

TOWARD A PRINCIPLED INTERPRETATION OF THE COMMERCE CLAUSE

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Formalism is the jurisprudence of rules.¹ Functionalism is the jurisprudence of balancing tests.² If forced to choose between formalism and functionalism, I would probably come down on the side of formalism. I would not do so, however, because there is some meta-rule that prescribes formalism. Rather, it would be because formalism, on balance, has better consequences than functionalism—in other words, because there are good functionalist reasons to be a formalist.³

Where I part company with many constitutional formalists is not so much over the desirability of rules as opposed to ad hoc balancing,⁴ but rather over the generality and the source of the

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1. See, e.g., Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 9 (1983) ("'Formalism' describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles.") (footnote omitted).

2. See, e.g., ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20-22, 136-175 (1982) (describing "pragmatic instrumentalism" and contrasting that approach with formalism).

3. This is also the position implicit in recent work of my colleague Martin Redish, who has proposed joining formalist and functionalist methods in his "pragmatic formalist" approach to the separation of powers. See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 100-03 (1995).

4. Justice Scalia, a leading proponent of formal analysis, has questioned whether judicial balancing tests are even properly regarded as rules of law, and has described his own approach to rules and balancing tests in the following way:

I have not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the *Rule of Law*, the law of *rules*, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989) (emphasis supplied); see also *id.* at 1182 (stating that the use of balancing tests "is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the

rules we apply. Rules come in different levels of generality, from abstract "principles" on the one hand to specific "commands" on the other. Although some formalists believe that the Constitution can be described as a collection of commands—an "instruction manual"⁵—most of the key provisions of the Constitution are best regarded as principles. This description is consistent with both the breadth of the language used by the Constitution and the basic purpose of such a document—to create a permanent framework for government "adapted to the various crises of human affairs."⁶

I also do not subscribe to the view associated with many formalists that the content of all constitutional rules is to be discovered in some immutable original understanding.⁷ Instead, I prefer to deploy a "conventionalist" approach to constitutional interpretation, drawing upon a variety of sources that our legal community regards as authoritative.⁸ These sources include the text of the Constitution and the evidence of the Framers' intentions, but also encompass the outcomes reached by the Supreme Court and other interpreters in applying the text to different controversies over time, as well as the evolved practices of the three branches of government.⁹

Discovering principles of constitutional law consistent with these diverse sources entails a process of reasoning similar to what appellate lawyers call seeking the "theory of the case." What we are seeking, in other words, is at least one principle that harmonizes the text, the evidence of original understanding, and the past authoritative pronouncements and practices of the legal community. The process is akin to what Ronald Dworkin calls the method of integrity,¹⁰ or to what students of historiography call the search for "covering laws"—constructs or hypotheses that integrate and explain a mass of historical data over a period of

point where 'law,' properly speaking, has any further application.")

5. Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON U. L. REV. 21, 21-22 n.9 (1988).

6. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

7. For various perspectives on the value of originalism in judicial interpretation, see Symposium, *Originalism, Democracy, and the Constitution: The Fourteenth Annual National Student Federalist Society Symposium on Law and Public Policy-1995*, 19 HARV. J.L. & PUB. POL'Y 237 (1996).

8. The case for conventionalism is developed more completely in Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996) (proposing "conventionalism" as a principled conservative alternative to the restrictive originalism of Judge Bork and the untethered "normativism" of Justice Brennan).

9. See *id.* at 516.

10. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

time.¹¹

Rather than pursue in an abstract vein about how legal interpreters should try to discover constitutional principles, it may be better to illustrate the conventionalist method by applying it to a particular structural constitutional issue. The issue I have in mind concerns the meaning of the clause in the Constitution that empowers Congress “[t]o regulate Commerce... among the several States.”¹² The effort to interpret these words has always been challenging.¹³ Today, the need to develop a principled interpretation of the Commerce Clause is more urgent than ever. Two recent developments pose a sharp challenge to received understandings of the clause, both in its role as an affirmative grant of legislative power to Congress and as a restriction on the regulatory powers of the States.

