Ct. 666, 671-72 (2000) (holding Driver's Privacy Protection Act to be valid and not inconsistent with *Printz* because Act does not compel states to regulate); *see also infra* Part III.B (detailing "Printz/Reno").

21. *See* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 146 (1984) (explaining that Constitution's structure provides for safe, yet useful government); THE FEDERALIST NO. 37, at 226-28 (James Madison) (Modern Library ed., 1941) (stating goals for new government).

22. *See* RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 62 (1993) (describing eighteenth-century view that balancing power in government was optimal for maintaining liberty); Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 85, 89-92 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978) (articulating Hamilton's and Madison's views as expressed in *The Federalist*). As explained in one of the introductory essays of *The Federalist*, a central goal of the constitutional project was to frame a national government that would safeguard both the union and individual liberty. THE FEDERALIST NO. 2, at 10 (John Jay) (Modern Library ed., 1941). Indeed, in the federalist view, "the vigor of government is essential to the security of liberty." THE FEDERALIST NO. 1, at 5 (Alexander Hamilton) (Modern Library ed., 1941). By the same token, the government would

Both of the Constitution's central structural principles – federalism and the separation of powers – reflect this aspiration of balance between the ideals of effective government and limited government.[23] Moreover, both principles invoke the same strategy in pursuit of that balance: they divide the power of governance.[24] Federalism divides power vertically between the national government and the states. The separation of powers, in turn, divides the power of the national government horizontally into three categories – legislative, executive, and judicial – and assigns each of the three powers to a different, and distinctively organized, institution of the government.[25]

With respect to both principles, the Constitution's division of power operates according to the same calculation. In each case, the framers sought effective government by assigning authority to the institution most competent to handle it. Thus, the separation of powers assigns each of the three categories of governmental power to an institution that the framers designed specifically to exercise that type of power. In this view, a multimember, bicameral, broadly representative legislature is our optimal lawmaker; a unitary, indirectly elected executive is our optimal law-administrator; and an independent judiciary is our optimal law-adjudicator.[26]

A similar judgment inheres in the federalism principle. Rather than dividing the power of government into its constituent parts, as separation-of-powers theory does, the federalism principle divides governmental power by subject matter. The Constitution thereby assigns to the national government

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receive its energy from the active involvement of a free people. *See* KETCHAM, *supra*, at 40 (describing idea of "self-governing society" that framers instilled in Constitution). For a recent study of the centrality of the metaphor of "balance" to the political thinking of the founding generation, see Richard Striner, *Political Newtonianism: The Cosmic Model of Politics in Europe and America*, 52 WM. & MARY Q. 583, 598-608 (1995) (outlining development of Newtonian political thought in late eighteenth-century America).

23. *See* BEER, *supra* note 1, at 283-301 (discussing how federalism and separation of powers in government ensure maintenance of both liberty and efficiency).

24. *See id.* at 96-97 (proposing that division of power among branches of national government as well as division of power between national government and state governments produces effective governing while protecting individual rights).

25. *See* THE FEDERALIST NO. 73, at 477-78 (Alexander Hamilton) (Modern Library ed., 1941) (explaining how division of power between legislative and executive branches would prevent "enaction of improper laws"); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 14 (2d ed. 1967) (defining separation of powers). Constitution-makers who adopt the separation of powers, however, typically modify this "pure" description of the model. *Id.* For my account of the American adaptation, see Werhan, *supra* note 8, at 434-43.

26. *See* BEER, *supra* note 1, at 285-87 (describing Madison's idea that for government to be truly effective, agencies "differently appointed, composed, qualified and empowered" to perform special functions should perform those special functions); THE FEDERALIST NO. 70, at 455 (Alexander Hamilton) (Modern Library ed., 1941) (emphasizing importance of strong executive); THE FEDERALIST NO. 78, at 503-05 (Alexander Hamilton) (Modern Library ed., 1941) (articulating importance of judiciary in maintaining balanced government).

a number of specified "objects" that concern "the great and aggregate interests" of "all the members of the republic," leaving the remainder, which concern the "local and particular" interests of the people, to the states.[27] In this view, not only did the framers create national governing institutions best able to handle the type of power assigned to them, but they also structured an overall national government "commensurate to the exigencies of the Union."[28]

The dispersal of power that the separation of powers and federalism prescribe, however, created governments that are limited, as well as competent. In each theory, the power divisions among governing institutions safeguard individual liberty by defeating "tyranny," which Publius defined as the "accumulation of all powers . . . in the same hands."[29] In combination, the two theories are instrumental in the creation of "the compound republic of America," which offers a "double security" for "the rights of the people."[30] The principles of federalism and separation of powers each reflect the insight that, in Ralph Ketcham's phrase, "only power could check power."[31]

More subtly, the dispersal of authority according to separation-of-powers and federalism principles limits government because it encourages moderation.[32] Because no governmental entity possesses all of the powers of govern-

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27. THE FEDERALIST NO. 10, at 60 (James Madison) (Modern Library ed., 1941); *see also* THE FEDERALIST NO. 14, at 82 (James Madison) (Modern Library ed., 1941) (emphasizing that "general" government has limits on its jurisdiction).

28. *See* THE FEDERALIST NO. 44, at 297 (James Madison) (Modern Library ed., 1941) (suggesting that proposed system of federalism would be necessary for survival of Union).

29. THE FEDERALIST NO. 47, at 313 (James Madison) (Modern Library ed., 1941) (defining tyranny). "Publius" is the pen name taken by the three authors of *The Federalist*, Alexander Hamilton, John Jay, and James Madison. *See* THE FEDERALIST, at xxiii-xxv (Modern Library ed., 1941) (providing biographies of authors of *The Federalist*). I use "Publius," rather than the individual names of the authors, to respect the text's claim to single authorship and to acknowledge the essential consistency among the authors. *See* EPSTEIN, *supra* note 21, at 2 (observing evidence of collaboration among authors); Martin Diamond, *The Federalist's View of Federalism*, *in* ESSAYS IN FEDERALISM 34 n.* (Institute for Studies in Federalism ed., 1961) (noting consistency of *The Federalist*). For a contrary view, see generally Alpheus Thomas Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625 (1952) (illustrating differences between writings of Hamilton and writings of Madison).

30. THE FEDERALIST NO. 51, at 339 (James Madison) (Modern Library ed., 1941); *see also* MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION 163 (1987) (explaining Madison's view of "double security" in government with federalism and separation of powers).

31. KETCHAM, *supra* note 22, at 62; *see also* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 85-86 (1988) (articulating Madison's idea that to overcome tyranny in government, each area of government must face difficulty in realizing its objectives).

32. *See* PETER B. KNUPFER, THE UNION AS IT IS: CONSTITUTIONAL UNIONISM AND SECTIONAL COMPROMISE, 1787-1861, at 40-41 (1991) (articulating federalists' argument that Constitution "contained institutional restraints that . . . encouraged moderate conduct"). To the federalists, wise leadership, in its essence, embodied the value of moderation. *Id.* at 44. For a discussion of the appreciation of the "virtues of moderation" in early America, see *id.* at 56-85.

ment, the actions of each are checked by the others. At the national level, each branch is counterpoised against the others: "[a]mbition... counteract[s] ambition."[33] Just as the separation of powers positions each branch of the national government to provide crosschecks on one another, federalism positions the national government and the states to counter the excesses of each other.[34]

The dual quality of both structural principles – the simultaneous attention to effective government and limited government – is a source of their strong appeal. They assure us we can have it all. Not surprisingly, however, this duality also has caused considerable difficulty in the elaboration of doctrines to give effect to these principles. The commitment to effective government encourages functionalism in both federalism and separation-of-powers doctrine. After all, both principles assigned powers to governing entities based on the framers' assessments of each entity's essence, and thus, of each entity's institutional competence. A functional methodology is true to those assignments.[35]

Yet that is only half the story. Constitutional assignments of governmental authority are grounded on categorical grants – by subject matter with respect to federalism and by power-type with respect to the separation of powers. Because the framers were serious about holding governmental entities within the limits of those categorical grants, formalism also exerts a continuing pull on structural doctrine. Formalism is true to the textual limits on governmental authority.[36]

This discussion demonstrates that the choice between formalism and functionalism as guiding methodologies for principles of governmental structure – a problem that has haunted both federalism and separation-of-powers jurisprudence – is a false choice. It is false because it is untrue to the framers' deployment of these principles toward the goals of both effective government and limited government. The only methodology that can be true to the constitutional design is one that integrates formal and functional understandings of governmental power. The only approach to federalism and to the separation of powers that serves the ultimate goal of balanced, moderate government is one that appropriately balances and moderates the legitimate claims of functionalism and formalism. Reviewing courts must allow governmental institutions the functional ability to achieve their constitutional ends, but also must

33. THE FEDERALIST NO. 51, *supra* note 30, at 33.

34. *See* THE FEDERALIST NO. 28, at 174-75 (Alexander Hamilton) (Modern Library ed., 1941) (describing role of state governments in limiting national government); THE FEDERALIST NO. 46, at 308-11 (James Madison) (Modern Library ed., 1941) (maintaining that state power is essential in preventing encroachment of national authority); THE FEDERALIST NO. 51, *supra* note 30, at 339-41 (arguing importance of division of power in government for protecting all interests).

35. *See supra* note 3 and accompanying text (detailing functional approach to federalism).

36. *See supra* note 2 and accompanying text (describing formalist approach).

hold those institutions within the formal limits of those ends. The Marshall Court knew this, and delineated the limits federalism imposes on congressional regulatory power accordingly.[37]

A. The Federalist Balance in the Marshall Court

One of the early tasks of the Supreme Court, inevitably, was to build a jurisprudential foundation for the constitutional commitment to federalism, and with it, a judicial approach for evaluating assertions of congressional regulatory power. In 1803, the Marshall Court issued its first important constitutional decision, *Marbury v. Madison*.[38] In *Marbury*, the Court exercised, and justified, a power to review actions by the other branches of the national government for their lawfulness and consistency with the Constitution.[39] In doing so, Chief Justice Marshall, writing for his Court, assured political decisionmakers that the justices would not review their decisions for policy agreement, but only for fidelity to law.[40] The Court followed *Marbury*'s establishment of the judicial role across the horizontal plane of separation of powers with a complimentary, vertical assertion of its authority within the federal system to review the decisions of state actors for their compliance with the Constitution and laws of the United States.[41]

Having established its role as authoritative interpreter of the constitutional design within the separation-of-powers/federalism matrix,[42] the Marshall Court was in position to settle the regulatory role of Congress in a federal system. The Marshall Court did so within a five-year stretch of the early national

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37. I have considered the integration of formalism and functionalism with respect to the separation of powers in other essays. *See generally* Werhan, *supra* note 8; Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681 (1996) (describing methodology for separation-of-powers jurisprudence that utilizes both functionalism and formalism).

38. 5 U.S. (1 Cranch) 137 (1803).

39. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166-67 (1803) (holding that courts can review Executive Branch actions that stem from constitutionally granted powers).

40. *See id.* at 166, 177 (defining Court's power to review legal actions but not political decisions of Executive Branch). The Court underscored that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. In this understanding, of course, the Constitution is "the fundamental and paramount law of the nation" that the Court is responsible for interpreting and enforcing. *Id.* at 177.

41. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413-415 (1821) (explaining that Supreme Court has appellate jurisdiction over cases originating in state court to determine questions of constitutionality); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816) (maintaining that Supreme Court's exercise of appellate jurisdiction over cases originating in state court is consistent with Constitution).

42. In establishing this judicial role, the Marshall Court acted as Publius had wished. *See* THE FEDERALIST NO. 78, *supra* note 26, at 505 (outlining duty of judiciary to "declare all acts contrary to the manifest tenor of the Constitution void"). For a general discussion, see Sotirios Barber, *Judicial Review and* The Federalist, 55 U. CHI. L. REV. 836 (1988).

period, deciding *McCulloch v. Maryland*[43] in 1819 and *Gibbons v. Ogden*[44] in 1824. In *McCulloch* and *Gibbons*, the Marshall Court elaborated a doctrine that reflected a balanced approach to federalism that was securely situated in the constitutional design.

1. McCulloch

At issue in *McCulloch* was the constitutional power of Congress to incorporate a national bank.[45] The difficulty was that the framers had not explicitly included this power in the Article I, Section 8 delineation of congressional authority.[46] The problem was at once fundamental and ordinary. It was fundamental because the issue went to the heart of the constitutional structure of congressional power – the degree of flexibility Congress possessed to deploy the enumerated powers to achieve the legislators' conception of the national interest. It was ordinary because, in practice, the extent of Congress's authority arising from its enumerated powers confronts Congress every day it is in session.

Chief Justice Marshall, writing for the Court, began his consideration of the *McCulloch* problem by recognizing what Publius repeatedly had emphasized: the government of the United States "is acknowledged by all to be one of enumerated powers."[47] Nevertheless, the absence of a provision for "estab-

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43. 17 U.S. (4 Wheat.) 316, 400-25 (1819) (upholding Congressional action in incorporating National Bank and establishing branch of National Bank in state of Maryland).

44. 22 U.S. (9 Wheat.) 1, 186-222 (1824) (determining that Congress has sole power to regulate interstate commerce and thus invalidating New York statute that, if exercised, would be contrary to federal regulation).

45. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

46. The framers intentionally excluded this power from Congress's expressly delineated powers. *See Minutes of the Constitutional Convention (September 14, 1787), in* II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Ferrand ed., 1911) (describing discussion among framers concerning possible expansion of Article I powers). On September 14, 1787, as the Constitutional Convention neared completion, James Madison moved that Congress be given the power "to grant charters of incorporation where the interest of the U.S. might require and the legislative provisions of individual States may be incompetent." *Id.* at 615. Rufus King objected that such a power in Congress was "unnecessary." *Id.* When James Wilson responded that the power "is necessary to prevent *a State* from obstructing the *general* welfare," King became more specific in his objection. *Id.* at 615-16. He worried that Congress would use this power, among other things, to create a bank. *Id.* at 616. George Mason suggested limiting the power "to the single case of canals," but even as so limited, Madison's motion lost decisively (three in favor, eight opposed). *Id.* For Chief Justice Marshall's response to the absence of the power to incorporate from among the enumerated powers of Congress, see *infra* note 69 and accompanying text.

47. *McCulloch*, 17 U.S. at 405; *see also* THE FEDERALIST NO. 14, at 82 (James Madison) (Modern Library ed., 1941) (stating that national government's jurisdiction is "limited to certain enumerated objectives"); THE FEDERALIST NO. 39, at 249 (James Madison) (Modern Library ed., 1941) (same); THE FEDERALIST NO. 45, at 303 (James Madison) (Modern Library ed., 1941) (maintaining that powers delegated to national government are "few and defined").

lishing a bank or creating a corporation" was not fatal to Congress's claim of power.[48] Chief Justice Marshall explained that the constitutional commitment to the doctrine of enumerated powers did not foreclose the existence of "incidental or implied powers" in Congress.[49] Thus, the issue was joined.

The textual home for Congress's implied powers, in Chief Justice Marshall's reading, is the Necessary and Proper Clause. One of the enumerated powers in Article I, Section 8, the clause authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers . . . [of Article I, Section 8]."[50] Chief Justice Marshall reasoned that the clause provides Congress some "right . . . of selecting means for executing the enumerated powers."[51] The interpretative battle in *McCulloch* was over the scope of that right.

The State of Maryland offered a restricted interpretation of the Necessary and Proper Clause, focusing on its "peculiar language."[52] The word "necessary," Maryland argued, limited Congress's "right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory."[53] This interpretation would deny Congress any meaningful latitude with respect to "the choice of means" to effectuate its powers.[54] Instead, in this view, the Necessary and Proper Clause tracks congressional legislation on the path that is "most direct and simple" to that end.[55]

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48. *See McCulloch*, 17 U.S. at 406 (noting that Constitution does not require all powers to be "expressly and minutely described").

49. *Id.* Chief Justice Marshall took solace in the wording of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. As Chief Justice Marshall noticed, this reservation omits the word "expressly," which had been included in a parallel provision of the Articles of Confederation in order to preclude the existence of implied powers in the national Congress. *See McCulloch*, 17 U.S. at 406; THE ARTICLES OF CONFEDERATION art. II. To the Chief Justice, this omission reflected the framers' intention to avoid the "embarrassments" caused by the ineffectiveness of Congress during the confederation period. *McCulloch*, 17 U.S. at 406-07.

The Chief Justice's interpretation of the Tenth Amendment's omission of the term "expressly" tracks Publius's explanation of the framers' decision not to similarly qualify the Necessary and Proper Clause. *See* THE FEDERALIST NO. 44, *supra* note 28, at 293 (discussing decision not to limit Congress's powers to those "expressly" delegated). Publius argued that inclusion of the "expressly" qualifier either would "disarm the government of all real authority whatever," or it would force Congress into the position "of violating the Constitution by exercising powers indispensably necessary and proper, but, at the same time, not expressly granted." *Id.* (emphasis omitted).

50. U.S. CONST. art. I, § 8, cl.18.

51. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412 (1819).

52. *Id.* at 413.

53. *Id.*

54. *Id.*

55. *Id.* The state also offered an even more restrictive interpretation of the Necessary and

Maryland's interpretive position was hardly new. It repeated the constitutional objections to the first Bank of the United States, which Treasury Secretary Alexander Hamilton proposed in 1790.[56] Thomas Jefferson, as Secretary of State, and James Madison, in the House of Representatives, led the opposition.[57] Both argued that a broad interpretation of the Necessary and Proper Clause would be not merely wrong, but dangerous. Their concern was that recognition of a general authority in Congress to select the means for effectuating the Article I powers would defeat the constitutional enumeration of those powers, in effect yielding to the national government a general legislative power.[58] Jefferson explained:

> [T]he constitution allows only the means which are "necessary" not those which are merely "convenient," for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power [to Congress,] . . . [i]t would swallow up all the delegated powers, and reduce the whole to one phrase . . . Therefore it was that the constitution restrained [Congress] to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.[59]

According to Jefferson, because the enumerated powers of Article I could "all be carried into execution without a bank," the creation of such an institution was "not *necessary*, and consequently not authorized" by the Necessary and Proper Clause.[60]

Proper Clause, arguing that the framers had included the provision simply to clarify that Congress could exercise the enumerated powers in the form of legislation. *Id.* at 412. The Court rejected that interpretation summarily, noting that the ability to enact legislation was inherent in the Constitution's grant of the legislative power to Congress. *Id.* at 412-13; *see also* U.S. CONST. art. I, § 1.

56. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 226 (1993) (describing Hamilton's proposal for National Bank).

57. *See id.* at 224 (discussing Jefferson's and Madison's opposition to National Bank).

58. *See id.* at 230-32 (discussing Madison's assertion that Constitution grants national government only limited, enumerated powers).

59. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, Feb. 15, 1791, *in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 278 (Julian P. Boyd ed., 1974). Jefferson feared that if Congress were allowed "a single step beyond the boundaries thus specially drawn around the [enumerated] powers . . . [it would] take possession of a boundless field of power, no longer susceptible of any definition." *Id.* at 276.

60. *Id.* at 278. Professor Randy Barnett recently has offered a stimulating argument that would revive the Jeffersonian position of a sharply limited necessary and proper power. *See generally* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997). Professor Barnett argued that the Necessary and Proper Clause should be read as a general limitation on congressional power. *Id.* at 745. Whenever Congress acts in a way that affects individual liberty, he would have a reviewing court shift the burden to Congress to justify its action. *Id.* at 787. Professor Barnett's position shares the risk and reward of the Jeffersonian interpretation, but I believe the *McCulloch* Court has the better of the argument.

Maryland agreed with Jefferson, but the *McCulloch* Court, following President George Washington, did not.[61] Indeed, although it often is overlooked, *McCulloch* did not present the Marshall Court with its first occasion to interpret the Necessary and Proper Clause. In *United States v. Fisher*,[62] Chief Justice Marshall, writing for the Court, summarily rejected the argument that an Act of Congress, which provided that a claim of the United States had priority in a bankruptcy proceeding, exceeded the necessary and proper power.[63] The Chief Justice dismissed the Jeffersonian interpretation, observing that requiring congressional legislation to be "indispensably necessary to give effect to [an enumerated] power" would cause "endless difficulties."[64] The Chief Justice in *Fisher* clearly indicated the direction of his preferred reading of the Necessary and Proper Clause. He explained, "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."[65]

Notwithstanding the *Fisher* precedent, the longstanding controversy surrounding the Bank of the United States made it clear that Chief Justice Marshall and his Court could not summarily pass over the necessary and proper

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In addition, I think Professor Barnett's approach is normatively troubling. His approach would tip the constitutional balance between effective government and limited government too far in the latter direction. The modern Supreme Court wisely dispenses with the usual presumption of constitutionality only with respect to types of legislation in considerable tension with constitutional norms, such as classifications grounded on race and gender and deprivations of fundamental rights. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (stating that "usual judicial deference to the legislature is inappropriate" with respect to laws that intrude on "family living arrangements"); Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that "[t]o withstand Constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement" thereof); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (noting that statutory provisions based on racial classifications are subject to "most rigid scrutiny" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944))). To treat all congressional legislation that in any way impinges on individual liberty as constitutionally suspect retreats too far in the discredited direction of *Lochner v. New York*, 198 U.S. 45 (1905). *See Lochner*, 198 U.S. at 57 (declaring that states' power to legislate cannot impinge on "liberty of person and freedom of contract").

61. President Washington signed the law creating the first Bank of the United States only two days after receiving Jefferson's memorandum urging him to cast a veto on constitutional grounds. ELKINS & MCKITRICK, *supra* note 56, at 232-33. Hamilton also submitted to President Washington a memorandum that supported the bank and responded to Jefferson's objections. *Id.* at 232-33; *see also infra* notes 71, 88, 90 and accompanying text (detailing arguments advocating strong Congressional power in federalist system).

62. 6 U.S. (2 Cranch) 358 (1805).

63. *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 396-97 (1805) (rejecting narrow definition of Necessary and Proper Clause).

64. *Id.* at 396.

65. *Id.*

issue in *McCulloch*.[66] The Court, quite rightly, approached the clause anew, and in doing so, completed the sketch begun in *Fisher*. In upholding Congress's power to incorporate a bank, Chief Justice Marshall in *McCulloch* once again offered an embracing interpretation of the Necessary and Proper Clause:

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.[67]

In supporting this broad reading of the Necessary and Proper Clause, the Chief Justice offered broad justifications. He drew on the nature of the Constitution, which he distinguished from a "legal code."[68] The former, by "[i]ts nature, . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[69] As Chief Justice Marshall famously added, "we must never forget, that it is *a constitution* we are expounding."[70]

He might as well have added, "we must remember that it is a *government* the Constitution created." Chief Justice Marshall not only supported his broad interpretation of the Necessary and Proper Clause with an argument from the nature of the Constitution, but also supported it with the nature of a functioning government.[71] For the Chief Justice, "a government, entrusted with such

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66. *See* CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 499-540 (1922) (placing *McCulloch v. Maryland* in historical context).

67. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412 (1819).

68. *Id.* at 407.

69. *Id.* For this reason, Chief Justice Marshall was untroubled by the absence of a power of incorporation among Congress's enumerated powers. The power to create a corporation is not an end in itself, but simply is a means toward an end. *Id.* at 421. Thus, the Chief Justice explained, "we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this." *Id.*

70. *Id.* Chief Justice Marshall's argument concerning the nature of the Constitution tracked Publius's account of the framers' rationale for adding the Necessary and Proper Clause as a general supplementary provision to the Article I, Section 8 enumeration, rather than attempting "a positive enumeration of the powers comprehended under the general terms 'necessary and proper.'" THE FEDERALIST NO. 44, *supra* note 28, at 293. Publius explained that the latter course "would have involved a complete digest of laws on every subject to which the Constitution relates." *Id.*

71. Alexander Hamilton emphasized this focus in his memorandum to President Washington responding to Jefferson's urging of a veto of the bank bill. Hamilton argued that "[i]t is essential to the being of the National government" that Jefferson's interpretation of the term

ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution."[72] Thus, by "general reasoning,"[73] without the need for the Necessary and Proper Clause,[74] "the powers given to the government imply the ordinary means of execution."[75]

For Chief Justice Marshall, the arguments from the nature of the Constitution and from the nature of government cohered into a vision of an effective, flexible, and adaptable authority in Congress to implement its enumerated powers as the legislators believed appropriate to address the needs of the nation. The Court approached the Necessary and Proper Clause as a provision embedded within the interpretive context of a "constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[76] The implication the Chief Justice drew from the permanence of the Constitution in a changeable world was clear:

> To have prescribed the means by which government should, in all future time, execute its powers, would have been . . . an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.[77]

"necessary" be "exploded." Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, Feb. 23, 1791, *in* VIII THE PAPERS OF ALEXANDER HAMILTON 63, 102 (Harold C. Syrett ed., 1965). Hamilton believed that Jefferson's limited understanding of the reach of congressional power "would be fatal to the just & indispensable authority of the United States." *Id.* at 97.

72. *McCulloch*, 17 U.S. at 408. The Chief Justice continued: "The power being given, it is in the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." *Id.* Chief Justice Marshall simply could not accept "[t]he baneful influence of [the state's] narrow construction [of the Necessary and Proper Clause] on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects." *Id.* at 417-18.

73. *Id.* at 411.

74. *Id.* at 419.

75. *Id.* at 409.

76. *Id.* at 415.

77. *Id.* at 415-16. Chief Justice Marshall again tracked Publius, who had argued that a complete, constitutional listing of legislative means available to Congress, in lieu of the necessary and proper catch-all, would have required the framers to predict "all the possible changes which futurity may produce." *See* The FEDERALIST NO. 44, *supra* note 28, at 294 ("[I]n every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.").

For Chief Justice Marshall, only a broad construction of the Necessary and Proper Clause was true to the essence of the constitutional project itself, to create a government that would be capable of governing effectively in an unknowable future.[78]

In adopting such a broad acceptance of the implied powers of Congress to effectuate the enumerated powers of Article I, Section 8, Chief Justice Marshall followed the lead of Publius. Publius largely devoted *Federalist 23* to emphasizing the "simple" and "uniform" "axioms" that constitute the principal theme of *McCulloch*: "The *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained."[79] Thus, as would Chief Justice Marshall, Publius recognized that "government ought to be clothed with all the powers requisite to complete execution of its trust."[80] Publius also rejected the Jeffersonian interpretation, much as Chief Justice Marshall did. Publius explained, "Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success."[81]

In *Federalist 33* and *44*, Publius defended the framers' inclusion of the Necessary and Proper Clause in Article I, Section 8 of the Constitution, against stiff anti-federalist objection that the provision would enable the new Congress to legislate without effective limitation.[82] Publius's defense was unflinching. "Without the *substance* of this power," he claimed, "the whole Constitution would be a dead letter."[83] Indeed, anticipating the Marshall Court's ultimate position in *McCulloch*, Publius observed that, even had the

78. Chief Justice Marshall followed Publius's lead when highlighting the importance of interpreting the scope of national power with an eye toward allowing Congress the capacity to address future contingencies that are unknowable at present. *See* THE FEDERALIST NO. 34, at 204-08 (Alexander Hamilton) (Modern Library ed., 1941) (stating that there is nothing "more fallacious than to infer the extent of any power . . . in the national government, from an estimate of its immediate necessities").

79. THE FEDERALIST NO. 23, at 142 (Alexander Hamilton) (Modern Library ed., 1941); *see also* THE FEDERALIST NO. 31, at 188, 190 (Alexander Hamilton) (Modern Library ed., 1941) (including this ends-means principle among "primary truths, or first principles" of governance).

80. THE FEDERALIST NO. 23, *supra* note 79, at 142.

81. *Id.* at 144.

82. *See* THE FEDERALIST NO. 33, at 198 (Alexander Hamilton) (Modern Library ed., 1941) (supporting Necessary and Proper Clause and noting that it is responsibility of government to judge "proper exercise of its powers"); JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 122-24 (1961) (urging that "Congress must be granted only limited authority" under anti-federalist thought); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 28-29 (1981) (noting that anti-federalists considered it imprudent to grant powers without limits because it gave government free reign).

83. THE FEDERALIST NO. 44, *supra* note 28, at 292.

framers not included the Necessary and Proper Clause, "there [could] be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication."[84] Publius added, in language Chief Justice Marshall later echoed: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."[85]

In Publius's defense of the Necessary and Proper Clause, however, he frustratingly failed to suggest a definition of the key term, "necessary."[86] That task was left to the Court in *McCulloch*, which adopted a broad definition of the term consistent with its own, and with Publius's, justification of the clause.[87] Following Alexander Hamilton's reading of the clause in defense of the first banks' constitutionality and in opposition to the Jeffersonian interpretation, Chief Justice Marshall equated the constitutional term "necessary" with what he understood to be the common meaning of the term, that which is "convenient, or useful, or essential to another."[88] He continued, "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."[89]

In defining the term "necessary," the Chief Justice sharpened the work of Publius by specifying the judicial check on congressional assertions of its necessary and proper power. More specifically, the *McCulloch* test provides: "Let the end be legitimate, let it be within the scope of the constitution, and

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84. *Id.* at 294.

85. *Id.*; *see also* THE FEDERALIST NO. 33, *supra* note 82, at 199 ("What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the means necessary to its execution?").

86. *See* THE FEDERALIST NO. 33, *supra* note 82, at 198-200 (supporting Necessary and Proper Clause and noting that it is responsibility of government to judge "proper exercise of its powers").

87. Justice Frankfurter wrote that, although "[n]o judge writes on a wholly clean slate," Chief Justice Marshall bore "the duty of creation to a degree greater than falls to the lot of even most great judges." FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 12 (1978).

88. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819). In his argument defending the constitutionality of the first bank, Hamilton wrote:

> According to [the grammatical and popular sense of the term], *necessary* often means no more than *needful, requisite, incidental, useful,* or *conducive to.* It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted, by the doing of this or that thing.

HAMILTON, *supra* note 71, at 102.

89. *McCulloch*, 17 U.S. at 413-14.

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."[90] This doctrine reflected the Marshall Court's goal of achieving the balance mandated by the constitutional aspiration of an effective, but limited government. Chief Justice Marshall made this understanding clear in his introduction to the necessary and proper test:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.[91]

The *McCulloch* Court thus designed a judicial role that limits Congress to the boundaries of its enumerated powers, yet allows legislative flexibility within those boundaries.

The *McCulloch* test maintains the balance between effective government and limited government by integrating formal and functional elements into its construction of the federalism limits on congressional power. The Court derives the formal dimension of the *McCulloch* test from its translation of the enumerated powers of Congress into the authorized "ends" of legislative action.[92] Those ends constitute the formal categories of congressional power. The functionalism of the test resides in the broad authority that the Necessary and Proper Clause provides Congress to select the "means" to achieve those ends. In this framework, the Necessary and Proper Clause does not "enlarge" congressional power beyond the markers placed by the enumerated powers, nor does it "restrain the powers of Congress . . . to exercise its best judgment

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90. *Id.* at 421. Chief Justice Marshall's test for evaluating congressional action pursuant to the Necessary and Proper Clause followed the approach Hamilton had suggested with respect to the first bank. Hamilton wrote: "If the end be clearly comprehended within any of the specified powers, & 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." HAMILTON, *supra* note 71, at 107 (finding that Constitution does not grant federal government complete sovereignty, rather "it is sovereign . . . [only] to the extent of the objects of its specified powers").

91. *McCulloch*, 17 U.S. at 421.

92. Chief Justice Marshall's equation of the enumerated powers with "ends" was consistent with Publius's consistent conceptualization of those powers as "objects." *See* EPSTEIN, *supra* note 21, at 43 (noting that "allowable ends" authorize means although means cannot be delineated); *supra* note 29 and accompanying text (describing Constitution's assignment of certain objects to national government). It also underscores the Aristotelian, teleological orientation that underlies the *McCulloch* understanding of the constitutional authority of Congress. *See supra* note 3 (describing purpose of teleological reasoning to explain something based on its goal or end).

in the selection of measures to carry into execution the constitutional powers of government."[93]

The federalist balance of the *McCulloch* test is aligned with the distinction between law and politics that lies at the center of the *Marbury* conception of judicial review.[94] In *Marbury,* the Marshall Court emphasized the legal nature of the Constitution's limitations on congressional authority.[95] Chief Justice Marshall wrote, "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[96] But within those legal limits, governmental actors have discretion to achieve the policy they believe to be in the public interest, without interference from the courts.[97] In the *Marbury* framework, when national political actors "possess a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."[98]

The formal/functional interplay of the *McCulloch* test follows *Marbury's* law/politics framework. The formal dimension of *McCulloch* focuses on the constitutionally prescribed, legal limits of national political authority. In *McCulloch,* the Court emphasized the *Marbury* injunction that Congress, "in the execution of its powers," could not pass laws "prohibited by the constitution."[99] Nor could Congress cite one of its enumerated powers as a "pretext . . . for the accomplishment of objects not entrusted to the [national] government."[100] So long as Congress remains within the formal limits on its authority, the *McCulloch* orientation remains functional, with the Court deferring to legislative judgment on "the degree of [a law's] necessity"[101] in accomplishing a constitutional end. As *Marbury* would describe it, that judgment is one of politics, not law. Were judges to follow the Jeffersonian inter-

93. *McCulloch,* 17 U.S. at 420.

94. For useful discussions of the law/politics distinction in *Marbury,* see generally George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court,* 130 U. PA. L. REV. 1 (1981) (discussing achievements of Marshall Court and its effect on power of judiciary and separation of law and politics); Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution,* 96 HARV. L. REV. 340 (1982) (considering implications of law/politics distinction on balance between democracy and constitutionalism); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence,* 76 MICH. L. REV. 893 (1978) (considering motivation of Marshall Court decisions as shaped by politics or principle).

95. The *Marbury* Court recognized the Constitution as "the fundamental and paramount law of the nation." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

96. *Id.* at 176.

97. *Id.* at 166.

98. *Id.*

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

100. *Id.*

101. *Id.*

pretation and calibrate the relative need of congressional legislation, the *McCulloch* Court, following *Marbury*, warned they would "pass the line which circumscribes the judicial department, and . . . tread on legislative ground."[102]

2. Gibbons

After *McCulloch*, the question remained how the justices should define the enumerated powers, or ends, within congressional authority. The Marshall Court would wait only five years before taking that next step. In *Gibbons v. Ogden*, the Court defined the most important of Congress's regulatory powers, that governing interstate commerce.[103] The Constitution's Commerce Clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[104] The *Gibbons* Court's approach to the clause followed the *McCulloch* strategy. The Court integrated formal and functional elements in an effort to allow Congress wide discretion to pursue regulatory goals within a defined boundary true to the constitutional balance of power between nation and state.

Gibbons arose from an effort by the states to parcel out exclusive navigation rights for steamboat operators within their territorial waters. Ogden, who enjoyed a monopoly from the New York legislature to operate steamboats on New York waters, had received an injunction from a New York court barring Gibbons from operating his steamboats within the state.[105] Gibbons, however, held a potential trump card in the form of a federal license issued pursuant to a congressional statute enacted in 1793.[106] If Congress possessed the constitutional power to control navigation, Gibbons's federal license would override Ogden's state monopoly right pursuant to the Supremacy Clause.[107] The Marshall Court held for Gibbons.[108]

Chief Justice Marshall, again writing for his Court, began his analysis as he had in *McCulloch*. He first assessed the implications of the Constitution's enumeration of congressional powers for the interpretive task of measuring the scope of those powers. In *McCulloch*, Maryland had argued that the logic

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102. *Id.*

103. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-98 (1824) (holding that Commerce Clause authorizes Congress to regulate navigation of waters).

104. U.S. CONST. art. I, § 8, cl. 3.

105. *Gibbons*, 22 U.S. at 1-3.

106. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 168 n.74-75 (1985) (referencing federal statute authorizing license that allowed Gibbons to operate steam boats between New York and New Jersey).

107. *See* U.S. CONST. art. VI, cl. 2. (stating that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land").

108. *Gibbons*, 22 U.S. at 210-22.

of enumeration required the Court to limit narrowly the reach of the Necessary and Proper Clause.[109] The Chief Justice rejected that interpretive stance, because it would have denied Congress its constitutional role of selecting from among various legislative policy options the approach it believes best addresses matters within the boundaries of the enumerated powers.[110] In *Gibbons*, Ogden argued similarly to Maryland, that the logic of enumeration mandated that the powers generally be "construed strictly."[111] Chief Justice Marshall again rejected the suggestion, noting the absence of any such rule of construction in the text of the Constitution.[112]

As in *McCulloch*, the *Gibbons* Court was guided by Publius's injunction to interpret the constitutional text in accordance with its "common-sense" meaning.[113] As Publius observed, with respect to "a constitution of government . . . , the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction."[114] Thus, while Chief Justice Marshall accepted the impropriety of any "enlarged construction" of the enumerated powers that would extend the text beyond its "natural and obvious import," he found a "narrow construction" that would rob the text of its common-sense meaning to be equally illegitimate.[115] The Chief Justice saw in Ogden's proffered rule of construction the same infirmity that had disabled Maryland's Jeffersonian interpretation of "necessary and proper" – it would lead to an incompetent national government. The *Gibbons* Court, true to *McCulloch* and to Publius as well, would not accept the "propriety" of a narrowing construction of the enumerated powers that would render Congress "unequal to the objects for which it is declared to be instituted . . . ."[116]

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109. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418-19 (1819).

110. *Id.* at 419-420.

111. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824).

112. *Id.* at 187-88.

113. THE FEDERALIST NO. 83, at 539-40 (Alexander Hamilton) (Modern Library ed., 1941); *see also supra* notes 88-90 and accompanying text (defining Necessary and Proper Clause using common understanding of term).

114. THE FEDERALIST NO. 83, *supra* note 113, at 540-41.

115. *Gibbons*, 22 U.S. at 188. Chief Justice Marshall, like Publius, adopted a rule of construction with respect to Congress's enumerated powers that presumed the framers "employed words in their natural sense, and to have intended what they have said." *Id.* at 188. In case of ambiguity caused by "the imperfection of human language," the Chief Justice accepted the "well settled rule that the objects for which [the power] was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction." *Id.* at 188-89. In doing so, he adopted a purposive approach to the interpretation characteristic of teleological functionalism. *See supra* note 3 (discussing meaning of functionalism and consistency of term with Aristotelian thought).

116. *Gibbons*, 22 U.S. at 188.

With this background understanding of the Court's interpretive role, Chief Justice Marshall began his analysis of the *Gibbons* problem by defining Congress's commerce power. He did so as he said he would, by parsing the text of the Commerce Clause with an eye on its common-sense meaning.[117] He focused first on the subject matter of Congress's power, "commerce."[118] The Chief Justice rejected Ogden's effort to exclude navigation from Congress's regulatory power by essentially limiting "commerce" to the sale, exchange, or traffic of goods.[119] While Chief Justice Marshall did not question that trafficking in goods was "commerce," he did not accept that such a "general term, applicable to many objects," was limited to that meaning.[120] Instead, the *Gibbons* Court opted for an understanding of "commerce" that would encompass the complete range of commercial relationships. Chief Justice Marshall explained: "Commerce, undoubtedly, is traffic [in commodities], but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all of its branches, and is regulated by prescribing rules for carrying on that intercourse."[121] Because "[t]he mind can scarcely conceive a system for regulating commerce between nations" that would exclude navigation, the framers should not be taken to have excluded navigation by use of the term "commerce."[122] Thus, in the *Gibbons* understanding, "commerce" takes on the functional character of "a general term," including everything that is part of the web of commercial activity and relationships that Congress would need to include in a "system" of international or interstate commercial regulation.[123]

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117. *Id.* at 189-190.