The first development is the decision in *United States v. Lopez*,¹⁴ where the Supreme Court announced, in effect, that it intends to take the words of the Commerce Clause much more seriously insofar as they constitute a grant of affirmative power to Congress to regulate commerce. Unfortunately, although the Court evinced a will, it is unclear whether it saw a way. The majority opinion of the Chief Justice lacks any clear theory of the outer limits of the clause. The Court badly needs a principled understanding of the Commerce Clause if it is to continue down the path of enforcing the constitutional limitations on federal power.

The second development is the emergence of a group of Justices—led by Justice Scalia and including Justice Thomas and sometimes the Chief Justice—who openly question the Court’s

11. This theory is generally associated with the work of Carl Hempel. See Carl G. Hempel, *The Function of General Laws in History*, 39 J. PHIL. 36 (1942) (arguing that knowledge progresses as deductive reasoning applies ever-expanding covering laws to more and more phenomena, enrolling them into causal chains which, in turn, connect previously unexplained phenomena); see also PATRICK L. GARDINER, *THE NATURE OF HISTORICAL EXPLANATION* 92-93, 98-102 (1952) (discussing Hempel’s theory).

12. U.S. CONST. art. I, § 8, cl. 3. For another illustration of my approach to the interpretation of structural provisions of the Constitution, see Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225.

13. For historical discussions of the difficult and conflicting evolution of Commerce Clause jurisprudence, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5-4, 305-10 (2d ed. 1988); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1398-1452 (1987).

14. 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990, which criminalized the possession of a firearm within 1000 feet of a school, as an *ultra vires* exercise of congressional authority under the Commerce Clause).

dormant Commerce Clause jurisprudence, asserting that it has no foundation in the constitutional text.¹⁵ If the dormant Commerce Clause is to continue to be enforced, the majority of the Court needs a theory that establishes the legitimacy of the doctrine in the face of this critique.

Is it possible to articulate a principled theory of the Commerce Clause through the conventionalist method? Perhaps. After engaging in a process of rumination that involves moving back and forth between the text of the Clause, the history of early controversies over its meaning, and the doctrinal pattern that has emerged in the decisions of the Court in recent decades, I think that a unified theory that explains both halves of the Commerce Clause—the affirmative grant of power to Congress and the dormant Commerce Clause limitations on state power—can be discerned. This theory rests on four principles. The first two are fairly traditional; at least they would be readily recognized by the Justices who sat on the Marshall and Taney Courts. The third and the fourth are innovations—modern refinements needed to reconcile the evolving doctrine under the Clause with the text and the earlier understandings devised by prior generations of jurists. I shall give a brief survey of the four principles.

The first principle is that “[c]ommerce . . . among the several States” refers to some aspect of commercial activity—some element of the formation or performance of a commercial contract—that actually crosses a state line. All kinds of things can qualify as an element that crosses a state line. It can include children traveling to attend summer camps in Maine¹⁶ or the flow of electrons moving over telephone lines from one state to

15. Justice Scalia first declared that the dormant Commerce Clause has “no conceivable basis in the text of the Commerce Clause” in *Tyler Pipe Indus., Inc. v. Washington Dep’t of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part). The most recent criticism to this effect is found in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1614–20 (1997) (Thomas, J. dissenting, joined by Scalia, J., and Rehnquist, C.J.). Criticism of the dormant Commerce Clause has not been limited to the courts. See, e.g., Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895 (1990) (arguing that the basis of dormant Commerce Clause doctrine is weak and that it shields both federal and state political branches from accountability); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 573 (arguing that the Court’s dormant Commerce Clause jurisprudence “lacks any basis in constitutional democratic theory” and that this “judicial supplement to the text” of the Constitution “actually contradicts, and therefore directly undermines, the Constitution’s carefully established textual structure for allocating power between federal and state sovereigns”).

16. See *Camps Newfound/Owatonna*, 117 S. Ct. at 1593–94 (1997).

another.¹⁷ But some aspect of either the formation or performance of a commercial transaction must cross a state line.

The constitutional power to regulate interstate commerce has long been held to extend beyond the precise element that actually crosses state lines and to include any activity that “affects interstate commerce.”¹⁸ We should interpret this to mean that the constitutional power encompasses any activity that increases or decreases the frequency of, or otherwise modifies, an element of contractual activity that crosses a state line. Thus, the power to regulate interstate commerce can apply to activities that take place wholly inside one state, but if and only if there is some nexus between the regulation of that activity and the passage of matter or energy across state lines.

The principle that interstate commerce means some element of commercial activity that crosses a state line rests comfortably in the text of the Constitution and would come as no surprise to the Justices of the Marshall and Taney Courts, who struggled with the initial efforts to interpret the clause. The gloss that expands the power to include anything that affects interstate commerce is more problematic as a matter of original understanding.¹⁹ The Necessary and Proper Clause,²⁰ however, arguably provides an additional increment of constitutional power that allows us at least to reconcile the “affecting commerce” gloss with the

17. See, e.g., *United States v. Campione*, 942 F.2d 429, 434-35 (7th Cir. 1991) (upholding Travel Act convictions based on the defendants’ use of interstate phone calls to verify credit card transactions used to pay for acts of prostitution); cf. *Moore v. United States*, No. 93-5273, 1994 WL 251174, at *3 (4th Cir. June 10, 1994) (upholding a conviction under the federal arson statute and finding an interstate commerce connection in the fact that the house that had been burned was connected to interstate gas and telephone lines).

18. See, e.g., *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (“Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—affected interstate commerce.”).

19. Note, however, that the idea that congressional power extends to activity “affecting” interstate commerce can be traced to the Court’s first full opinion interpreting the Commerce Clause, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (describing the activities that Congress may not regulate as those “which do not affect other States”). The move that almost certainly takes the affecting commerce doctrine beyond the original understanding is the “aggregation principle” of *Wickard v. Filburn*, 317 U.S. 111 (1942), which allows Congress to regulate any activity having a substantial effect on interstate commerce when viewed in the aggregate, regardless of the triviality of individual transactions. See *id.* at 127-28.

20. U.S. CONST. art. I, § 8, cl. 18 (providing that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

constitutional text.

The next principle is that the power to regulate commerce among the several states is an exclusive power. Only Congress can regulate interstate commerce; no state may regulate interstate commerce. This exclusive grant understanding is the only way to square the constitutional text with the dormant Commerce Clause doctrine. Because states have no power to regulate interstate commerce, state laws that are found to be regulations of interstate commerce are void, without regard to whether Congress has legislated on the subject. On the other hand, if Congress subsequently exercises its exclusive power, and says that states are permitted to engage in regulation of the sort invalidated by the Court, then the decision of the Court no longer applies because the state regulation now has the sanction of Congress. The exclusive powers construction therefore explains the paradox that Congress can "overrule" Supreme Court decisions in this area by ordinary legislation, but not otherwise in constitutional law.²¹

The second principle, more so than the first, has always been a controversial interpretation of the text of the Constitution. Whether the commerce power is exclusive or concurrent was hotly debated by the Justices who sat on the Marshall and Taney Courts, and they reached no definitive conclusion.²² Many

21. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 426-27 (1946) (holding that the McCarran-Ferguson Act authorizes states to regulate and tax insurance companies notwithstanding prior authority holding such regulation invalid under the dormant Commerce Clause); *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311, 321-25 (1917) (holding that the Webb-Kenyon Act left states free to regulate commerce in intoxicating liquors in ways previously prohibited under the dormant Commerce Clause); see also Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-10, 15-16 (1975) (discussing dormant Commerce Clause jurisprudence as a primary example of "constitutional common law"); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 54, 56 & n.239 (1985) (discussing Monaghan's analysis).

22. Compare *Gibbons*, 22 U.S. (9 Wheat.) at 196-210 (finding "great force" in argument that the commerce power is exclusive but not reaching the question); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446-49 (1827) (stating in dictum that commerce power is exclusive) and *The Passenger Cases*, 48 U.S. (7 How.) 283, 572-73 (1849) (three and possibly five Justices take position that the commerce power is exclusive) with *The License Cases*, 46 U.S. (5 How.) 504, 578-79 (1847) (stating that "the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States" and holding that a state may "make regulations of commerce for its own ports and harbours, and for its own territory and that such regulations are valid unless they come in conflict with a law of Congress"). See generally DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888* 168-183, 204-06, 222-36, 330-42, 403-16 (1985); EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATE RIGHTS* (1936);

scholars today dismiss the exclusive powers interpretation as unsound.²³ They point out that the Commerce Power, unlike other powers in Article I, Section 8, such as the power to lay duties and imposts or the power to coin money,²⁴ is not coupled with a provision in Article I, Section 10, limiting the power of the states to engage in such regulation.²⁵ This raises the inference that the commerce power is concurrent rather than exclusive.