118. *Id.*

119. *Id.* at 189-90.

120. *Id.* at 189.

121. *Id.* at 189-90.

122. *Id.* at 190. Chief Justice Marshall noted that the United States had regulated navigation "from the commencement of the government, . . . with the consent of all, and ha[d] been understood by all to be a commercial regulation." *Id.* The Chief Justice added:

> All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have understood it in that sense because all have understood it in that sense; and the attempt to restrict it comes too late.

Id. Publius likewise connected control of navigation with the regulation of international commerce. *See* THE FEDERALIST NO. 11, at 62 (Alexander Hamilton) (Modern Library ed., 1941) (describing importance of national Navy to secure international trade and relations).

123. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 229-32 (1824). This functional definition of commerce was true to the interpretive approach Chief Justice Marshall delineated earlier in the

The *Gibbons* Court's definition of "commerce" settled the nature of the activity that Congress could regulate. The Commerce Clause, however, also limits Congress's power to reach that activity within two geographical realms, one external to the nation, the other internal.[124] Within the external sphere, the text suggests that Congress has complete authority to control commerce. The Constitution does not qualify Congress's power to regulate commerce "with foreign Nations."[125] As Chief Justice Marshall signified by his emphasis on the need for Congress to address navigation rights in connection with its regulation of the country's commercial relationships with other nations, a narrow definition of "commerce" would have prevented Congress from completely controlling matters of international commerce.[126] Such a narrow understanding of commerce, therefore, was unacceptable.

In contrast with international commerce, the Commerce Clause does not give Congress complete authority to regulate internal commerce. The text of the Commerce Clause limits the jurisdiction of the national legislature to commerce "among the several States."[127] Here again, Chief Justice Marshall embraced a broad, functional understanding of the text. He read the phrase to attach congressional power to activity in the "interior" of the states, so long as that activity "extend[s] to or affect[s] other States."[128] The functionalism of this interpretation aligns with that of the earlier definition of "commerce." The Commerce Clause allows Congress to regulate any activity within the web of commercial relationships, anywhere in any state, so long as that activity extends to or affects any of the other states.[129]

Gibbons opinion. *See supra* notes 121-23 and accompanying text (noting Chief Justice Marshall's goals of interpreting Constitution based on "common-sense" meaning and on purpose).

124. In this discussion, I do not consider the nature of Congress's power to regulate commerce with Native American tribal governments.

125. U.S. CONST. art. I, § 8, cl. 3; *see also Gibbons*, 22 U.S. at 193-94 (noting that commerce cannot stop at states' borders; it extends into states).

126. *Gibbons*, 22 U.S. at 229-30.

127. U.S. CONST. art. I, § 8, cl. 3.

128. *Gibbons*, 22 U.S. at 194. In reaching this conclusion, Chief Justice Marshall took the word "among" to mean, "intermingled with." *Id.* He wrote: "A thing which is among others, is intermingled with them." *Id.*

129. Professor Richard Epstein suggested a narrower interpretation of the effect test of *Gibbons*. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1405 (1987) (considering scope of congressional power under Commerce Clause). Professor Epstein argued, "There is not the slightest hint that Chief Justice Marshall meant to have the 'affects' qualification expand the specific objects to which the 'plenary' commerce clause applies, beyond the control of interstate commercial transactions and the instrumentalities of interstate commerce." *Id.* I think there are several such hints. The first and most obvious is that Chief Justice Marshall explicitly rejected the limitation of commerce to commercial transactions. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-91 (1824). Moreover, nowhere in his lengthy and expository opinion did the Chief Justice mention the term "instrumentalities" of

The *Gibbons* understanding of Congress's commerce power follows from the theory of representative legitimacy that Chief Justice Marshall invoked in *McCulloch*. In this account, the "only security against the abuse of [governmental] power" lies "in the structure of the government itself," whereby the government operates on "its constituents," whose electoral power provides them with the "influence" to ward off "erroneous and oppressive" measures.[130] For such a political check to operate on the exercise of governmental power, it is crucial that those who are affected have a political voice that the government has incentive to hear. When a state's action affects only its residents, the political check is in full force. However, when state action substantially burdens those who reside and vote in other states, the political check is compromised, with a corresponding increase in the risk of an abuse in governing power.[131] On this theory, the national government has the strongest claim to political legitimacy with respect to those activities with effects that substantially radiate beyond the borders of any one state.[132] Because the citizens of each state send representatives to Congress, everyone who is affected by congressional regulation has had an opportunity to participate in the process of that legislature's decision making.[133] As the *McCulloch* Court concluded,

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interstate commerce or any similar term. Reversing the burden of persuasion on Professor Epstein, there is nothing in Chief Justice Marshall's opinion that limits his discussion to steamboats plying interstate waterways. His language is broader and more inclusive, and presumably, purposefully so.

There are other hints as well. For example, the operative phrase of Chief Justice Marshall's opinion includes activities that "extend to *or* affect other states." *Gibbons*, 22 U.S. at 194 (emphasis added). Professor Epstein's reading fits well the first category ("extend to"), but not the disjunctive second ("affect"). Hint: Why did the Chief Justice not qualify the disjunctive term "affect" if he intended it simply to refer to the effects on the instrumentalities and transactions that "extend to" state lines? Reading "affect" broadly fits the general, ordinary usage of the unqualified term. Moreover, an unqualified reading of the "affects" test fits the understanding of representative legitimacy that Chief Justice Marshall introduced in *McCulloch*, and also fits his primary reliance on the political process to limit congressional power. *See infra* notes 143-50 and accompanying text (describing importance of representative legitimacy as political check on governmental power). Finally, and most generally, Professor Epstein, throughout his analysis, reads *Gibbons* with a determination to limit congressional power to the most restrictive category the case might bear. Epstein, *supra*, at 1401-08. That interpretative stance, however, links Professor Epstein not to Chief Justice Marshall, but to those whose arguments the Chief Justice rejected in *McCulloch* and *Gibbons*. Although I fully agree with Professor Epstein that a certain formalism is important to Chief Justice Marshall's approach to congressional power, *see* Epstein, *supra*, at 1406, I think Professor Epstein mistakenly discounted the clearly functional component of the Chief Justice's thinking.

130. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819).

131. *See id.* at 429 (explaining that sovereignty of states ends at their borders).

132. *See id.* at 405 (stating that national government "is the government of all; its powers are delegated by all; it represents all, and acts for all").

133. *See id.* at 435 (discussing exercise of power by individuals through congressional representation).

"[t]he difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole."[134]

The power of the *McCulloch* understanding of representative legitimacy comes through in *Gibbons* not only with respect to Chief Justice Marshall's definition of what counts as interstate commerce, but also with respect to his definition of Congress's power to "regulate." For the *Gibbons* Court, the Commerce Clause gives Congress the complete power "to prescribe the rule by which commerce is to be governed."[135] The constraint on Congress is political, not legal:

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, . . . the *sole restraints* on which [the framers] have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[136]

In adopting this broad understanding of congressional power, the Chief Justice followed the formal/functional balance of the *McCulloch* framework: "[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects."[137]

It is telling that Chief Justice Marshall's delineation of the congressional commerce power came to rest on the people and the idea of representation. In analyzing Congress's commerce power in this way, he not only aligned *Gibbons* with *McCulloch*, he also followed the federalist understanding. In *Federalist 45* and *46*, Publius addressed anti-federalist fears that the new national government would overwhelm the state governments, inevitably consolidating all political power at the national level. Publius met the objection head on. Because creation of a competent national government was "essential" to secure the "happiness" of the American people, he argued, the displacement of some pre-existing state authority was simply a byproduct of a necessary change, rather than a legitimate basis for objection.[138] Publius continued:

> Was . . . the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, . . . not that the people of America should enjoy peace, liberty, and safety, but that the government

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134. *Id.* at 435-36.

135. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (explaining that "[the commerce] power, like all others vested in [C]ongress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution").

136. *Id.* at 197 (emphasis added).

137. *Id.*; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (noting that "the government of the Union, though limited in its powers, is supreme within its sphere of action").

138. THE FEDERALIST NO. 45, *supra* note 47, at 298.

> of the individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?[139]

For Publius, "the public good, the real welfare of the great body of the people, is the supreme object" of the Constitution and of constitutional government.[140] "[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people," Publius concluded, "the voice of every good citizen must be, Let the former be sacrificed to the latter."[141]

In the federalist framework, the people not only are the ultimate object of governmental power, but also they are the "ultimate authority."[142] Publius thus identified the founding generation's commitment to popular sovereignty as the conceptual key to balancing federalism.[143] The "arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments,"[144] is not best understood as a treaty negotiation between two contending powers grudgingly dividing up their sovereignty. To Publius, the national and state governments are "kindred systems" that coexist as "parts of one whole."[145] Federalism, then, is an effort to provide an overall structure of government that would best serve the people. As Publius reminds all those who would become preoccupied with questions of governmental sovereignty, "[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."[146] Neither Congress nor the state legislatures are sovereign in any ultimate sense.[147]

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139. *Id.* at 298-99.

140. *Id.* at 299. Publius concluded the thought by noting, "no form of government whatever has any other value than as it may be fitted for the attainment of this object." *Id.*

141. *Id.* In *Gibbons*, Chief Justice Marshall followed Publius in reminding Ogden that the pre-existing sovereignty of the states "underwent a change" with ratification of the Constitution. *See* Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 187 (1824) (discussing character of state sovereignty before and after Constitution).

142. THE FEDERALIST NO. 46, *supra* note 34, at 305.

143. *See* BEER, *supra* note 1, at 137, 152 (discussing establishment of federal system with allocation of power made by people); KETCHAM, *supra* note 22, at 72 (viewing Constitution as document through which people authorized redivision of sovereignty); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 532, 447-54 (1969) (detailing enthusiasm of federalists in reservation of primary right of power in people). For a thoughtful study of the power of the idea of popular sovereignty for the founding generation, see generally EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).

144. THE FEDERALIST NO. 37, *supra* note 21, at 228.

145. THE FEDERALIST NO. 82, at 536 (Alexander Hamilton) (Modern Library ed., 1941) (emphasis omitted).

146. THE FEDERALIST NO. 46, *supra* note 34, at 304-05.

147. *See* PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787, at 200 (1983) (stating that reservation of

Because of this ultimate reliance on popular will, Publius understood that the working balance of power between the nation and the states would emerge from the political process. That balance "will not depend merely on the comparative ambition or address of the different governments," but will instead ultimately "depend on the sentiments and sanction of their common constituents."[148] As a default position, Publius expected that "the first and most natural attachment of the people will be to the governments of their respective States."[149] He thus concluded:

> If, therefore, . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . . .[150]

Publius, in this account, anticipated *McCulloch* and *Gibbons*. As would the Marshall Court, he viewed federalism, and more particularly, the scope of congressional power, through the lens of popular sovereignty. The end of federalism, in their shared view, is not the preservation of sovereignty per se in either the national government or in the states. Rather, it is the harnessing of the powers and responsibilities of both levels of government as a means toward the ultimate end of serving the collective good of a sovereign people.[151] The role of formalism in the federalist understanding, then, is not so much to preserve preconceived notions of state or national governmental sovereignty, but rather to keep each level of government within the authority the people had entrusted to them.

Publius thus counterbalanced his defense of a competent national government with an overriding understanding that its power would be exercised only within "a certain sphere."[152] The states, therefore, retain "a very extensive portion of active sovereignty,"[153] or governing supremacy.[154] In this scheme,

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ultimate authority to people clarified question of whether state or federal government would be sovereign); WOOD, *supra* note 143, at 531 (explaining that lack of sovereignty by state legislatures or Congress exists because of emanation of power from people).

148. THE FEDERALIST NO. 46, *supra* note 34, at 305.

149. *Id.*

150. *Id.* at 306.

151. *See* KETCHAM, *supra* note 22, at 60 (discussing inclusion of people in affairs of government to aid in pursuit of public good).

152. THE FEDERALIST NO. 46, *supra* note 34, at 306.

153. THE FEDERALIST NO. 45, *supra* note 47, at 300.

154. When Publius used the term "sovereignty," as he often did, he used it to mean "supremacy" in the relative sense of governmental jurisdiction. For a discussion of the concept of sovereignty in American constitutionalism, see *infra* notes 392-400 and accompanying text.

the powers of the federal government, although sufficient to control "the great and aggregate interests" of the people,[155] nevertheless are "few and defined."[156] Correspondingly, while the states are limited to the "local and particular" interests of the people,[157] their powers remain "numerous and indefinite."[158] The national government exercises a governing sovereignty, or supremacy, only to a certain extent, as measured by the "objects of its specified powers."[159]

Although *McCulloch* and *Gibbons* often are read as strongly nationalist in intent,[160] the Marshall Court's framework for congressional power reflects the federalist sensibility of balancing national and state powers. In *McCulloch*, after all, the Court established the enumerated powers of Congress as the only permissible ends of national legislative action. The Court thus confined the necessary and proper power to the selection of policy to attain those fixed goals. Indeed, in the *McCulloch* framework, the principal role of a reviewing court is to ensure that Congress has not abused its necessary and proper power by attempting to reach ends that the Constitution reserved for the states.[161]

In *Gibbons*, the Court again consciously preserved a balanced federalism respectful of the governing status of the states. Chief Justice Marshall maintained the *McCulloch* assurance that the enumerated powers themselves fix meaningful boundaries on congressional power. As he explained in *Gibbons*, "[t]he enumeration presupposes something not enumerated."[162] In the *Gibbons* balance, the power of Congress over interstate commerce allowed regulation of "commercial intercourse,"[163] broadly and functionally understood, within a state that "extend[s] to or affect[s] other states,"[164] but only that. The regula-

155. THE FEDERALIST NO. 10, *supra* note 27, at 60.

156. THE FEDERALIST NO. 45, *supra* note 47, at 303.

157. THE FEDERALIST NO. 10, *supra* note 27, at 60.

158. THE FEDERALIST NO. 45, *supra* note 47, at 303. Publius continued: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.*

159. HAMILTON, *supra* note 71, at 107.

160. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 120 (1942) (explaining that in *Gibbons*, "Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded"); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 65-71 (1960) (discussing *McCulloch* and *Gibbons* in light of Marshall Court's desire to enhance national power).

161. *See supra* notes 86-98 and accompanying text (providing further discussion of *McCulloch's* analysis of Necessary and Proper Clause).

162. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

163. *Id.* at 189-90, 193 (recognizing Congress's power to regulate "every species of commercial intercourse between the United States and foreign nations").

164. *Id.* at 194.

tion of noncommercial matters, as well as "completely internal commerce,"[165] remained outside Congress's commerce power.

To Chief Justice Marshall, the *Gibbons* definition of Congress's commerce power fit the essential constitutional balance of authority between nation and state. He explained:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not those which are completely within a particular state, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.[166]

Chief Justice Marshall's account, moreover, fit precisely with the federalist understanding of federalism that emerged from the constitutional convention.[167]

The *McCulloch/Gibbons* articulation of the federalism balance, with its mixing of formal and functional understandings of the scope of congressional power, created an allocation of power that allowed both levels of government the competence to address matters within their authority. In this scheme, the national government controlled selected matters designated by the Constitution as within national concern, with a broad, undefined remainder of authority left to the state governments. In late eighteenth and early nineteenth century America, the thoroughly local concerns of the individual states constituted "a very extensive portion of active sovereignty."[168]

II. The Federalism Pendulum

The Marshall Court's decisions in *McCulloch* and *Gibbons* established a juridical settlement of the federalism limits on congressional regulatory power that aligned constitutional law with the federalist vision. That settlement built on a concerted effort by the early national government to lay an economic foundation for the growth of a national market.[169] With the increas-

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165. *Id.* at 195.

166. *Id.*

167. *See* WOOD, *supra* note 143, at 529-31 (discussing federalist division of power through "concurrent jurisdiction" over local and national concerns). An influential spokesman of the federalist view, James Wilson, offered the following description of the "general principle" that the framers developed for the "drawing of the line" between the roles of the federal and the state governments: "[W]hatever object was confirmed in its nature and operation to a particular State ought to be subject to the separate government of the States; but whatever in its nature and operation extended beyond a particular State, ought to be comprehended within the federal jurisdiction." *Statement of James Wilson in the Pennsylvania Convention*, Nov. 24, 1787, *in* 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139-40 (Max Ferrand ed., 1911).

168. THE FEDERALIST NO. 45, *supra* note 47, at 300.

169. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 89 (1989) (explaining Congress's desire to intervene in private markets and its use of law as "an instrument

ing intractability of the sectional conflict that plagued antebellum America, however, the federal role in the national economy largely evaporated soon after the *Gibbons* decision.[170]

The national legislature's withdrawal from economic regulation did not simply reflect the political constraints of sectionalism. It flowed from an ideological shift as well. Led by the Jacksonian "revolution,"[171] Americans came to believe that markets were best "regulated" by competition among private actors.[172] Government regulation of markets thus fell into disfavor during the antebellum era. When such regulation proved necessary, moreover, the American preference was for state control rather than control by the national government.[173]

While this antebellum political settlement might have disappointed some of the more ardent nationalists of the federalist persuasion,[174] it did not offend federalist constitutionalism. Publius had argued that the working balance of regulatory power between nation and state would reflect the evolving policy preferences of the people.[175] In addition, Publius predicted that "the first and most natural attachment of the people will be to the governments of their

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to promote private economic enterprise"). The creation of a commercial unity on a national scale was an important federalist goal in creating a viable national government under the Constitution. *See generally* THE FEDERALIST NO. 11 (Alexander Hamilton) (Modern Library ed., 1941) (discussing varying positions of federal regulation of trade).

170. *See* HALL, *supra* note 169, at 90, 92 (detailing controversies of federal regulation and eventual decline in federal legislation involving economic entities). The federal withdrawal from its engagement with the national economy is best symbolized by President Andrew Jackson's veto in 1832 of Congress's legislation to reauthorize the Bank of the United States. *See* MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS & BELIEFS 10-13 (1957) (discussing Jacksonian movement against "Monster Bank" of United States). The federal withdrawal was not total, however. For example, in 1852, Congress enacted its first major regulatory statute, which addressed the safety of steamboat operations. HALL, *supra* note 169, at 93.

171. *See* JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 320-24 (1982) (chronicling Jackson's presidential campaign against John Quincy Adams).

172. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 80 (1991).

173. *See* HALL, *supra* note 169, at 94 (describing pre-Civil War trend of reserving economic regulation to states). The antebellum timeline of state regulation resembled that of Congress. After a brief flourishing of state regulation early in the nineteenth century, those efforts subsided in the wake of the Panic of 1837. *Id.* at 94-96.

174. Chief among those, undoubtedly, would have been Alexander Hamilton, who believed it important to tap the full potential of the federal government to promote the cause of nation building. *See* ELKINS & MCKITRICK, *supra* note 56, at 92-114 (reviewing background and political beliefs of Hamilton).

175. *See* THE FEDERALIST NO. 46, *supra* note 34, at 305 (explaining that "sentiments and sanction" of constituents were likely to be factor in government action); *supra* notes 139-51 and accompanying text (explaining Publius' view of relationship between national government, state governments, and people).

respective states."[176] It hardly is surprising that this would remain so in the "underdeveloped society"[177] of deTocqueville's America, which was characterized by "small towns and rural life."[178] In this social context, the *McCulloch/Gibbons* conception of congressional regulatory power had become politically unusable, and thus constitutionally dormant.