But the issue is far from one-sided. A number of eminent figures from the founding generation—including Madison,²⁶ Marshall,²⁷ and Story²⁸—endorsed the exclusive power construction. One can argue, moreover, that the power to regulate commerce among the several states is a power that, by its very nature, cannot be exercised satisfactorily by any single state. At least two states are involved in any case involving interstate commerce, and they may have conflicting policies or interests as to how such commerce should be regulated. To allow state law to govern interstate transactions would thus allow each state to be the judge of its own cause, a circumstance that the Framers consistently identified as the quintessential example of injustice.²⁹

But the point here is not to identify the best interpretation of the Commerce Clause as if we were answering a multiple choice examination based solely on the words of the Constitution. The objective is to find the interpretation that provides the best “fit”

FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937).

23. See, e.g., Richard D. Friedman, *Putting the Dormancy Doctrine Out of its Misery*, 12 *CARDOZO L. REV.* 1745, 1745-46 (1991); Redish & Nugent, *supra* note 15, at 573.

24. See U.S. CONST. art. I, § 8, cls. 1, 5.

25. See U.S. CONST. art. I, § 10 (forbidding states without the consent of Congress to “lay any Imposts or Duties on Imports or Exports [or] lay any Duty of Tonnage,” and forbidding states to “coin Money”).

26. See 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 625 (Max Farrand ed., 1911) (attributing the following observation to Madison: “Whether the States are now restrained from laying tonnage duties depends on the extent of the power ‘to regulate commerce.’ These terms are vague but seem to exclude this power of the States . . .”).

27. See *Gibbons*, 22 U.S. (9 Wheat.) at 209 (Marshall, C.J.) (noting “great force” in the argument for the exclusive power construction).

28. See 2 *JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 513 (Rothman & Co. ed., 1991) (1833) (arguing that a grant of absolute power to Congress necessarily precludes any state action).

29. See, e.g., *THE FEDERALIST NO. 10* (James Madison) (Benjamin Fletcher Wright ed., 1961) (“No man is allowed to be a judge in his own cause, because his interest, would certainly bias his judgement, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . .”).

with both the text and our constitutional traditions and practices. The best interpretation in this sense—the most coherent and principled interpretation—has to include the exclusive powers interpretation, because only that interpretation squares the text of the Constitution with 150 years of dormant Commerce Clause jurisprudence.

Now come the innovations. The third principle is that, in deciding whether a legislative body like the Congress or a state legislature has violated the Commerce Clause, we look to the intent behind the legislation rather than its effect. Why intent? The reason is similar to that which led the Supreme Court, in *Washington v. Davis*,³⁰ to hold that the Equal Protection Clause bars legislation that reflects a discriminatory intent toward protected groups, but not legislation having a disparate impact on such groups.³¹ All kinds of laws have a disparate impact on protected groups. The Court in *Washington* was concerned that a disparate impact standard would cast the command of equality far too broadly³² and would necessitate the development of an elaborate jurisprudence distinguishing between disparate impacts that “go too far” and those that do not—an inquiry for which there are no obvious answers. To avoid such an intrusive and unworkable result, the Court limited the Equal Protection Clause to governmental actions motivated by an invidious intent.

Similarly, in a highly interdependent, advanced industrial society, virtually all commercial activity will have some causal connection to the movement of matter or energy across state lines. Our first two Commerce Clause principles tell us that Congress has the exclusive power to regulate anything that affects an element of commercial activity that crosses state lines. Thus, if we focus on the effect of economic regulation, it should be possible to discover an “interstate effect” in virtually every instance. Under an effects interpretation of the Commerce

30. 426 U.S. 229 (1976).