The hostile environment for federal regulation began to change after the Civil War. The small-scale economy of the antebellum era yielded to an ever-increasing process of industrialization.[179] With industrialization came the development of large-scale economic enterprises,[180] and with them, a host of social problems.[181] Many Americans saw the rise of the "huge new companies" in the late nineteenth century as "unnatural," and "alarming."[182]

As the antebellum understanding would have it, the first regulatory responses to the problems associated with the new industrialism came from the state legislatures.[183] Yet, Publius had also predicted that the people's preference for regulatory decision making at the state level would change if "manifest and irresistible proofs of a better administration" developed at the national level.[184] Such proofs developed with the realization that the individual states could not adequately control enterprises that had created a transcontinental

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176. THE FEDERALIST NO. 46, *supra* note 34, at 305.

177. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 111 (1977) (explaining economic background of nineteenth century America).

178. HALL, *supra* note 169, at 87. It was not until 1850 that the value of goods manufactured in the United States exceeded that of agricultural produce. *Id.* at 88.

179. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 117 (1987) (explaining shifts to large-scale enterprise and ensuing constitutional questions).

180. *Id.*

181. *See id.* at 118-19 (listing social problems associated with industrialized society, such as overcrowding, unemployment, poverty, and inequalities in bargaining power); MCCLOSKEY, *supra* note 160, at 102-03 (noting environment of concern that collective welfare might be harmed by spread of capitalism if not controlled by government).

182. THOMAS K. MCCRAW, PROPHETS OF REGULATION 77 (1984). Professor McCraw summarized the perceived "novel and alarming practices" of these firms as follows:

> [D]egredation of human labor in such industries as steel (where immigrant laborers put in 72-hour workweeks); unscrupulous manipulation of stocks and bonds in industries such as railroads and utilities (where "frenzied finance" seemed common); and abrupt losses of community control, not only over industries but over individual center firms, whose resources often dwarfed those of city and even state governments.

Id.

183. COX, *supra* note 179, at 119; *see also* Arnold M. Paul, *Legal Progressivism, the Courts, and the Crisis of the 1890s*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 283, 283-84 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978) (listing state movements in areas of antitrust and labor abuses).

184. THE FEDERALIST NO. 46, *supra* note 34, at 306.

system of railroads, had organized on a national scale, and had developed an increasingly interdependent national economy.[185] Congress responded legislatively to this diagnosis of state regulatory failure.[186] The most prominent and the most suggestive congressional legislative actions of this era were the Interstate Commerce Commission Act of 1887,[187] which established the first modern federal regulatory agency in an attempt to control the railroads, and the Sherman Antitrust Act of 1890,[188] which outlawed monopolies and various anti-competitive practices. In these legislative efforts, Congress relied on the regulatory framework provided by the Commerce Clause and the Necessary and Proper Clauses and thus, on *Gibbons/McCulloch*. The legislation also inevitably sharpened the political and constitutional controversy concerning the authority of the federal government to control capitalism.[189]

A. The Formalist Turn

Congress's forays into regulatory action were met with judicial resistance. The congressional initiative required the Court to rethink the *McCulloch/Gibbons* approach to the federalism limits on congressional regulatory power, as well as the federalist understanding of federalism on which that approach was grounded. The result was a redefinition of congressional power along exclusively formalistic grounds. The justices returned to *Gibbons*, eliminated Chief Justice Marshall's opinion, and limited Congress's regulatory authority to legislation that fit precisely the factual dynamic of the case. Stripped to those essentials, *Gibbons* simply had allowed Congress to authorize steamboats to enter the navigable waterways of the states notwithstanding local regulatory barriers to that entry. Reconstructed this way, *Gibbons* had done no more and no less than to legitimate congressional regulations that facilitated movement in the "streams" of interstate commerce.

The restrictive core of the Court's formalized approach to the commerce power emerged early on, when the justices in *United States v. E. C. Knight Co.*[190]

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185. COX, *supra* note 179, at 118-19; MCCLOSKEY, *supra* note 160, at 102-03.

186. Congress did not embark on a wholesale takeover of state regulation. Instead, the national legislators targeted their regulatory attention on enterprises that, because of the scope of their activities, could not adequately be controlled by the states individually. MCCRAW, *supra* note 182, at 60-61.

187. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (1887) (repealed 1978) (current version codified as amended in scattered sections of 49 U.S.C.).

188. Act of July 2, 1890, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1-7 (1994)).

189. *See* COX, *supra* note 179, at 138-39 (noting numerous challenges to federal regulatory intervention made by business enterprises); MCCLOSKEY, *supra* note 160, at 101-04 (detailing conflicting interests between ownership of property and freedom of action).

190. 156 U.S. 1 (1895).

largely disabled the Sherman Antitrust Act.[191] In *Knight*, the government sought to cancel a corporate acquisition that gave the American Sugar Refining Company a ninety-eight percent share of the sugar-refining market in the United States.[192] There can be little doubt that the *Gibbons* understanding of the commerce power supported the constitutional reach of the Sherman Act to the Sugar Trust. Sugar refining certainly fits within any common-sense meaning of "commercial intercourse" – the *Gibbons* understanding of "commerce."[193] Furthermore, it is an understatement that a virtually complete national monopoly "extend[s] to or affect[s] other states" – the *Gibbons* understanding of what makes commerce interstate in character.[194] The *Knight* Court disagreed, however, reasoning that the sugar-refining industry was one of manufacturing and not one of "commerce."[195]

The *Knight* separation of manufacturing from commerce evoked the rejected distinction in *Gibbons* between navigation and commerce.[196] Chief Justice Marshall, following Publius, pointedly resisted resorting to any artificially narrow definition of "commerce" that would compromise the ability of Congress to reach activity that common sense placed within the web of relationships that constituted international or interstate commerce.[197] Chief Justice Fuller, writing for the *Knight* majority, clearly indicated the formalist reversal of the Marshall Court's more functional understanding of "commerce":

> Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and

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191. *See* United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (holding commerce power inapplicable to application of antitrust laws when acts of sugar company "indirectly affected" trade or commerce). The Court simultaneously neutralized the Interstate Commerce Commission Act as well. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1212-15 (1986) (discussing Supreme Court decisions manifesting "hostility" towards Interstate Commerce Commission). In Professor McCraw's summary, "the federal judiciary, with the Supreme Court in the lead, sharply restricted the powers of the [Interstate Commerce Commission] and reduced it, by the late 1890s, to a mere collector of data." MCCRAW, *supra* note 182, at 62.

192. *Knight*, 156 U.S. at 5, 9.

193. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

194. *Id.* at 194.

195. *Knight*, 156 U.S. at 12.

196. During this formalist period, the Court eventually would equate "commerce" with "trade," see Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936), the very equation Chief Justice Marshall rejected in *Gibbons*. *See supra* notes 117-23 and accompanying text.

197. *See supra* notes 113-16 and accompanying text (discussing Chief Justice Marshall's "common-sense" construction of constitutional text, as advocated by Hamilton).

> affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not part of it.[198]

Having excised sugar refining from the definition of "commerce," the Court was free to deploy *McCulloch/Gibbons* in the unaccustomed role of denying congressional power. Because it was not classified as "commerce," sugar refining was unreachable by Congress, regardless of the inevitability or the extent of its "indirect" effect on interstate commerce.[199] The *Knight* departure from the federalist understanding lay in the unnatural, overly formalistic meaning the Court ascribed to commerce, I should emphasize, and not in the formal restriction on congressional power that resulted from the finding that Congress had regulated a noncommercial activity.

The Court complimented this intensified, formalistic limitation of the activity that qualified as "commerce" with an acceptance of congressional regulatory authority over activity the justices visualized as within a "stream" or "current" of interstate commerce.[200] In *Stafford v. Wallace*,[201] for example, the Court allowed congressional regulation of stockyards that held livestock shipped from out of state for eventual sale or shipment to customers in other states.[202] Because the stockyards were "but a throat through which the current [of interstate commerce] flows,"[203] they were "a part of interstate commerce"

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

199. *Id.* at 16. As the Court explained, "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State." *Id.* at 12.

Only Justice Harlan, in dissent, retained the federalist sensibility that had shaped the *McCulloch/Gibbons* understanding of congressional power. He wrote:

> To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish.

Id. at 45 (Harlan, J., dissenting).

200. For a discussion of the origins of the stream-of-commerce doctrine, see David Gordon, Swift & Co. v. United States: *The Beef Trust and the Stream of Commerce Doctrine*, 28 AM. J. LEGAL HIST. 244, 275-79 (1984). For an analysis of the doctrine during the formalist period, see Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 108-27 (1992).

201. 258 U.S. 495 (1922).

202. Stafford v. Wallace, 258 U.S. 495, 528 (1922).

203. *Id.* at 516. The Court noted that "[t]he object to be secured by the act is the free and unburdened flow of livestock." *Id.* at 514. This notation was significant because it helped

and thus within congressional power.[204]

The levee that separated the congressionally regulable activity in the streams of interstate commerce from the local activity on land was permeable, but only slightly so. In *The Shreveport Rate Cases*,[205] the Court upheld the federal government's power to regulate the rates on an *intra*state rail route in an effort to prevent discrimination against the rates for *inter*state carriage.[206] In *Knight*, of course, the Court had blocked Congress from addressing a local activity (sugar refining) despite its effect on interstate commerce (the buying and selling of refined sugar), because that effect, by definition, was deemed *indirect*. In *Shreveport*, by contrast, the justices allowed Congress to reach the local activity (the intrastate rates) because its effect on interstate commerce (the interstate routes) was deemed *direct*. The *Shreveport* Court explained the finding of directness by characterizing the congressional regulation as one that, in effect, controlled the rail carriers themselves as "instruments of interstate commerce":

> *[Congress's] authority, extending to these interstate carriers as instruments of interstate commerce*, necessarily embraces the right to control *their* operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.... Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that

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distinguish *Stafford* from *Hammer v. Dagenhart*, 247 U.S. 251 (1918). In *Hammer*, the Court invalidated an act of Congress that barred the transportation in interstate commerce of products manufactured by child labor. *Id.* at 269-72. Although this regulation applied within the stream of commerce, it imposed, rather than removed, a barrier to the flow of goods. *Id.* at 269-70. The law thus did not fit the *Gibbons* model, as reconstructed, and became suspect. *Id.* at 271-76. The Court in *Stafford* reaffirmed the *Hammer* limitation, noting that the "very essence" of Congress's commerce power was to ensure that the "streams of commerce... are ever flowing." *Stafford*, 258 U.S. at 519.

204. *Stafford*, 258 U.S. at 516. The transactions that occurred at the stockyards, the Court found, could "not be separated from the movement to which they contribute and necessarily take on its character." *Id.* The Court also noted that the stockyards Congress had regulated were "not a place of rest or final destination." *Id.* at 515.

The Court distinguished *Stafford* in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935), when it invalidated federal regulation of a slaughterhouse that processed poultry mostly from out of state, but then sold to local customers. *Id.* at 542-51. Because "the flow in interstate commerce had ceased," the sales and operations of the slaughterhouse were not "transactions in interstate commerce." *Id.* at 543. Unlike the stockyards in *Stafford*, which received livestock from out of state and returned them to interstate commerce, the poultry in *Schechter* "had come to a permanent rest within the State." *Id.*

205. 234 U.S. 342 (1914).

206. Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 350-55 (1914).

> is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.[207]

The *Shreveport* decision is best seen as a limited exception to *Knight*. Although the Court allowed Congress some authority to reach local activity, it did so only through the *Knight* vision of *Gibbons*. The key to *Shreveport* was the Court's recognition of Congress's authority over railroads as "the common instrumentalities of interstate and intrastate commercial intercourse."[208] That authority enabled Congress to control the carriers "as instruments of interstate commerce," and to prevent them from using their "intrastate operations" to harm activity "within the national field."[209] At bottom, the justices in *Shreveport* simply vindicated the authority of Congress to ensure that interstate carriers "keep the highways of interstate communication open to interstate traffic upon fair and equal terms" with their local operations.[210] So viewed, *Shreveport* fit the *Gibbons* fact pattern. It was the tight interrelationship of the local rates and the interstate rates on rail lines, which operated locally as well as interstate, that converted a local, commercial activity into a matter of national concern. The *Shreveport* Court had eased *Knight's* formalism only slightly.[211]

As the *Stafford* and *Shreveport* decisions demonstrate, the early modern Court was hardly a single-minded foe of federal regulation.[212] Yet, in *Knight*, the doctrinally dominant decision of this era, the Court made clear that it had

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207. *Id.* at 351-52 (emphasis added).

208. *Id.* at 353.

209. *Id.* at 351-52.

210. *Id.* at 353-354.

211. The Court in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925), followed the *Shreveport* exception to *Knight*. In *Coronado*, the Court upheld application of the Sherman Antitrust Act to a strike against mine operators. *Id.* at 310. Although mining, like the sugar refining in *Knight*, is a local activity, the purpose of the strike, like the purpose of the discriminatory local rail rates in *Shreveport*, was to harm interstate commerce. *Id.*

The Court emphasized the continuing vitality of *Knight* formalism, and the limited nature of the *Shreveport* and *Coronado* exceptions, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In *Carter*, the Court invalidated a federal statute that imposed, among other things, certain labor regulations on coal mining operations. *Id.* at 289-310. Following *Knight*, the Court classified mining as "production," not "commerce." *Id.* at 300-01, 303. Accordingly, although the Court "freely granted" that coal mining operations affect interstate commerce, the Court discounted that effect as "indirect," and thus outside the regulatory reach of Congress. *Id.* at 307-08. The *Carter* Court clarified the formalism of the relationship inquiry: "[T]he matter of degree has no bearing upon the question here, since that question is not – What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? But – What is the *relation* between the activity or condition and the effect?" *Id.* at 308.

212. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 4-5 (1990).

lost its balance. The justices retained the formalism of the *McCulloch/Gibbons* understanding by holding Congress to the constraints imposed by the Constitution's enumeration of powers.[213] In doing so, they remained focused on the important federalism value of protecting the governmental integrity of the states.[214] They ignored, however, the counterbalancing, teleological functionalism[215] of the Marshall Court's foundational decisions. Within the formal confines of the enumerated powers, Chief Justice Marshall consistently rejected artificial barriers to the accomplishment of Congress's constitutional responsibilities. In *Gibbons*, the Marshall Court made clear that a balanced federalism must accommodate a power in Congress to regulate activities that, as a matter of common sense, are a part of interstate commerce. In its overriding dedication to preserve a meaningful governmental role for the states in a quickly changing society, the early modern Court threatened to rob Congress of any meaningful role in addressing the national economy. Congress, to be sure, could act within the "streams of commerce" to keep them "ever flowing,"[216] but the national legislature was left powerless to address the myriad of activities, clearly economic in nature, on which that flow ultimately depended.

Thus, the early modern Court had transformed federalism into a purely formalistic division of regulatory authority between the nation and the states grounded on an unworkably narrow conception of commerce among the states.[217] This division safeguarded state prerogative, but it ignored the Marshall Court's central premise that legal conceptions of congressional power must make functional sense, allowing Congress to play its constitutional role as a national legislature. This division also ignored the reality of a modern national economy. The early modern Court's thoroughly formalist understanding of federalism could not stand.

B. The Functional Response

By the early 1930s, the Stock Market Crash of 1929 had produced a devastating, nationwide economic crisis.[218] The political reaction to the Great Depression included a transfer of government in the 1932 election, with the

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213. *See, e.g., Carter*, 298 U.S. at 291; United States v. E.C. Knight Co., 156 U.S. 1, 11-13 (1895).

214. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935); *Knight*, 156 U.S. at 13.

215. *See supra* note 3 (discussing characteristics of functionalism).

216. Stafford v. Wallace, 258 U.S. 495, 519 (1922).

217. This formalistic division is known as "dual federalism." COX, *supra* note 179, at 138-55; HOVENKAMP, *supra* note 172, at 79-81.

218. For a description of this period, see JAMES MACGREGOR BURNS, THE AMERICAN EXPERIMENT: THE WORKSHOP OF DEMOCRACY 539-59 (1985).

national electorate removing the Republican Party from its long-standing position of control over Congress and the White House.[219] Franklin Roosevelt and the newly resurgent Democrats assumed power in 1933, and within the First Hundred Days the New Deal Congress, working under President Roosevelt's leadership, enacted fifteen major regulatory statutes.[220] In the summer of 1935, again prodded by President Roosevelt, Congress followed with another ambitious set of regulatory laws in the Second Hundred Days.[221] Virtually all of this legislation, however, was constitutionally problematic under the formalistic doctrine the early modern Court had devised in its effort to control the regulatory power of Congress.[222]

In the early tests of the New Deal legislation, the Court held to its formalist line and invalidated virtually every part of the federal recovery program that came to its attention.[223] In the economic and social catastrophe of the Great Depression, however, the manufacturing, mining, and agricultural sectors throughout the country had been especially hard hit.[224] To hold, as *Knight* and its progeny dictated, that such matters were local, noncommercial, and outside the reach of Congress[225] proved to be untenable and unacceptable.[226]

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219. For a description of the election, see Frank Freidel, *Election of 1932*, *in* THE COMING TO POWER: CRITICAL PRESIDENTIAL ELECTIONS IN AMERICAN HISTORY 322 (Arthur M. Schlesinger, Jr. ed., 1971).

220. *See* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 41-62 (1963).

221. *Id.* at 143-66.

222. COX, *supra* note 179, at 147-48.

223. The following cases struck down New Deal legislation on Commerce Clause grounds: Carter v. Carter Coal, 298 U.S. 238 (1936) (invalidating price-fixing and labor regulations of Bituminous Coal Conservation Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating regulations of hours and wages in slaughterhouses promulgated pursuant to National Industrial Recovery Act); R.R. Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (invalidating Railroad Retirement Act). The Court also invalidated congressional legislation in *United States v. Butler*, 297 U.S. 1 (1936) (invalidating Agricultural Adjustment Act on taxing and spending power grounds), and in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating § 9(c) of National Industrial Recovery Act on nondelegation grounds). The exception to the early judicial resistance to the New Deal came in *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935) (upholding validity of Joint Resolution of June 5, 1933, ch. 49, 48 Stat. 112, abolishing gold standard, on gold clauses grounds).

224. *See* BURNS, *supra* note 218, at 543-44 (discussing impact of Depression on agricultural and manufacturing sectors); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 664-65 (1946) (discussing impact of Depression on mining sector).

225. *See* United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895).

226. For an exploration of the political controversy generated by the Court's constitutional resistance to the New Deal, centering on President Roosevelt's "Court-Packing Plan," see WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82-162 (1995).

The justices – and their formalistic doctrine – had to yield.[227]

And yield they did, in the "Constitutional Revolution of 1937."[228] The essence of the "revolution" was the Court's replacement of the formalism that had dominated the federalism doctrine of the early modern era with a thoroughly functional approach to congressional power.[229] The first retreat came in *NLRB v. Jones & Laughlin Steel Corp.*,[230] when the Court upheld an important component of the Second Hundred Days, the National Labor Relations Act of 1935.[231] The National Labor Relations Board created by that Act charged the steel company with an unfair labor practice for its firing of employees who attempted to organize a union.[232] The constitutional rub was that these employees had worked in one of Jones & Laughlin's manufacturing facilities, an activity that *Knight* had removed from Congress's commerce power.[233] The government responded with an attempt to position the case under *Stafford*.[234] With Jones & Laughlin vertically integrated on a national scale, the manufacturing facility, in the government's view, functioned as the "focal point" in a stream of commerce.[235] Because "industrial strife" at the facility "would cripple the entire movement" of the company's goods, the government depicted the Act's labor regulations, at least as applied to Jones & Laughlin, as an effort to remove a potential barrier to the interstate "flow" of commerce.[236] The company, in turn, sought to distinguish *Stafford* on the ground that manufacturing was not simply a holding pen, as were the stockyards in that case, but a transformative process: what flowed into the plant

227. As William Leuchtenburg observed, "[t]he Great Depression presented the necessity for government action with a special urgency, and when even then the Justices resisted, their fate was sealed." *Id.* at 236.

228. *Id.* at 213-36. For a revisionist view challenging the timing, if not the fact, of a "constitutional revolution" in the Court's approach to the regulatory power of Congress, see generally Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

229. The revolution included not only a move from formalism to functionalism with respect to the federalism limits on congressional regulatory power, but also a similar shift with respect to the substantive due process limits on the power of states to enact economic and social regulation. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (holding that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process").

230. 301 U.S. 1 (1937).

231. *See* Act of July 5, 1935, 74th Cong., 1st Sess., ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§151-69 (1994)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-41 (1937) (holding that effect of labor disputes on steel industry triggered Congress's Commerce Clause power).

232. *Jones & Laughlin*, 301 U.S. at 22.

233. *Id.* at 34.

234. *Id.* at 34-36; *see also supra* notes 201-04 and accompanying text (discussing *Stafford*).

235. *Jones & Laughlin*, 301 U.S. at 34-35.

236. *Id.* at 35-36.

(raw materials) was not what flowed out (finished products). In this view, Jones & Laughlin's manufacturing plant was not a harbor in the stream, but a local land mass that stood between, and outside, two separate streams.[237]

The point/counterpoint of the stream of commerce argument in *Jones & Laughlin* vividly demonstrated the formalist game of struggling to place a regulated activity within one (*Knight*) or another (*Stafford*) legal category. The "revolution" the justices instigated in the case accompanied their announcement that they no longer would play that game. The Court found it unnecessary to unravel the arguments from *Knight* and *Stafford* because "congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce."[238] With this tack, the Court reached back to another of the early modern precedents, *Shreveport*, which allowed Congress to regulate the local, commercial activities of interstate carriers if those activities had "a close and substantial relation to interstate traffic."[239] In doing so, the *Jones & Laughlin* Court transformed that limited exception to the *Knight/Stafford* dichotomy into the foundation for a new and functional doctrinal construct.

The Court began on the familiar terrain of *Shreveport*. Chief Justice Hughes, writing for the majority, announced: "Although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[240] The essence of the *Jones & Lauglin* transformation was the Court's measuring of the "relation" between the local activity and interstate commerce by the extent of the "effect" the former had on the latter.[241] Given the "far-flung activities" of Jones & Laughlin[242] and the size and importance of the steel industry,[243] Chief Justice Hughes thought it "obvious" that a labor strike at the manufacturing plant would have an "immediate" and "most serious effect upon interstate commerce."[244] It was that effect which enabled Congress's commerce power.[245]

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237. *Id.* at 36.

238. *Id.*

239. Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 351 (1914); *supra* note 206 and accompanying text.

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

241. *Id.* at 40; *see also id.* at 41-43.

242. *Id.* at 41.

243. *Id.* at 43.

244. *Id.* at 41. Indeed, the Chief Justice believed the effect might prove "catastrophic." *Id.*

245. *Id.* at 43.

The Court's focus in *Jones & Laughlin* on the actual effect of a regulated activity on interstate commerce, rather than on the logical or juridical relationship between the activity and commerce, reversed the early modern understanding.[246] In *Jones & Laughlin*, it was "the effect upon commerce, not the source of the injury, which is the criterion" that governed Congress's regulatory authority.[247] Eschewing the "intellectual vacuum"[248] of the early modern precedent, Chief Justice Hughes in *Jones & Laughlin* approached interstate commerce as "a practical conception."[249] Refusing "to shut [their] eyes to the plainest facts of our national life,"[250] the Court measured the effect of a regulated activity on commerce in the light of "actual experience."[251]

With its embrace of functionalism, the *Jones & Laughlin* Court did not intend to abandon meaningful limits on congressional regulatory power. As had Chief Justice Marshall in *Gibbons*,[252] the Court emphasized that the Commerce Clause itself signified that the framers had withheld some measure of regulatory power from Congress.[253] Early in his opinion, Chief Justice Hughes made this limitation clear:

> The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause establishes, between commerce "among the states" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.[254]

Rather than drop the federalism limits on the commerce power, the Court sought to functionalize them. Chief Justice Hughes explained the new approach:

> Undoubtedly the scope of [the commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.[255]

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246. *See supra* notes 190-99 and accompanying text (discussing *E.C. Knight's* rejection of *McCulloch/Gibbons* understanding of commerce power).

247. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 32 (1937).

248. *Id.* at 41.

249. *Id.* at 41-42.

250. *Id.* at 41.

251. *Id.* at 42.

252. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) (delineating bounds of congressional power under commerce clause).

253. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-30 (1937) (describing distinction between local and national spheres under commerce clause).

254. *Id.* at 30.

255. *Id.* at 37.

After *Jones & Laughlin*, the Court no longer required that an activity which affected interstate commerce be local or noncommercial.[256] The measure of directness was not definitional, as it had been in the early modern era. The new functional orientation evaluated effect as a matter of "degree," based on the real-world impact of a regulated activity on interstate commerce.[257] Within several years, the Court in *Wickard v. Filburn*[258] reduced the *Jones & Laughlin* analysis to a constitutional test of whether the activity Congress sought to regulate exerted a "substantial economic effect on interstate commerce."[259]

The Court's switch in *Jones & Laughlin* led to a thoroughly functional reconstruction of Commerce Clause jurisprudence in the post-New Deal period. The justices were solicitous of the need for an effective national regulatory power, but as will be seen, they grew increasingly tone-deaf to the complimentary need for meaningful constitutional limits on the reach of that power.[260] Such was not the immediate meaning of *Jones & Laughlin*, in which the justices had exhibited a concern for limits. After all, a crucial determinant in that decision was the undeniable centrality of steel manufacturing, at Jones & Laughlin and generally within the industry, to the national economy. But, at least in retrospect, it seems clear that a functional imbalance inevitably followed from the essentially single-minded focus on "economic effects" in the *Jones & Laughlin* analysis.[261]

Jones & Laughlin presents a mirror image of *Knight*. In *Knight*, the Court drained the functionalism from the federalist understanding of the commerce power, retaining only its formalism.[262] In *Jones & Laughlin*, the Court revived the functionalism of the early foundational cases, but in doing so, it established a framework that left no room for the formal constraints of the enumerated powers doctrine. In *Gibbons*, Chief Justice Marshall's first step in defining the Commerce Clause was to define "commerce" as the subject matter within Congress's regulatory power.[263] The constitutional mistake of the *Knight* regime was to unnaturally tighten that formal limit on congressional power. But with the *Jones & Laughlin* focus on the effect, rather than on the nature of

256. *See supra* notes 266-78 and accompanying text (explaining functional interpretation of commerce clause).

257. *Jones & Laughlin*, 301 U.S. at 37.

258. 317 U.S. 111 (1942).

259. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

260. *See infra* notes 266-79 and accompanying text (describing Court's deference to Congress in regulating interstate commerce).

261. *Wickard*, 317 U.S. at 124.

262. *See supra* notes 190-99 and accompanying text (explaining formalistic approach used in United States v. E.C. Knight Co., 156 U.S.1 (1859)).

263. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-93 (1824) (stating meaning of commerce); *supra* notes 117-23 and accompanying text (describing Court's definition of commerce in *Gibbons*).

a regulated activity, the subject-matter limitation entirely disappeared. As the Court made clear in *Wickard*, it no longer mattered whether the activity Congress sought to regulate could be categorized as "commerce," as long as it carried the requisite effect on interstate commerce.[264]

The partial incorporation of *Gibbons* into the *Jones & Laughlin* reformulation of Commerce Clause doctrine would ultimately threaten the post-New Deal consensus. With *Jones & Laughlin*'s elimination of all traces of formality from Commerce Clause analysis, the efficacy of the federalism limits on congressional regulatory power rides entirely on the functional effect of the regulated activity on interstate commerce. In a "highly interdependent society" like the modern United States, however, the limiting potential of an exclusive focus on effects is chimerical.[265] To make matters worse, the post-New Deal Court deployed the logic of *Jones & Laughlin* to weaken the doctrine of *Jones & Laughlin*, making it even more difficult for the effect test to shoulder the burden of federalism limits on its own.

The implications of *Jones & Laughlin* for meaningful limits on Congress's commerce power began to sharpen into view with the Court's decision in *United States v. Darby*.[266] Just as the *Jones & Laughlin* Court had revived the effect test of *Gibbons*,[267] *Darby* re-acknowledged *Gibbons*'s acceptance of Congress's "plenary power"[268] to regulate freely within the boundaries of the Commerce Clause. Thus, the *Darby* Court recognized equal power in Congress to open and to close the streams of interstate commerce, as the legislators deem appropriate.[269] The justices also disclaimed any intention to second-guess Congress's motive, purpose, or policy preference when regulating interstate commerce.[270] These once again became matters for "the legislative judgment" and not for the courts.[271] Accordingly, the *Wickard* Court added,

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264. *Wickard*, 317 U.S. at 119-25. In *Wickard*, the Court described the regulated activity at issue as "production [of wheat] not intended in any part for commerce but wholly for consumption on the farm." *Id.* at 118. The Court explained: "[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Id.* at 120.

265. BEER, *supra* note 1, at 124-25.

266. *See generally* United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act of 1938).

267. *See Gibbons*, 22 U.S. at 196-97 (explaining effect test); *supra* notes 124-26 and accompanying text (discussing bounds on congressional power delineated in *Gibbons*).

268. *Darby*, 312 U.S. at 115.

269. *See id.* at 113-15 (explaining deference to legislative judgment). The *Darby* Court explicitly overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918). *Darby*, 312 U.S. at 115-17; *see also supra* note 203 (discussing *Hammer*).

270. *See Darby*, 312 U.S. at 114-15 (explaining policy of legislative deference).

271. *Id.* at 115; *see also* Wickard v. Filburn, 317 U.S. 111, 129 (1942) (deferring to legislature).

"restraints"[272] on Congress's use of *its* commerce power "must proceed from political rather than from judicial processes."[273]

The *Darby* acceptance of the commerce power as a *congressional* power induced the justices to view Commerce Clause issues from a congressional perspective. The adoption of that perspective, while itself consistent with *Gibbons*, had two important doctrinal consequences. The first was the so-called aggregation principle of *Wickard v. Filburn*. According to that principle, the Court allows congressional regulation to reach any individual whose effect on interstate commerce, while "trivial by itself,"[274] is substantial when "taken together with that of many others similarly situated."[275] The aggregation principle encourages the justices to assess a regulatory problem as Congress sees it. When Congress legislates, it does so by delineating general rules that apply similarly to those who are similarly situated. Legislatures do not focus on individuals but on categories of individuals.[276] When Congress decides to regulate an activity because of its effect on interstate commerce, it measures that effect in the aggregate, not in each individual application. The aggregation principle thus allows the Court to apply the effect test with a functional recognition that the Commerce Clause is a legislative power that authorizes Congress to use legislative judgment.

The justices' appreciation that they are reviewing a legislative judgment ultimately counseled a considerable deference when they reviewed congressional exercises of the commerce power. The second doctrinal consequence of the Court's adoption of a congressional perspective with respect to the Commerce Clause followed. In upholding the Civil Rights Act of 1964,[277] the Court stepped back from determining, on its own, whether the activity Congress had regulated triggered a "substantial economic effect on interstate commerce."[278] The justices limited themselves to asking whether Congress had "a rational basis" for so finding.[279]

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272. *Wickard*, 317 U.S. at 121.

273. *Id.* at 120.

274. *Id.* at 127.

275. *Id.* at 127-28. In *Perez v. United States*, 402 U.S. 146 (1971), the Court restated the aggregation doctrine as follows: "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 154 (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968)).

276. *See generally* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441 (1915) (discussing legislation by categories of individuals).

277. 42 U.S.C. § 2000 (1964).

278. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

279. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (finding that only concern for Court is that Congress had rational basis for law and employed reasonable means to achieve that end); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (stating that Court's function is to determine whether Congress has rational basis for regulation).

Both the aggregation principle and the rational basis test are modifications of *Jones & Laughlin*. In upholding the labor act's application to the steel company, the Court satisfied itself of the effect on commerce, measured from the perspective of Jones & Laughlin's manufacturing facility, not of all employers nationwide.[280] Although an amendment, the aggregation principle flows from the *Jones & Laughlin* Court's adoption of a functional and realistic understanding of congressional power. Congress must legislate generally by category, not ad hoc by individual. The rational basis test, on the other hand, does not fit quite so comfortably with *Jones & Laughlin*. If the substantiality limit articulated in *Jones & Laughlin* is to be a meaningful constitutional constraint, is it not necessary for the justices to make their own decision on the requisite "degree" of an activity's effect on interstate commerce? The Court's move to a more deferential posture, although in tension with *Jones & Laughlin's* concern for meaningful limits on congressional power, nevertheless followed from the essential meaning of the "Constitutional revolution of 1937."[281] In overturning the early modern jurisprudence, the justices decided to withdraw from the national political process and to allow Congress to assume the unchallenged lead in deciding which issues require a national regulatory response.[282]

With this new stance, however, the post-New Deal Court simply traded one form of imbalance for another. The thoroughgoing functionalism of the post-New Deal settlement allowed Congress to fulfill its constitutional role, but it could not simultaneously hold the national legislature within that role. The Court revived the functionalist dimension of the federalist conception of federalism but disregarded the role of formalism in securing a healthy balance in the jurisprudence. Having reversed the overriding and overbearing formalism of the early modern era, "the Court could find no stopping place short of abdication."[283] Federalism lost its legal dimension.[284]

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280. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-43 (1937) (analyzing effects of statute upon Jones & Laughlin and entire steel industry).

281. *See supra* note 229.

282. *See, e.g., Wickard*, 317 U.S. at 120, 129 (stating willingness to defer to legislative judgment).

283. MCCLOSKEY, *supra* note 160, at 178.

284. *See supra* note 95 and accompanying text (discussing formalist approach in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Professor Samuel Beer emphasized that "American federalism is at once a system of law and a structure of power." BEER, *supra* note 1, at 23. Yet, writing in 1963, Professor Charles Black, in reviewing the jurisprudence governing the federalism limits on congressional power, noted, "[t]he issue . . . is whether the federal system has any legal substance, any core of constitutional right that courts will enforce." CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 30 (1963).

III. The Contemporary Search for Balance

The post-New Deal settlement allowed the Court to embrace, in the justices' own phrase, a "broad and sweeping" commerce power in Congress.[285] The breadth of that power served the functional goal of enabling Congress to enact legislation commensurate with its constitutional responsibility to control interstate commerce in the national interest. The sweeping nature of that power, however, threatened to dissolve all legal constraints on Congress's policy prerogative, and thus jeopardized the constitutional commitment to federalism.[286]

The functional reaction of the post-New Deal Court to the formalism of the early modern era represents an overreaction. Moreover, it exhibits two sources of the discontent that have been associated with federalism jurisprudence for many years. First, it reflects the tendency of the Court, so prevalent in its modern separation-of-powers jurisprudence, to over-rely on formal or functional methodologies with respect to constitutional structure. The justices tend to swing between those polar approaches, drawing on functionalism to empower the political branches and on formalism to limit them. Second, the Court's reaction highlights the incompleteness of either a purely formal or a purely functional approach to constitutional structure. Each understanding addresses but one dimension of structural issues. Only a balanced jurisprudence, one that integrates formal and functional components in the constitutional spirit of energetic yet limited government, will produce a healthy approach to the separation of powers and federalism.

Although the search for balance has proved elusive with respect to separation of powers, appropriately balanced federalism jurisprudence has been available since the foundational era of constitutional law. In *McCulloch* and in *Gibbons*, Chief Justice Marshall delineated doctrine that reflects the federalist balance of the founding generation and that, even now, offers a model with considerable promise for a Court that is rethinking the post-New Deal settlement.[287]

Just as the Marshall Court laid the foundation of its approach to congressional regulatory power in two decisions – the first in *McCulloch*, with respect to the necessary and proper power, and the second in *Gibbons*, with respect to the commerce power – the current revision has come with a similar pairing.

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285. Katzenbach v. McClung, 379 U.S. 294, 305 (1964).

286. The height of the Court's hands-off approach, at least rhetorically, occurred in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (finding that Fair Labor Standards Act, as applied to public mass transit authority, is within scope of congressional power under Commerce Clause).

287. *See supra* notes 45-189 and accompanying text (discussing federalist limits in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

The first emerging line of decisions, like *Gibbons*, concerns the commerce power. Beginning with *United States v. Lopez*[288] and continuing through *United States v. Morrison*,[289] the Court's reformation of Commerce Clause doctrine offers some hope that the justices may be intent on restoring the federalist balance to federalism jurisprudence. The second emerging line of decisions, like *McCulloch*, concerns the discretion of Congress to regulate within the ambit of its enumerated powers. This second doctrinal line, with *Printz v. United States* at its center, suggests the instability of the current rethinking of federalism doctrine, as well as the possibility of a return to the style of strict formalism that doomed the jurisprudence of the early modern Court.[290] Yet, in *Reno v. Condon*, the Court recently cabined *Printz*, offering hope that the *Printz* line of decisions will amount only to a limited exception to an otherwise general renewal of the federalist design. I discuss the *Lopez/Morrison* and *Printz/Reno* developments in turn.

A. Lopez/Morrison

In *Lopez*, for the first time since the last hurrah of the early modern era in 1936, the Supreme Court invalidated an act of Congress for exceeding the boundaries of the Commerce Clause.[291] The culprit was the Gun-Free School Zones Act of 1990,[292] which made it a federal crime to possess a firearm in or near a school.[293] In *Morrison*, the Court explicitly followed *Lopez* in holding

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

289. United States v. Morrison, __ U.S. __, 120 S. Ct. 1740 (2000).

290. Printz v. United States, 521 U.S. 898 (1997). *Printz* crystallized and extended a prior decision that had generated this second line of decision, *New York v. United States*, 505 U.S. 144 (1992). For a comparison of *Printz* and *New York*, see *infra* notes 427-45 and accompanying text.

291. *See generally* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (invalidating Gun Free School Zones Act); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down price fixing provisions of Bituminous Coal Conservation Act of 1935). Not surprisingly, the *Lopez* decision has generated considerable commentary. *See generally* Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793 (1996) (suggesting that *Lopez* may signal return to federalism through Commerce Clause); Charles E. Ares, Lopez *and the Future Constitutional Crisis*, 38 ARIZ. L. REV. 825 (1996) (predicting that *Lopez* will cripple Congress's ability to respond to national problems); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213 (1996) (stating that Court is encroaching on state prerogatives); *Symposium: The New Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 633 (1996) (sampling of different views of *Lopez*); *Symposium: Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995) (collection of articles on effect of *Lopez*).

292. 18 U.S.C. § 922 (1990).