31. See *id.* at 239-41, 244-46, 248.

32. See *id.* at 248 (noting that a disparate impact rule applied to facially neutral laws in the absence of compelling justification “would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white”); *id.* n.14 (listing “(s)ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges” as other areas of concern along with “minimum wage and usury laws as well as professional licensing requirements”) (alteration in original) (citations omitted).

Clause, therefore, Congress could regulate any and all forms of economic activity. This, of course, is basically consistent with the post-New Deal understanding. Conversely, however, under such an interpretation virtually all state economic regulation would be void under the dormant Commerce Clause doctrine. This result, needless to say, does *not* comport with the post-New Deal understanding, which has been generally sympathetic to all government regulation of economic activity, whether at the federal or the state and local levels.

In an attempt to stave off these conclusions—especially the implication that the Commerce Clause requires massive deregulation of economic activity at the state level—the Court over the years developed various tests for distinguishing between “truly” interstate and “truly” local commerce.³³ Each of these effects tests has eventually been deemed unworkable, however, and has been abandoned as a failure.

Because no effects test has proved to be workable, we must turn to intent if we are to continue to enforce the constitutional language. Thus, with respect to congressional enactments, we must ask whether the intent of Congress is to regulate commerce insofar as it affects the movement of matter and energy across state lines (a permissible objective) or whether it is to regulate commercial activity without regard to whether there is any effect on interstate movements (an impermissible usurpation of the states’ police powers). With respect to state enactments challenged under the dormant Commerce Clause, we must ask the same question: Is the state’s intent to regulate commerce that affects more than one state—something that only Congress can do—or is the state’s intent to regulate purely local effects?

How do we ascertain the legislative intent of a collective body? Is this not a fiction? Is it not hopeless to think that courts will get it right? To complete the picture we need the fourth principle, which is that the courts will apply certain presumptions about legislative intent derived from long experience with recurring controversies. The most general presumption is one of deference;

33. Two prominent efforts to develop such a measure were the “inherently national versus inherently local” test of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319-20 (1852), and the “direct versus indirect effect test,” *see, e.g., Schechter Poultry Corp.*, 295 U.S. at 546 (“In determining how far the federal government may go in controlling intrastate transactions upon the ground that they ‘affect’ interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.”).

the legislature's intention is presumed to be a permissible one. The reason for this presumption is closely related to the reason for examining intent, rather than effects, in the first place: virtually all legislative enactments will have some interstate effects, and determining on a case-by-case basis whether the "dominant" intent of the legislature is to reach the interstate effects rather than the local effects would be time consuming, intrusive, and fraught with error. Thus, although only Congress can regulate interstate commerce and only the states can regulate purely intrastate commerce, we defer to both types of legislative bodies with respect to which type of regulation they intend. The result is that, in practice, we permit a significant degree of overlap between federal and state regulatory regimes.

Notwithstanding the general pattern of deference to the intentions of both Congress and state legislatures, there are certain circumstances where the presumption of regularity is overcome. The Court has developed certain rules of thumb—or "red flags" if you will—that single out situations in which the presumption of permissible intent is reversed and the burden is placed on the legislative body to demonstrate that it is *not* seeking to usurp the constitutional prerogatives of the other sovereign. This approach is easiest to see with respect to the dormant Commerce Clause, which polices attempts by the states to usurp Congress's exclusive power to regulate interstate commerce.

The Court's dormant Commerce Clause jurisprudence says, in effect, that the Court will presume that the intent of state legislation is to regulate local activity pursuant to the police power, except in two principal situations. The first exception is where the state law differentiates between local and interstate commerce to the disadvantage of the latter, thus "discriminating" against interstate commerce. Much like the presumption adopted in equal protection law against laws that adopt racial or gender classifications,³⁴ legislation that discriminates against interstate commerce is highly likely to be motivated by an impermissible intention—namely, to regulate interstate commerce rather than local activity. Thus, when we encounter discriminatory local laws, the presumption of permissible intent is reversed,³⁵ and the

34. See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that racial classification triggers strict scrutiny); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that gender classification triggers heightened scrutiny).