293. *See also* § 922 (q)(2)(A) (1994) (formerly § 922 (q)(1)(A)) (making it unlawful for "any individual [who] knowingly possess[es] a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone").

that the civil remedy section of the Violence Against Women Act of 1994,[294] which provided a federal cause of action for the victims of "crimes of violence motivated by gender,"[295] exceeded Congress's commerce power.[296] In both *Lopez* and *Morrison*, Chief Justice Rehnquist wrote the Court's opinion for an identical and slim five-justice majority.[297]

The sense of occasion in *Lopez* was apparent in the rhetorical structure of Chief Justice Rehnquist's majority opinion. Beginning with "first principles,"[298] his emphasis is revealing. Chief Justice Rehnquist began, as had Chief Justice Marshall, with the doctrine of enumerated powers.[299] In doing so, he emphasized the role of that doctrine in maintaining "a healthy balance between the States and the Federal Government."[300] Having completed the prelude of first principles, Chief Justice Rehnquist offered a narrative of Commerce Clause precedent that reached back to *Gibbons*.[301] At the conclusion of that presentation, the Chief Justice offered a reconceptualization of Commerce Clause doctrine that he considered to be consistent with the "structure" of the precedent.[302] He began formally, by identifying "three broad categories of activity that Congress may regulate under its commerce power."[303]

Chief Justice Rehnquist's first two categories embraced the lines of formalist doctrine that permitted congressional regulation during the early modern era. The first category incorporated *Stafford*, allowing Congress to "regulate the use of the channels of interstate commerce."[304] The second category in-

294. 42 U.S.C. § 13981 (1994).

295. *Id.* § 13981(c); *see also id.* § 13981(d)(1) (defining "motivated by gender"); *id.* § 13981(d)(2) (defining "crime of violence").

296. *See* United States v. Morrison, __ U.S. __, 120 S. Ct. 1740, 1748-54 (2000) (holding that Violence Against Women Act exceeds scope of congressional power under Commerce Clause).

297. The majority justices in each case included Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. Justices Breyer, Ginsburg, Souter, and Stevens dissented in each case.

298. United States v. Lopez, 514 U.S. 549, 552 (1995).

299. *Id.* at 552-53; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

300. *Lopez*, 514 U.S. at 552 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). Chief Justice Rehnquist's introductory discussion, notwithstanding its invocation of the federalism goal of balance, nevertheless stressed the limits on congressional power. *Id.* at 552. This stress is understandable, perhaps, in light of the judicial neglect of limits in the post-New Deal case law.

301. *See id.* at 553-58 (tracing history of commerce clause).

302. *Id.* at 558.

303. *Id.*

304. *Id.*; *see also supra* notes 201-04 and accompanying text (discussing Stafford v. Wallace, 258 U.S. 495 (1922)). Chief Justice Rehnquist, with his citations to *United States v. Darby*, 312 U.S. 100 (1942), and to *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), seemed quite clearly to acknowledge Congress's plenary power over the channels of commerce.

cluded *Shreveport*, allowing Congress 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."[305] The third and final of the Chief Justice's categories added the functionalist doctrine of *Jones & Laughlin* and *Wickard*: "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[306]

Chief Justice Rehnquist's definition of the third category reflects a clarification, and perhaps a modification, of the post-New Deal effect test. The clarification came with the *Lopez* Court's reminder that an activity's effect on interstate commerce must be "substantial" in order to trigger Congress's commerce power.[307] Chief Justice Rehnquist noted the inconsistency of the post-1937 precedent on this point but concluded that "the proper test" for the Commerce Clause required a showing of substantiality.[308] In making this choice, Chief Justice Rehnquist realigned the effect test with *Jones & Laughlin* and *Wickard*.[309]

The possible change reflected in the third category is more "elusive"[310] and is more suggestive of the transformative potential of *Lopez/Morrison*. In his reformulation of the effect test in *Lopez*, Chief Justice Rehnquist did not mention the rational basis orientation of the Civil Rights Act precedent.[311] Because the Chief Justice did not flag this change, as he had with respect to the substantiality requirement, it is possible that the absence of rational basis language was inadvertent. He included the rational basis component of the effect test in his narrative of Commerce Clause precedent, and he did not indicate any disagreement with that doctrine at the time.[312] Yet, Chief Justice Rehnquist gave every indication in *Lopez* that he intended his three categories

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Thus, in the *Lopez* understanding, Congress would have equal power to open and close the channels of commerce. *Lopez*, 514 U.S. at 558; *see also supra* notes 266-70 and accompanying text (discussing *Darby*).

305. *Lopez*, 514 U.S. at 558; *see also supra* notes 205-17 and accompanying text (discussing Houston E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914)).

306. *Lopez*, 514 U.S. at 558-59 (citations omitted); *see also supra* notes 240-51 and accompanying text (describing *Jones & Laughlin*).

307. *Id.* at 558-59.

308. *Id.*

309. *See supra* notes 230-57 and accompanying text (explaining standard in *Jones & Laughlin*). The four dissenting justices in *Lopez*, however, would have preferred the adjective "significant" over "substantial," because the latter description "implies a somewhat narrower [commerce] power than recent precedent suggests." *Lopez*, 514 U.S. at 616 (Breyer, J., dissenting).

310. *Morrison*, 120 S. Ct. at 1764 (Souter, J., dissenting).

311. *See supra* notes 277-79 and accompanying text (noting rational basis test used to evaluate Civil Rights Act).

312. *See Lopez*, 514 U.S. at 557 (mentioning rational basis test).

of congressional commerce power to serve as a reformulated, three-part constitutional test. It is difficult to believe that his omission of the rational basis component in the statement of that test reflected an oversight.[313] Moreover and most suggestively, the Chief Justice, in stark contrast to the dissenting opinions,[314] did not use the rational basis test in his subsequent analysis of the statute at issue in *Lopez*, even though that analysis centered exclusively on the third category.[315] Indeed, he noted pointedly that the Court's evaluation of a statute's constitutionality under the Commerce Clause is "independent,"[316] an assertion in severe tension with the high level of judicial deference that the rational basis test registers.[317]

The Court's subsequent decision in *Morrison* strengthens the suggestion that the justices have abandoned the rational basis test. In *Morrison*, unlike in *Lopez*, Congress had made a number of factual findings attempting to link gender-motivated violent crimes to interstate commerce.[318] In addition, at least in the view of the four dissenting justices, in *Morrison*, again in contrast to *Lopez*, Congress had presented "a mountain of data . . . showing the effects of violence against women on interstate commerce."[319] Notwithstanding the congressional findings and supporting evidence, the Court insisted on the independence of its assessment of the effect of such acts of violence on interstate commerce.[320] In *Morrison* as in *Lopez*, the majority analyzed the "effect issue" without mentioning the rational basis test, while the dissenters encased their analysis supportive of the statutes in the deference prescribed by that test.[321]

Yet, notwithstanding these soundings from *Lopez* and *Morrison*, neither case provided a final test for the current vitality of rational basis deference. As will be developed, the substantial effect analysis in both cases was dis-

313. It also is suggestive that the Court's restatement of the effect test later in the opinion omits any reference to the rational basis filter. *See id.* at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

314. *See id.* at 603-04 (Souter, J., dissenting); *id.* at 616-17 (Breyer, J., dissenting).

315. *See id.* at 559-68.

316. *Id.* at 562.

317. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (noting that Court must defer to congressional finding if Congress had rational basis for its actions).

318. *See* Morrison, 120 S. Ct. at 1752 (stating findings of Congress); *id.* at 1759-64 (Souter, J., dissenting) (same).

319. *Id.* at 1760 (Souter, J., dissenting).

320. *See id.* at 1752 (stating that congressional findings alone are not sufficient to support finding of burden on interstate commerce).

321. *See id.* at 1748-54 (deciding that violence does not impermissibly burden interstate commerce); *id.* at 1759-64 (Souter, J., dissenting) (finding that violence against women substantially affects interstate commerce).

abled at the outset, because Congress had not regulated an economic or a commercial activity in either statute before the Court.[322] Thus, the Court has had no occasion, in *Lopez* or after, to evaluate a factual showing by Congress that purports to link a regulated commercial activity with interstate commerce. It is entirely possible that the Court, while maintaining the independence of its reviewing role, nevertheless might hesitate in all but the clearest cases to invalidate Congress's judgment with respect to the interstate impact of regulation the justices accepted as truly commercial in nature. Such a "clearly erroneous" middle ground between the near-complete deference of rational basis scrutiny and the near-complete judicial takeover of *de novo* review carries considerable promise for a balanced federalism jurisprudence. The post-New Deal Court's recognition that the Commerce Clause is a congressional power was fully consistent with the federalist understanding. So too was its sense that some measure of judicial modesty is appropriate in the review of Congress's use of its authority. To summarize, it is clear that *Lopez/Morrison* aligned contemporary doctrine with *Jones & Laughlin* by reemphasizing the substantiality requirement of the effect test, and it is likely that the justices also have dropped the rational basis dilution of that test. Even with that reassertion of judicial authority, the Court may, and should, exhibit considerable respect for congressional findings that link truly commercial regulation to interstate commerce.

As an overall framework, the *Lopez* Court's categorization of Commerce Clause analysis reflects the federalist intuition to bring "a healthy balance" to federalism doctrine by integrating formal and functional methodologies.[323] The initial categorization of Commerce Clause jurisprudence into three doctrines provides a formal organization.[324] Within that structure, the Court's three doctrinal categories combine three lines of precedent, two formal and one functional. The Court's recognition that each of the three categories provides Congress "broad" sources of regulatory power offers an overall functional counterweight to the formal organization.[325]

The Court's integration of formal and functional elements penetrates its approach to the crucial third category of the *Lopez* framework.[326] The effect test of that category is the fulcrum of Commerce Clause jurisprudence. On one hand, Congress requires a broad, functional understanding of the test to enable the regulation of subjects it must address in order to control interstate commerce. On the other hand, an effective limit on this authority is necessary

322. *See infra* note 328 and accompanying text (discussing Court's requirement that regulated activity be commercial or economic in nature).

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

324. *See id.* at 558 (discussing three categories that impose burden on interstate commerce).

325. *Id.*

326. *See id.* at 559-68 (analyzing whether court could sustain statute under third category).

to prevent Congress from converting its jurisdiction over interstate commerce into a general regulatory power. The *Lopez* Court addressed this latter concern, in part, by tightening the functional limits on congressional power. The Court recommitted to the substantiality requirement and in combination with *Morrison*, likely eliminated the rational basis orientation of the effect test. *Lopez*'s most suggestive move in limiting congressional authority, however, was in reintroducing a formal dimension to the effect analysis.

The Court in *Lopez* counterbalanced the thoroughgoing functionalism of the post-New Deal jurisprudence by requiring, as a threshold matter, that the regulated activity be "economic" or "commercial" in nature.[327] *Lopez*'s introduction of this formal element in the effect test completes the Court's return to *Gibbons*, which the justices had begun in *Jones & Laughlin*. In the post-New Deal decisions, the Court had only incorporated the functional elements of the Marshall Court's approach to the Commerce Clause. By reemphasizing that congressional regulation pursuant to that authority must address subject matter within the category of "commerce," the Court finally returned Commerce Clause jurisprudence to its original, federalist balance.[328]

The four dissenting justices in *Lopez/Morrison* vigorously challenged the majority's inclusion of the economic-or-commercial activity threshold as a return to the formalism of the early modern era.[329] The history of radical mood-swinging that has characterized the Court's attention to issues of separation of powers and federalism provide some basis for concern that *Lopez/Morrison* may reflect early steps toward a hardened formalism. Heightening this concern, the opinions of several of the justices who constitute the majority in *Lopez* and *Morrison* include ominous references to traditional spheres of authority – sometimes with respect to education or at other times with respect to criminal law – that are constitutionally reserved to the states.[330]

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327. *See id.* at 559-62 (discussing that Court found other statutes sustainable when pertaining to economic activity); *id.* at 565-68 (deciding that firearm possession is not economic but commercial activity).

328. *See supra* notes 162-67 and accompanying text (discussing how Court in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), adhered to federalist balance).

329. *See Morrison*, 120 S. Ct. at 1766-68 (Souter, J., dissenting) (explaining that majority's distinction between economic and non-economic activity privileges Court's view of federalism); *id.* at 1774-77 (Breyer, J., dissenting) (examining problems with distinction between economic and non-economic activity); *Lopez*, 514 U.S. at 608 (Souter, J., dissenting) (considering distinction to be return to "untenable jurisprudence from which Court extricated itself almost 60 years ago"); *id.* at 627-28 (Breyer, J., dissenting) (discussing case law that insists determination of burden on interstate commerce must rest on practical considerations).

330. *See, e.g.*, *Morrison*, 120 S. Ct. at 1753 (suggesting that "other areas of traditional state regulation" would be open to congressional regulation); *Lopez*, 514 U.S. at 561 n.3 (explaining that criminal law is generally under state authority); *id.* at 583 (Kennedy, J., concurring) (expressing concern over "tendency of this statute to displace state regulation in areas of traditional state concern").

These references, which are troubling in their own right, might suggest an ultimate linkage between *Lopez/Morrison* and *Printz*. In *Printz*, as I discuss in the following section, the Court developed a purely formalistic restraint on congressional power grounded on judicial notions of state sovereignty.[331]

Assessing the scope of congressional power pursuant to Article I from any list of legal categories over which the states possess a presumptive sovereignty, as the *Lopez/Morrison* dissenters argue, threatens a return to failed jurisprudential experiments of the past.[332] More fundamentally, such a stance inverts the constitutional structure. The Constitution delineates the powers of the national government, not those of the states. In the federalist scheme, the United States possesses power over a number of specified "objects" of national concern, while the individual states remain as a kind of regulatory default, exercising authority over the undifferentiated remainder of governmental concerns.[333] With respect to any congressional regulatory effort, the appropriate question is whether the act falls within a constitutional power, not whether the regulation affects some area traditionally under state control.[334] Such seems the clear import of the Supremacy Clause, which explicitly privileges federal laws "made in Pursuance" of the Constitution over any form of state law.[335]

Although the allusions to traditional areas of state sovereignty create a troublesome echo of the early modern era, Chief Justice Rehnquist's opinions in *Lopez* and in *Morrison*, on the whole, reflect great caution to avoid signaling any embrace of the thoroughgoing formalism of the early modern era. Indeed, in *Lopez* he criticized that precedent for having "artificially . . .

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331. *See infra* notes 371-446 and accompanying text (discussing how *Printz* seems to be a step towards Court's early formalism).

332. *See Morrison*, 120 S. Ct. at 1772 n.19 (Souter, J., dissenting) (stating that majority's defining of congressional power by "categorical exceptions" is return to "near tragedy for court"). The most prominent, recent example of the failure of federalism doctrine reasoned from a set of sovereign authorities within states was short-lived. *See generally* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In *League of Cities*, the Court disabled Congress from regulating states "in areas of traditional government functions." *Id.* at 852. Later cases impressed the Court with the difficulty of deploying the "traditional government functions" standard, and the Court abandoned the effort by overruling *League of Cities*. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985). The Court had become convinced that the "traditional government functions" test was "unsound in principle and unworkable in practice." *Id.* at 546-47.

333. *See supra* note 27 and accompanying text (discussing constitutional division between state and federal power).

334. *See Morrison*, 120 S. Ct. at 1768-72 (Souter, J., dissenting) (discussing disapproval of state sovereignty as principle limiting commerce power).

335. U.S. CONST. art. VI, §1, cl. 2.

constrained the authority of Congress to regulate interstate commerce."[336] It is revealing in this light that Justice Thomas, a member of the *Lopez/Morrison* majority who does support a return to the early modern Commerce Clause doctrine, wrote alone in both cases.[337]

The core of the dissenters' objection to the *Lopez/Morrison* reorientation of Commerce Clause doctrine is the use of any categorical analysis. The dissenters insist on the pure functionalism of the post-New Deal precedent, in effect, equating any introduction of a categorical element with a full swing back to the early modern era.[338] Instead, while the ultimate implications of *Lopez/Morrison*, as always, must await future decisionmaking, the decisions, as they stand now, reflect the federalist middle course of blending formal and functional ingredients in an effort to maintain a balanced federalism.

The *Lopez/Morrison* understanding of "commerce" is much closer to *Gibbons* than to *Knight*.[339] The error of *Knight* was not the limitation of the commerce power to commercial regulation, but rather the artificial narrowness of the Court's definition of commerce. Any power to regulate interstate commerce that excludes authority over manufacturing, agriculture, mining and other forms of production is dysfunctional at the outset. The *Knight* Court ignored the *Gibbons* injunction that the Commerce Clause must enable Congress to erect a fully functional "system for regulating" interstate and international commerce.[340] The early modern justices, in short, violated the federalist instruction to interpret congressional power according to the "common-sense" meaning of the constitutional text.[341] There is no indication in Chief Justice Rehnquist's analysis that he is about to spring the *Knight* trap.[342]

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336. *Lopez*, 514 U.S. at 556. Justice Kennedy's concurring opinion, in which Justice O'Connor joined, amplified the theme of the failure of the early modern precedent, stressing that the "limited" holding in *Lopez* should not be read as a return to the formalist mind-set. *Id.* at 568-70 (Kennedy, J., concurring).

337. *See Morrison*, 120 S. Ct. at 1759 (Thomas, J., concurring) (stating that "substantial effects" test should not be used); *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (discussing how Court has strayed from original understanding of commerce power, of which "substantial effects" test was not part).

338. *See, e.g.*, *Morrison*, 120 S. Ct. at 1766-68, 1773-74 (Souter, J., dissenting) (discussing how categories based on economic activity or traditional state area are not useful today); *id.* at 1774-77 (Breyer, J., dissenting) (explaining that categorical distinctions are not helpful in commerce clause analysis).

339. *See* United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895) (defining commerce power as not including manufacturing process).

340. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 190 (1824); *see also supra* notes 117-23 and accompanying text (discussing *Gibbons* Court's functional approach to defining interstate commerce).

341. *See supra* notes 113-15 and accompanying text (discussing how *Gibbons* Court used "common-sense" principles to define interstate commerce).

342. Justice Kennedy emphasized the point by noting that the Court had no intention of

The *Lopez* Court has a more flexible and inclusive understanding of the economic or commercial activity that is within Congress's commerce power. Chief Justice Rehnquist simply looked for a connection between the congressional regulation and "commerce" or some "economic enterprise."[343] *Lopez*'s economic-or-commercial activity compartment is not formalistically airtight, but true to *Gibbons*, it allows functional breathing space. In *Morrison*, while the Chief Justice left no doubt of the centrality of this element to the *Lopez* analysis,[344] he declined to register that centrality with the adoption of any ironclad "categorical rule."[345] In *Lopez*, for example, Chief Justice Rehnquist indicated that Congress could control noneconomic activity if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[346] In addition, Congress can reach noncommercial activity if the statute contains a "jurisdictional element" that ensures, "through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce."[347] The *Lopez* Court did not exhibit the *Knight* intention of slicing up the field of economic regulation in order to limit the scope of congressional power to the narrowest margin. *Lopez* evokes instead the *Gibbons* requirement that congressional regulation pursuant to the Commerce Clause address subject matter within the common-sense meaning of "commercial intercourse."[348]

The *Lopez* and *Morrison* decisions themselves demonstrate how the rebalanced approach to the Commerce Clause should function to check congressional regulatory power. In *Lopez*, the government sought to justify Congress's prohibition of firearm possession in and around schools by positing two causal chains to establish the requisite effect on interstate commerce.[349]

"returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

343. *Id.* at 561.

344. *See Morrison*, 120 S. Ct. at 1750 (discussing *Lopez*).

345. *Id.* at 1751.

346. *Lopez*, 514 U.S. at 561. On this reasoning, the *Lopez* Court explicitly embraced *Wickard*, one of the most expansive of the post-New Deal precedent. *Id.* at 560-61; *see also id.* at 573-74 (Kennedy, J., concurring) (pointing to *Wickard* as example of "practical conception" of commerce power); *supra* note 247 and accompanying text (noting that *Jones & Laughlin* used "effect of commerce" as criterion).

347. *Lopez*, 514 U.S. at 561; *see also Morrison*, 120 S. Ct. at 1750-51 (asserting that jurisdictional element would bring activity within commerce power).

348. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824) (defining commerce as "commercial intercourse between nations, and parts of nations, in all its branches"); *see also supra* notes 113-23 and accompanying text (discussing *Gibbons* Court's focus on common sense meaning of commerce).

349. *See Lopez*, 514 U.S. at 563-64 (explaining two causal chains set out in government's argument). Although Congress, when it enacted the statute, made no findings that gun posses-

The first chain linked "possession of a firearm in a school zone" to the "substantial" costs associated with "violent crime," which ultimately are spread by "the mechanism of insurance" throughout the country.[350] The second chain maintained that "the presence of guns in schools" posed "a substantial threat to the educational process by threatening the learning environment," which in turn produces "a less productive citizenry" and ultimately causes "an adverse effect on the Nation's economic well-being."[351] In dissent, Justice Breyer made a persuasive empirical case for the reasonableness of these claims.[352] Yet, as Chief Justice Rehnquist emphasized, similar causal chains could be constructed to link virtually any activity to interstate commerce.[353] The *Lopez* Court simply refused to allow Congress to construct such a chain unless the first link was an economic or commercial activity.[354]

In *Morrison*, the government attempted a similar causal chain to link gender-motivated violence against women with interstate commerce.[355] Congress found that such acts of violence deterred the interstate travel of women who were potential victims of that activity.[356] Gender-motivated violence also, according to Congress's findings, restricted potential victims' employment and business transactions in interstate commerce and drove up their medical costs, thereby resulting in a decrease of national productivity.[357] Following *Lopez*, the *Morrison* Court noted that such a causal chain could be built for any kind of violent crime or any other activity with effects that, at

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sion in and around schools had an impact on interstate commerce, the Court did not find that failure to be disabling. *Id.* at 562-63. Congress did make findings after the case had begun. *See id.* at 618 (Breyer, J., dissenting) (stating that Congress made findings "after *Lopez* was prosecuted").

350. *Id.* at 563-64.

351. *Id.* at 564.

352. *See id.* at 618-25 (Breyer, J., dissenting) (discussing how chain could establish reasonable connection between firearm possession in school zone and interstate commerce).

353. *See id.* at 564-66 (discussing government's arguments to link gun possession in schools and interstate commerce). The Court explained: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

354. *See id.* at 566-68 (finding that firearm possession in school zone is not economic activity and that Government cannot establish chain to link this activity and interstate commerce).

355. In *Morrison*, the Court noted that Congress had used the same "method of reasoning" in defending the Violence Against Women Act that had failed in *Lopez*. *See Morrison*, 120 S. Ct. at 1752-54 (noting that government's argument established chain to link gender-motivated violence and interstate commerce).

356. *See id.* at 1752 (stating that gender-motivated violence discouraged women from traveling out of state).

357. *See id.* (discussing how gender-motivated violence reduced national productivity).

some point, reached interstate commerce.[358] Again following *Lopez*, the Court refused to allow the aggregate, rippling effects of violent acts to activate the commerce power unless the violence itself was linked to commerce.[359]

The *Lopez/Morrison* refusal to accept causal chains that convert general regulation into commercial regulation promises to return Commerce Clause jurisprudence to the federalist balance of *Gibbons*. As Publius observed, the plan of the Constitution, which extends the power of Congress "to certain enumerated cases," necessarily "so excludes all pretension to a general legislative authority."[360] Chief Justice Rehnquist, following Chief Justice Marshall, emphasized the need to maintain congressional power within the discipline of the enumerated powers doctrine.[361] *Lopez* also infused federalism jurisprudence with the sense of legal limitation that had been missing since the post-New Deal settlement.[362] Chief Justice Rehnquist accomplished these objectives precisely as had Chief Justice Marshall, by requiring that the regulatory subject matter be within a common-sense understanding of commercial intercourse.[363] Navigation rights clearly fit within such an understanding;[364]

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358. *See id.* at 1752-53 (stating that this reasoning would allow Congress to regulate any activity).

359. *See id.* at 1754 (explaining that violence must be "directed at the instrumentalities, channels, or goods involved in interstate commerce"). In *Morrison*, the Court also rejected the effort by Congress to justify the Act on the basis of Congress's authority to enforce the Fourteenth Amendment. *Id.* at 1759; *see also* U.S.CONST. amend. XIV, § 5 (stating that Congress has power to enforce this amendment through legislation). The core of the Court's ruling was that the Act exceeded congressional enforcement power because the cause of action it created was not limited by the state action requirement of the Fourteenth Amendment. *See Morrison*, 120 S. Ct. at 1754-59 (discussing applicability of Fourteenth Amendment). It is beyond the scope of this Article to assess the soundness of the Court's ruling with respect to the Fourteenth Amendment.

360. THE FEDERALIST NO. 83, *supra* note 113, at 541.

361. *See Morrison*, 120 S. Ct. at 1752 (explaining that government's chain of reasoning is unacceptable if they are to adhere to principle of enumerated powers); *Lopez*, 514 U.S. at 566-68 (refusing to treat enumerated powers as unlimited).

362. *See Morrison*, 120 S. Ct. at 1748 (stating that commerce power "is not without effective bounds"); *Lopez*, 514 U.S. at 566 (articulating how confining congressional authority to enumerated powers will bring more certainty to analysis); *supra* notes 94-95 and accompanying text (discussing legal limits as emphasized in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). The *Morrison* dissenters acknowledged that their allegiance to the post-New Deal doctrine would necessitate essentially a purely political check on Congress's commerce power. *See Morrison*, 120 S. Ct. at 1770-72 (Souter, J., dissenting) (explaining that political aspect would control concept of commerce power); *id.* at 1775-77 (Breyer, J., dissenting) (suggesting dependence on political process as limit to commerce power).

363. *See supra* notes 113-15 and accompanying text (discussing how Court deciding Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), used common sense approach to define commerce).

364. *See* Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1, 190 (1824) (stating that navigation is part of interstate commerce).

possession of a firearm in or around a school, as well as gender-motivated violence, just as clearly, did not.[365]

Also following Chief Justice Marshall and departing from the early modern Court, the *Lopez/Morrison* revision still allows Congress a robust power to address those economic or commercial matters that concern the nation. Chief Justice Rehnquist in *Lopez* acknowledged the breadth of congressional power within the formal category of commerce, when he offered the following assurance: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[366] He also embraced the functionalism of this commitment by reaffirming the place of the aggregation principle in measuring the substantiality of that effect.[367] On the other hand, the *Lopez/Morrison* majority endorsed a balanced understanding of *Gibbons*, as well as of *Jones & Laughlin*, when it rendered the effect limitation meaningful by reclaiming their obligation to make an independent determination of substantiality.

The *Lopez* and *Morrison* decisions revitalized the federalist balance in the jurisprudence of federalism. They promise to secure the clarity – and strength – of a formal threshold, while adding the flexibility of a functional approach once that threshold has been passed. They also promise a corrective to the tendency of the post-New Deal jurisprudence to cede a general regulatory power to Congress, by tying exercises of Commerce Clause authority to the text of Article I and by insisting that the regulation truly be of "Commerce . . . among the several States."[368]

In blending formal and functional methods, *Lopez/Morrison* maintains a doctrine which, unlike that of the early modern formalism, allows Congress a power sufficiently "broad" to address all matters pertaining to the economic concerns of the nation. At the same time, *Lopez/Morrison*, unlike the post-New Deal functionalism, manages to do so without enabling a power so "sweeping" as to encourage Congress to ignore the Constitution's enumeration, and thus limitation, of its regulatory authority.[369]

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365. *See Lopez*, 514 U.S. at 567-68 (deciding that possession of firearms is not part of interstate commerce).

366. *Lopez*, 514 U.S. at 560. Justice Kennedy reaffirmed this intention in his concurring opinion. *See id.* at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").

367. *See id.* at 561 (stating that statute cannot be valid "under our cases upholding regulations of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially affects interstate commerce"); *supra* note 276 and accompanying text (discussing congressional perspective that produced aggregation principle as consequence).

368. U.S. CONST., art. 1, § 8, cl. 3.

369. *See supra* note 285 and accompanying text (indicating that post-New Deal settlement allowed Court to interpret commerce power more broadly).

B. Printz/Reno

In an effort parallel to the *Lopez/Morrison* renewal of constitutional limitation on the ends of Congress's commerce power, the Supreme Court has threatened to undermine its newly balanced federalism jurisprudence by trimming the federalist understanding of Congress's discretion to select the means to achieve those ends. This effort began, albeit somewhat ambiguously, in *New York v. United States*,[370] which the Court decided several years before *Lopez*.[371] The Court crystallized the meaning of *New York* two years after *Lopez*, in *Printz v. United States*. Although the *Printz* decision is a troubling reminder of the early modern formalist mind set, the Court's more recent decision in *Reno v. Condon* provides a hopeful counterweight.[372] In *Reno*, decided just months before *Morrison*, a unanimous Court signaled somewhat of a retreat from the broadest, most destabilizing implications of the *Printz* retrenchment.

In *Printz*, the Court, with the same five/four split as in *Lopez/Morrison*, invalidated provisions of the Brady Handgun Violence Prevention Act of 1993,[373] which required local law-enforcement officials to make a "reasonable effort"[374] to conduct background checks on prospective handgun purchasers.[375] This statutory obligation was to remain in force only for the several years required to create a national system capable of performing that function.[376]

The outcome of *Printz* is striking. The activity Congress regulated – the sale of handguns – is clearly commercial in nature. Moreover, there can be no serious question concerning the interstate, indeed international, dimension of the market for these products. Thus, under *Lopez/Morrison*, the Brady Act fits squarely within the commerce power of Congress.[377] Nevertheless, the Court held that Congress had exceeded its constitutional authority by "com-

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370. 505 U.S. 144 (1992).

371. New York v. United States, 505 U.S. 144 (1992). For a discussion of *New York*, see *infra* notes 427-34 and accompanying text (discussing how *New York* Court was "troubled by Congress's insinuation into the legislative, policymaking process of the states").

372. *See generally* Reno v. Condon, __ U.S. __, 120 S. Ct. 666 (2000) (retreating from approach in *Printz*).

373. 18 U.S.C. § 922 (1994).

374. *Id.* § 922(s)(2).

375. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (concluding that Congress may not direct or command state officers in implementation of federal program).

376. For the Court's description of the statutory details, see *Printz*, 521 U.S. at 902-04 (discussing regulatory scheme in Brady Act). For commentary on *Printz*, see generally Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199; Roderick M. Hills, Jr., *The Political Economy of Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998).

377. *See Printz*, 521 U.S. at 941 (Stevens, J., dissenting) (stating that Congress clearly can exercise commerce power over sale of handguns).

pelling state officers to execute federal laws."[378] In doing so, the justices ignored federalist principle and thereby threatened to upend the balance of federalism.

In the federalist framework, the Constitution's federalism-based limits on congressional power reside primarily in the "ends" or "objects" of national authority, not in the "means" to achieve those objectives.[379] As Publius explained, in our "compound" republic, "the essential point" is to "discriminate the objects, as far as it can be done, which shall appertain to the different provinces or departments of power,"[380] while "allowing to each [such province or department] the most ample authority for fulfilling the objects committed to its charge."[381] In his account, Publius cautioned, "it is both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management."[382]

Following in that federalist spirit, the Marshall Court limited Congress's jurisdiction to the enumerated powers but acknowledged its authority to be "plenary"[383] and "supreme"[384] within those powers. The foundational jurisprudence of the Marshall Court thus allowed Congress "complete"[385] discretion to select the means it thinks best suited to effectuate its powers, so long as they are "necessary" – that is, "plainly adapted" to those powers – and "proper" – that is, consistent "with the letter and spirit of the constitution."[386] Such choices, for the most part, are matters of policy, not questions of law.[387] Because, as the

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378. *Id.* at 905; *see also id.* at 935 (holding that "Congress cannot circumvent that prohibition [against compelling state officers to enforce federal laws] by conscripting the states' officers directly").

379. *See supra* notes 90-102, 160-68, and accompanying text (discussing how McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), achieved "balanced federalism").

380. THE FEDERALIST NO. 23, *supra* note 79, at 144 (emphasis omitted).

381. *Id.*

382. *Id.* at 145.

383. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

384. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

385. *Gibbons*, 22 U.S. at 196.

386. *Id.* at 196-97 (defining commerce power); *McCulloch*, 17 U.S. at 421-23 (discussing extent of necessary and proper power); *see also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 275-76 (1993) (arguing that "necessary" and "proper" signal two separate requirements for the constitutionality of acts of Congress implementing one of the enumerated powers). Although Professor Lawson and Ms. Granger suggested a detailed interpretation of the constitutional meaning of "proper," *id.* at 291-297, I am more comfortable, at least in this Article, remaining with Chief Justice Marshall's shorthand description that congressional statutes must "consist with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421.

387. *See Gibbons*, 22 U.S. at 196-97 (asserting that restraints on commerce power vest in "the people"); *McCulloch*, 17 U.S. at 421-23 (stating that Congress should have "discretion,"

Printz Court candidly acknowledged, there is "no constitutional text" that prohibited the means of enforcement Congress selected in the Brady Act,[388] the default position of congressional discretion, in the federalist scheme, should remain intact, unless the Act violated the "spirit" of the Constitution.

Justice Scalia, writing for the majority, invoked the spirit of state sovereignty to invalidate the Act.[389] While some spirit of sovereignty both with respect to the national and state governments undoubtedly resides in American constitutionalism, it is difficult to sustain a state-sovereignty principle sufficiently sturdy to justify the *Printz* ruling. As a general matter, one must be cautious with usage of the term "sovereignty" in the American constitutional tradition. "Sovereignty" classically refers to the absolute, ultimate power in a political community.[390] As a matter of principle, American constitutionalism locates sovereignty in the people of the United States, not in any governmental institution.[391] When Publius used the term "sovereignty," as he did often, he used it to mean "supremacy" in the relative sense of governmental jurisdiction, not in the classical sense of ultimate powerholder.[392] In this light, it is not surprising that the Constitution, unlike the Articles of Confederation it replaced, contains no textual mention of state "sovereignty."[393]

As Chief Justice Marshall reminded the state sovereignty advocates of his day, the sovereign status of the states "underwent a change" with adoption

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which "will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people").

388. *Printz*, 521 U.S. at 905.

389. *See id.* at 918-22 (asserting that "dual sovereignty" principle reserved sphere of authority for states).

390. *See* SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 19-28 (1999) (describing classical doctrine of sovereignty); Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 132, 134 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (discussing attributes of doctrine of sovereignty).

391. *See supra* notes 142-47 and accompanying text (articulating basis of sovereignty in constitutional system). Professor Onuf has explained that the American commitment to popular sovereignty has always limited the conception of any sovereignty that might reside in the states. *See* ONUF, *supra* note 147, at 22, 31.

392. *See* Diamond, *supra* note 29, at 22 (stating way in which sovereignty was defined in context).

393. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1456 (1987) (identifying absence of word "sovereignty" in Constitution). This silence is in marked contrast to the Articles of Confederation, which provided that "[e]ach State retains its sovereignty, freedom and independence . . . ." THE ARTICLES OF CONFEDERATION art. II; *see also* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781, at 161-76 (1948) (detailing historical problems associated with notion of sovereignty).

of the Constitution.[394] Publius needed no such reminder. He understood that the creation of a national government, with its own sovereignty, inherently diminished the pre-existing dominance and independence of the states.[395] Publius made clear that state sovereignty under the Constitution was "residual," existing only with respect to those "objects" that the framers had not deemed appropriate to place under national control.[396] Accordingly, Chief Justice Marshall required that arguments from state sovereignty, when deployed to challenge congressional power, be grounded on "a fair consideration" of the Constitution.[397] Rhetoric that evoked a "state sovereignty," which even during the pre-Constitutional Golden Age was "insubstantial and illusory," simply would not do.[398]

The *Printz* Court's justification for invalidating the Brady Act has only the most tenuous connection to the Constitution, textually or spiritually. The constitutional text contains neither a general commitment to state sovereignty nor any particular anti-commandeering provision. While the justices' reliance on the constitutional spirit of state sovereignty may seem more appealing, it similarly evaporates on inspection. It is difficult to sustain the claim that the residual sovereignty of the states is compromised intolerably in *every* case where Congress, acting within its enumerated powers, has directed state and local officials to play some part, *any* part, in the administration of national programs.[399]

As Justice Scalia noted in his majority opinion, during the pre-constitutional era governed by the Articles of Confederation, Congress had relied

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394. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402-05 (1819) (discussing approach to sovereignty at Constitutional Convention). Contrary to the tenor of Justice Scalia's opinion in *Printz*, "[b]y 1787 the need to establish effective control over the states was generally recognized." ONUF, *supra* note 147, at 45.

395. *See* The FEDERALIST NO. 15, at 89 (Alexander Hamilton) (Modern Library ed., 1941) (discussing effect of federal government's sovereignty on states). As Peter Onuf has observed, "[t]he debasement of state sovereignty was a crucial component in rethinking and reconstituting the American union." ONUF, *supra* note 147, at 197-98.

396. THE FEDERALIST NO. 39, at 249 (James Madison) (Modern Library ed, 1941). Publius explained the federal relationship as follows: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, *within their respective spheres*, to the general authority, than the general authority is subject to them, *within its own sphere*." *Id.* (emphasis added).

397. *Gibbons*, 22 U.S. at 187; *see also id.* at 187-89 (stating way in which courts should construe Constitution).

398. Peter S. Onuf, *State Sovereignty and the Making of the Constitution*, *in* CONCEPTUAL CHANGE AND THE CONSTITUTION 78, 80 (Terence Ball & J.G.A. Pocock eds., 1988).

399. *See Printz*, 521 U.S. at 918-22 (articulating notion that congressional directives to state officials weaken state sovereignty and detailing historical context of state sovereignty).

exclusively on the states for the implementation of its laws.[400] The Articles provided that the Congress of the United States, although vested with considerably less competence than would be a fully enabled legislature, nevertheless had the authority to issue "binding" instructions on the states.[401] Notwithstanding its provision for a "[f]ederal commandeering of state governments,"[402] there was no doubt that the Articles contemplated a robust sovereignty in the states.[403] Indeed, the requirement that Congress implement national programs through the states was appreciated as a recognition, not a betrayal, of state sovereignty.[404] It is a curious conclusion, to say the least, that the implicit, diminished, and residual state sovereignty under the Constitution would disallow what the explicit, dominant, and primary state sovereignty under the Articles demanded – that Congress work through the states.

The contemporary experience of the European Union echoes somewhat that of America during the Confederation era.[405] If anything, the sovereignty of the member states of the European Union is more meaningfully observed than has ever been the case among the states of the American Union.[406] Yet, as was true during the state-dominant era of the American Confederation period, the authority of the European Union to issue "directives" to member states compelling them to regulate according to specified criteria is considered consistent with the sovereignty retained by those states.[407]

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400. *Id*; *see also* Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 20 Publius 55, 61-64 (1990) (noting role of states in implementing laws and detailing debate of representation).

401. THE ARTICLES OF CONFEDERATION art. IX; *see also id.* at art. XIII (stating that states shall follow directives of Congress).

402. *Printz*, 521 U.S. at 925.

403. *See supra* note 395 and accompanying text (discussing development of doctrine of sovereignty in America).

404. *See* MORGAN, *supra* note 143, at 264 (describing nature of congressional action under Articles of Confederation).

405. The European Union had its origin in the post-World War II efforts toward economic integration in Western Europe, beginning with the creation of the European Coal and Steel Community ("ECSC") by the Treaty of Paris in 1951. *See* DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 3-4 (3d ed. 1993) (detailing foundation of European Union Movement). The current European Union is grounded in the Treaty on European Union (TEU), signed in Maastricht in 1992. *See* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 6-8 (4th ed. 1998) (explaining basis for and features of current European Community). Professor Hartley cautioned, "[i]t is not easy to compare the Community with other political entities: it contains some features of an ordinary international organization and, less prominently perhaps but nevertheless quite distinctly, some features of a federation." *Id.* at 9.