35. See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) ("State laws discriminating

state is required to show that it has a strong and legitimate local interest that justifies the discrimination.³⁶

The second exception is where the state law imposes a substantial burden on interstate commerce and the local benefits appear to be minimal.³⁷ Again, laws that reflect such a disparity between interstate burdens and local benefits raise a red flag that the purpose is to regulate interstate commerce, not local activity. In these circumstances it is also appropriate that the presumption of regularity be reversed and the burden be placed on the state to show that its intent is indeed one of permissible local regulation.

The doctrine that governs the affirmative scope of the commerce power is less developed, largely because the Court has been exceedingly deferential to Congress in the post-New Deal era. In effect, the presumption of permissible intent has been applied in a virtually conclusive fashion. *Lopez*, however, suggests that this approach might change, and it also suggests at least one set of circumstances where it is appropriate that the presumption of permissible congressional intent be reversed. As the Court noted, the Gun-Free School Zones Act did not regulate the channels of interstate commerce; it did not attempt to prohibit the interstate transportation of a commodity; it did not contain a jurisdictional element that would ensure that the firearm possession in question had some nexus with interstate commerce; and it did not regulate a form of commercial activity, such as buying and selling.³⁸ Moreover, the statute as originally enacted contained no formal findings that possession of guns on school yards would substantially affect interstate commerce.³⁹

against interstate commerce on their face are 'virtually per se invalid.' ") (quoting *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 99 (1994)).

36. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 138 (citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)).

37. This is the so-called "*Pike test*," named for *Pike v. Bruch Church, Inc.*, 397 U.S. 137, 142 (1970). For applications, see, for example, *Edgar v. Mite Corp.*, 457 U.S. 624, 646 (1982) (invalidating the Illinois Business Takeover Act because it "impose[d] a substantial burden on interstate commerce which outweigh[ed] its putative local benefits"); and *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429, 447 (1978) (invalidating Wisconsin regulations restricting operation of trucks over 55 feet long and of double-trailer trucks traveling upon interstate highways "because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety").

38. See *United States v. Lopez*, 514 U.S. 549, 559-61 (1995).

39. See *id.* at 563 ("But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.").

The Court's opinion can thus be read as holding that, at least when all five of these traditional connections with interstate commerce are absent from a statute, the presumption of permissible intent will be reversed, and it will be incumbent on the government to prove that Congress's intention was in fact the regulation of some form of interstate commerce, as opposed to a usurpation of the police power of the states.

Such a limitation on congressional power would be easy to circumvent, as Congress would simply have to take care to include some jurisdictional nexus with interstate commerce, or make appropriate findings, before it legislates.⁴⁰ What is the point of requiring Congress to establish some nexus to interstate commerce, or include a finding of such a nexus, when it legislates under the authority of the Commerce Clause?

One reason for insisting on some demonstrable nexus to interstate commerce is that this serves as a reminder that the federal government is a government of limited powers and thus that federal legislation requires some affirmative justification.⁴¹ Another reason for insisting on such a nexus is that it preserves the principle that congressional legislation rooted in a desire to regulate purely local activity is unconstitutional. Notwithstanding the general presumption of permissible legislative intentions, the Court in extreme cases stands ready to enforce this bedrock principle.

Perhaps most importantly, the nexus requirement renders the affirmative scope of the Commerce Clause symmetrical with the dormant Commerce Clause, and provides the key to a principled theory that relates both halves of the clause to the text of the Constitution. It is imperative that some such conception be articulated if the Court is to continue to enforce any limitations on the power of the federal government to regulate and if the Court is to continue to strike down state laws that discriminate against interstate commerce. I believe that both of these judicial functions are worthy of being sustained, and therefore the quest

40. See H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 651-52 (1995) (predicting that "the main effect of *Lopez* is very likely to be nothing more than a renewed congressional interest in loading federal criminal statutes with findings and 'jurisdictional element[s]' in order to demonstrate the close link between what Congress wishes to regulate and 'Commerce . . . among the several States'" (footnotes omitted) (alteration in the original).

41. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 802-03 (1995).

for a principled theory of the Commerce Clause—whether along the lines sketched here or on some other basis—should be among the most pressing concerns of constitutional scholars.