406. *See* HARTLEY, *supra* note 405, at 255-56 (observing that Parliament law in United Kingdom ultimately prevails over European Community law). The members of the European Union, of course, have long histories as sovereign nation-states.

407. Article 189 of the Treaty Establishing the European Economic Community authorizes the Council and the Commission of the European Union to "issue directives" to a member state.

As the regimes of the American Confederation and the European Union demonstrate, it is incorrect, as an empirical matter, to posit that a commitment to state sovereignty, even one far stronger than that implied in the American Constitution, requires a conclusion that the general government may not act through the states. The evidence points decidedly toward the opposite conclusion. It certainly is the case, as Justice Scalia emphasized, that the American framers fully intended to free Congress from the Confederation's requirement that it act only through the states.[408] But the motivation for doing so was not to nurture state sovereignty by limiting the power of the national government.[409] In *Federalist 15*, the leading essay that explains and justifies the Constitution's enabling of the national government to operate directly on the people, Publius never once argued that this shift would protect state sovereignty. Indeed, in that very paper, Publius candidly noted that the framers' decision to create a competent national government would undercut that sovereignty.[410]

Federalist 15 makes clear that the founders' decision to empower the national government to act directly on the people of the United States reflected a commitment to enhance the competence of that government by removing its dependence on the states.[411] They sought to effectuate the autonomy and sovereignty of the national government, not of the states.[412] Their decision,

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WYATT & DASHWOOD, *supra* note 405, at 69-70 (detailing effect of directives on member states). Article 189 provides that directives are "binding, as to the result to be achieved," but that the member states can choose the "form and methods" of implementation. HARTLEY, *supra* note 405, at 199-200. Article 189 also authorizes the Council and Commission of the European Union to "make regulations," which are "binding" rules of "general application" that are "directly applicable" to the people "in all Member States." *Id.* at 99, 196. Because the European Court has found that directives, under certain conditions, can have a similar "direct effect," the line between directives and regulations has blurred somewhat. *See id.* at 200-06 (clarifying differences between directives and regulations). (Article 189 has been renumbered Article 249 by the Treaty of Amsterdam, signed in 1997.)

408. *See Printz*, 521 U.S. at 919-20 (remarking that constitutional system required concurrent authority between states and federal government). Publius considered the Confederation requirement that Congress act only on the states as the "great and radical vice" of that regime. THE FEDERALIST NO. 15, *supra* note 395, at 89 (stating that problem of Confederation is lack of energy given to federal government).

409. *See Printz*, 521 U.S. at 919-22 (arguing that structure of constitutional system would protect liberty).

410. *See* THE FEDERALIST NO. 15, *supra* note 395, at 89 (maintaining that weakening of state sovereignty is necessary for workable federal government).

411. *See id.* at 89-95 (discussing how lessening of state sovereignty will strengthen entire constitutional system).

412. Justice Stevens made a similar argument for the four *Printz* dissenters. *See Printz*, 521 U.S. at 945-48 (Stevens, J., dissenting) (detailing how constitutional system was designed to empower federal government). Justice Stevens's argument tracked his opinion in *New York v. United States*, 505 U.S. 144, 210-13 (1992) (Stevens, J., concurring in part and dissenting in part). I discuss *New York* at *infra* notes 427-34 and accompanying text.

more generally and more essentially, embodied the central federalist understanding that the national government was constituted by the "People of the United States"[413] and not by the states as corporate entities.[414]

In this light, the *Printz* Court stands opposed to the federalist understanding of federalism as well as to its prescription for balance. Throughout his majority opinion, Justice Scalia stressed the need to limit the power of the national government as if that is the only constitutional value at stake in the case that is worthy of judicial notice. Nowhere in the opinion is there recognition of the complimentary requirement that the national government be fully competent to achieve its limited constitutional mission. The justices in *Printz* accomplished what the opponents of the national bank in *McCulloch* had attempted, but failed to accomplish. By a judicial slight of hand, the *Printz* Court converted a decision by the framers to empower the government into a limitation.[415] (In *McCulloch*, this decision involved the Necessary and Proper Clause and, in *Printz*, the power of the national government to act directly on the people.)

Publius certainly gave no indication that the national government's authority to act directly on the people would cause this kind of limiting effect.[416] Indeed, in direct contrast to the *Printz* position, Publius believed that the Constitution empowered the national government to use state officials in the administration of federal law *because* it authorized that government to act directly on the people. In *Federalist 27*, Publius explained that "by extending the authority of the federal head to the individual citizens of the several States, [the Constitution] will enable the government to employ the ordinary magistracy of each, in the execution of its laws."[417] He continued: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws."[418] Publius invoked the same principle in *Federalist 36*, when in seeking to quiet fears of Congress's taxing authority, he observed that Congress "can make use of the *system of each State within the State*" in the

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413. U.S. CONST., pmbl.

414. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402-05 (1819) (determining that federal government is empowered directly by people).

415. *See id.* at 418-21 (explaining that necessary and proper clause expands powers of Congress).

416. *See* BEER, *supra* note 1, at 251-53 (illustrating how increased authority of federal government affects both states and individuals); Powell, *supra* note 1, at 659-64 (arguing that Publius envisioned balancing of state and federal power).

417. THE FEDERALIST NO. 27, at 169 (Alexander Hamilton) (Modern Library ed., 1941).

418. *Id.* at 169-70.

collection of federal taxes.[419] Publius's expectation could not have been clearer. It followed from a central premise of the federalist balance: Although the national government is limited to certain, enumerated objects of authority, within those objects the policy dictates of the federal government trump state prerogatives.[420]

This was the essence of the federalist understanding which the early modern justices ignored as they carved up the common-sense meaning of "commerce" in the interest of state autonomy. The *Printz* majority made the same mistake when it carved out, again in the interest of state autonomy, one of Congress's policy options for the effectuation of its constitutional power. Like the early modern Court, the *Printz* Court acted without any secure basis in the Constitution. Instead, the justices in both instances allowed their overdrawn assessment of the demands of state sovereignty categorically to displace congressional judgment.

The *Printz* majority also resembled the early modern justices in the starkness of its formalism. One may grant, as I do, that "proper" congressional legislation must align with the "spirit" as well as the text of the Constitution, and that some notion of state sovereignty resides in that spirit. One may also grant, again as I do, that Congress's power to direct the actions of state governments and their officials, even within the ambit of federal authority, inherently conflicts with legitimate state interests in sovereignty. The federalist understanding of federalism, after all, posits the "constitutional necessity" of a "separate organization" of the states "for local pur-

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419. THE FEDERALIST NO. 36, at 219 (Alexander Hamilton) (Modern Library ed, 1941). Publius continued, "[t]he method of laying and collecting . . . taxes in each State can, in all its parts, be adopted and employed by the federal government." *Id.* at 219-20.

Publius struck a similar note in *Federalist 44*, when he justified the Supremacy Clause's requirement that state officials comply with federal law but not that federal officials follow state law. He observed:

> Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution.

THE FEDERALIST NO. 44, *supra* note 28, at 297.

420. *See* THE FEDERALIST NO. 27, *supra* note 417, at 169 (stating that federal law will be supreme and binding on states). Justice Souter grounded his dissent in *Printz* on *Federalist 27*, which he found consistent with other papers. *See Printz*, 521 U.S. at 971 (Souter, J., dissenting) (arguing that *Federalist 27* is supported by THE FEDERALIST *36*, *44*, and *45*). Justice Stevens interpreted the relevant *Federalist Papers* similarly. *See id.* at 946-48 (Stevens, J., dissenting) (maintaining that framers intended that federal government could require states to implement its laws). For Justice Scalia's alternative reading of *The Federalist* in support of the majority position, see *id.* at 910-15 (determining that states must consent to responsibilities imposed by federal government).

poses."[421] The states, as well as the national government, have a constitutional status that must be preserved for the maintenance of balanced governance.[422] The federalist appreciation of meaningful state sovereignty, for example, is evident in the general presumption of concurrent state power with respect to matters reachable by Congress.[423] The federalist balance similarly should ensure that congressional directives do not rob states of their essential ability to govern in the areas of their residual sovereignty. This need for balance, however, suggests the appropriateness of a functional, rather than a formal inquiry.[424] A functional consideration of congressional means that enlist state and local officials in the service of national ends would fit the general federalist approach to congressional power, which integrates formal limits on regulatory ends with a functional assessment of the statutory means toward those ends.[425] In this setting, a truly balanced approach, one respectful of the implications of governmental sovereignty in both the national and state governments, would avoid any categorical rule completely allowing or disallowing Congress to direct the states to administer federal policy.

The opportunity for a more functional, and more balanced, alternative to the *Printz* problem is suggested by a look at *New York v. United States*, a decision on which the *Printz* Court placed its chief reliance.[426] In *New York*, the Court invalidated a federal statutory provision that obligated states either to provide for the safe disposal of low-level radioactive waste generated

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421. THE FEDERALIST NO. 9, at 52 (Alexander Hamilton) (Modern Library ed., 1941). Publius added, however, that the states would exist "in perfect subordination to the general authority of the union...." *Id.*

422. *See* BEER, *supra* note 1, at 300 (outlining reasons for balance between state and federal governments); KETCHAM, *supra* note 22, at 61 (noting positive aspects of federalism).

423. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 360-61 (1819) (noting that while states have power to tax, they cannot tax bank incorporated by United States); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203-05 (1824) (detailing power of states to regulate health, to quarantine, and to inspect); THE FEDERALIST NO. 32, at 194 (Alexander Hamilton) (Modern Library ed., 1941) (describing power of states to raise revenue). According to Publius, the presumption of concurrent state power should be rebutted only in three situations:

> [1] where the Constitution in express terms granted an exclusive authority to the Union; [2] where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and [3] where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.*

Id. at 194.

424. *See supra* note 3 and accompanying text (summarizing functional method of constitutional interpretation).

425. *See supra* notes 98-101 and accompanying text (explaining Supreme Court's approach to interpreting Commerce Clause).

426. *Printz*, 521 U.S. at 926-33.

within their borders, or to take title to and possession of that waste.[427] Finding that Congress had "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,"[428] the Court invalidated the provision because it was "inconsistent with the federal structure of our Government established by the Constitution."[429] The Court in *New York* was rightly troubled by Congress's insinuation into the legislative, policymaking processes of the states.[430] In at least some theories of sovereignty, especially in those systems that, like ours, are governed by the rule of law, the nature of sovereign power is closely associated with the power to make law.[431] There is, to be sure, a considerable devotion to categorical, formalistic rhetoric in the *New York* opinion that may offer solace to the *Printz* Court. Yet, at bottom, *New York* presented the justices with a functionally disturbing governance problem, which they emphasized as well. By blurring the decision making process in the state legislature, Congress had seriously compromised the "separate organization" of the sovereign law making processes of the states.[432]

The stakes for state sovereignty realistically at risk in *Printz*, however, were a far cry from *New York*. The background checks the Brady Act assigned to local law-enforcement officials were tentative and minor.[433] Under the Act, as summarized by Justice Scalia, these officials were only under an implicit obligation to accept forms submitted by firearms dealers concerning prospective purchasers.[434] Within the five-day waiting period, the officials were not obligated to perform background checks of the purchasers to determine their legal eligibility to buy the firearm, but only to make "reasonable efforts" to do so.[435] That is it. The local law-enforcement officials were not even required to block a purchase they deemed to be

427. New York v. United States, 505 U.S. 144, 174-77 (1992).

428. *Id.* at 176 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

429. *Id.* at 177.

430. Saikrishna Prakash has argued that there is a stronger historical pedigree for the Court's no-commandeering principle with respect to state legislative processes than with regard to state executive and judicial offices. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1959-60 (1993) (arguing that federal government can require state agencies to enforce federal law).

431. *See* GORDON, *supra* note 390, at 43-46 (describing different theories of sovereignty).

432. *See* New York v. United States, 505 U.S. 144, 168-69 (1992) (discussing way in which accountability is diminished by allowing federal government to compel states to enforce its laws); *supra* note 422 and accompanying text (discussing federalist understanding of federalism).

433. *See Printz*, 521 U.S. at 902-04 (detailing provisions of Brady Act).

434. *Id.* at 904.

435. *Id.*

illegal.[436] Not only were the Brady Act intrusions minimal in any functional sense, they also were temporary. The local law-enforcement officials were "pressed into federal service"[437] only until the federal government could create a national system for background checks, but in no event longer than five years.[438] During this interim period, the federal government was unable to perform the background checks effectively.

Any functional review would have distinguished *Printz* from *New York*. Yet, the *Printz* Court pointedly refused to engage in any kind of "balancing analysis" that would require a judicial assessment of the actual intrusion on state sovereignty, as compared with congressional need for state administration.[439] The Court preferred to tilt the balance in every case toward state sovereignty.

It is precisely the kind of functional analysis rejected by the *Printz* Court that is appropriate here, however. In the *New York/Printz* setting, the constitutional issue necessarily is poised in a functional dimension. There is no constitutional text, as the Court recognized, that governs the issue of federal use of state administration. Nor is there, as the Court would have it, any firm constitutional "*principle* of separate state sovereignty"[440] sufficiently specific to resolve this issue. In these cases, the Court must balance because both Congress and the states have a legitimate constitutional claim at stake. For Congress, it is the right to exercise policy discretion in the exercise of its constitutional powers. For the states, it is the right to governmental competence to pursue the objects of authority that have not been entrusted to the nation. The question in each case, inescapably, must be whose right must yield to the overriding interest of the other.

The Court in *Printz* hardened the *New York* concern with respect to congressional dictation of state legislative processes by announcing an airtight rule against any congressional direction of any state official in the administration of any federal regulatory programs under any set of circumstances.[441] In

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436. *Id.*

437. *Id.* at 905.

438. *Id.* at 902.

439. *Id.* at 932.

440. *Id.*; *see also supra* notes 390-99 and accompanying text (explaining doctrine of sovereignty within constitutional system).

441. The *Printz* Court expressed its conclusion as follows:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is

doing so, the Court renewed an old relationship, expressing a preference for strict formalism in enforcing the federalism limits on congressional power. Justice Scalia explained, "an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one."[442] Similar to the early modern Court, he required a strict formalism to maintain a strict "system of dual sovereignty."[443]

Justice Scalia's opinion for the *Printz* majority powerfully evoked the thoroughgoing formalism of the early modern Court. All of the warning signs are present. The opinion appealed to state sovereignty as the guiding norm of decision, with a concomitant disrespect for the policy judgment of Congress.[444] The Court categorically enforced limiting principles on congressional authority that lack grounding in the constitutional text and that flow instead from a felt need to channel federal authority as the justices believe appropriate. Finally, and most suggestively, the Court once again embraced a formal limit on congressional authority without any functional counterweight.

The early modern echoes of *Printz*, however, have been muted somewhat by the Court's recent decision in *Reno v. Condon*.[445] In *Reno*, the justices upheld the Driver's Privacy Protection Act of 1994, which restricted the authority of states to disclose the personal information contained in the records of their departments of motor vehicles.[446] Chief Justice Rehnquist, writing for a unanimous Court, explained that the personal information, in this setting, was "an article of commerce,"[447] and that "its sale or release into the interstate stream of business is sufficient to support congressional regula-

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involved, and no case-by-case weighing of the burdens of benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz, 521 U.S. at 935.

442. *Id.* at 928.

443. *Id.* at 935; *see also supra* note 217 and accompanying text (articulating that formalist theory of constitutional construction is necessary to maintain dual sovereignty).

444. *See id.* at 941 (Stevens, J., dissenting) (stating that Necessary and Proper Clause enables Congress to make policy decisions affecting state sovereignty).

445. Reno v. Condon, __ U.S. __, 120 S. Ct. 141 (2000).

446. 18 U.S.C. §§ 2721-25 (1994). For a description of the statutory scheme, see *Reno*, 120 S. Ct. at 668-70 (detailing provision of Driver's Privacy Protection Act).

447. *Reno*, 120 S. Ct. at 671. Chief Justice Rehnquist explained:

> The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring.

Id.

tion."[448] The central issue in *Reno* was whether the congressional regulation violated the "*principle* of separate state sovereignty" that the Court had formalized in *Printz*.[449]

The state argued that, as in *New York* and *Printz*, the congressional regulatory scheme compromised its sovereignty.[450] The state complained that Congress had directed its officials to comply with a complex network of obligations in the service of a national policy of protecting the privacy of drivers.[451] The state, in this sense, had lost sovereign control not only over its employees, but also over the resources necessary to comply with congressional mandates.[452] The Court rejected the argument, refusing to extend the *New York/Printz* prohibition beyond congressional statutes that "require the States in their sovereign capacity to regulate their own citizens."[453]

The Court's decision in *Reno* in no way calls into question the commitment of the *Printz* majority to maintain its categorical exclusion of congressional commandeering of state regulatory authority, but it does suggest the justices may be content to allow *Printz* to rest there. If this is so, *Printz* ultimately might become simply a junior partner to *Lopez/Morrison*. In *Lopez/Morrison*, the Court sought to revitalize the federalism limits on congressional regulatory power by reintroducing a formal constraint on the enumerated ends of that power. *Printz*, in its most basic, least suggestive reading, simply added another formal limit, foreclosing a particular means that the justices regard as especially threatening to state sovereignty. So confined, the *Printz* decision, while inconsistent with the federalist understanding of federalism, should not prove destabilizing to the overall balance of the Court's doctrinal structure.

If on the other hand, the Court, notwithstanding *Reno*, begins to expand the *Printz* exclusion in a widening definition of an impregnable state sovereignty, it will be *Lopez/Morrison* that will become a footnote, or rather a prelude, to a major swing of the federalism pendulum back toward the heady formalism of the early modern era. In this event, the balance of *Lopez/Morrison* would be seen as a momentary pause as the Court finally halted its post-New Deal functional swing and prepared for a return in the formalist direction. For those who favor a balanced approach to federalism, as did the federalist leaders of the founding generation, such a retreat could only be considered a lost opportunity.

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448. *Id.*

449. *Printz*, 421 U.S. at 532.

450. *See Reno*, 120 S. Ct. at 670-71 (expressing South Carolina's claim that regulatory scheme violated Tenth Amendment).

451. *See id.* at 671-72 (outlining responsibilities of state officers under Act).

452. *See id.* (noting resources states must use to comply with Act).

453. *Id.* at 672.

Conclusion

Federalism jurisprudence is, again, at a cross roads. In its rethinking of the federalism limits on the regulatory power of Congress, the contemporary Court has cleared two paths. One path, identified in *Lopez/Morrison*, promises a balanced jurisprudence in line with the federalist tradition and the foundational era of constitutional jurisprudence. The other, opened in *Printz*, threatens a return to the dysfunctional formalism that plagued the early modern era. In *Lopez/Morrison*, the justices were acutely aware of the value, and the limits, of formalism in any healthy understanding of congressional authority. In *Printz*, they seemed to have forgotten their own warnings against a full-fledged embrace of formalism. One hopes the meaning of *Reno* is that they have remembered.

The justices will continue to settle the ultimate meaning of *Lopez/Morrison* and *Printz/Reno*, as well as the direction of federalism jurisprudence, in future decisions. When doing so, the justices should keep in mind their experience with respect to the other central feature of the constitutional structure – that governing the separation of powers. The Court's perpetual cycling between formal and functional methodologies has left separation-of-powers methodology in considerable disarray. While *Lopez* promised to break that cycle in federalism doctrine, *Printz* threatened to propel it. A judicial settlement along the path of *Lopez/Morrison* balance, with a corresponding abandonment of *Printz* formalism, not only would create a healthy federalism, but also may spur a long overdue rethinking of separation-of-powers jurisprudence.

ESSAY